Bench Handbook
JURY MANAGEMENT

ADMINISTRATIVE OFFICE
OF THE COURTS

JUDICIAL AND COURT OPERATIONS
SERVICES DIVISION
CENTER FOR JUDICIARY EDUCATION AND RESEARCH

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ABOUT CJER

The California Center for Judiciary Education and Research (CJER), of the Administrative Office of the Courts (AOC), is responsible for developing and maintaining a comprehensive and quality educational program for the California judicial branch. Formed in 1973 as a joint enterprise of the Judicial Council and the California Judges Association, CJER supports the Chief Justice, the Judicial Council, and the courts by providing an extensive statewide educational program for judicial officers and court staff at both the trial and appellate levels. It includes orientation programs for new judicial officers, court clerks, and administrative officers; continuing education programs for judicial officers, court administrators, and managers; an annual statewide conference for judicial officers and court administrators; video and audiotapes; and judicial benchbooks, benchguides, and practice aids.

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INTRODUCTION

Presiding over a jury trial and working with juries is one of the most difficult, rewarding, and important tasks you will do as a judge. This Handbook is a compilation of materials from CJER civil and criminal benchbooks (the law); the thinking of many different judges (judicial practices); and suggested innovations from the Blue Ribbon Commission on Jury System Improvement (these recommendations are noted with the symbol ✪) and the Judicial Council's former Task Force on Jury System Improvement, appointed by Chief Justice George to implement the Commission's work. It is intended to tell you what the law requires and, in areas in which there are no legal requirements, to stimulate thinking and innovative ideas based on suggestions from the Commission and the experiences of contributing judges statewide. The coverage is sufficiently comprehensive that it should be useful to both newer and experienced judges. Although it is written for judges, the information presented in this Handbook is intended to be useful to court executives and jury commissioners as well.

For a more in-depth discussion of the law with respect to managing jury trials, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—TRIAL, SECOND EDITION (Cal CJER 2010).

Chapter 1
JURY SELECTION

I. [§1.1] COMPLIANCE WITH REPRESENTATIVE CROSS-SECTION REQUIREMENT

Jury selection starts with a list of prospective jurors. Various statutes and cases require that this list contain a representative cross-section of the population served by the court. The jury commissioner is statutorily required to create a list of qualified jurors. To meet the statutory requirements, the names on the list must be selected randomly and the source or sources of the names must include a representative cross-section of the population of the area served by the court. See CCP §§194(g), 197(a), 198.

A. [§1.2] THE REQUIREMENT

A party's constitutional right to a jury trial includes the right to a trial by a jury drawn from a representative cross-section of the community. *People v Burgener* (2003) 29 C4th 833, 855, 129 CR2d 747. This guarantee requires that the pools from which juries are drawn must not systematically exclude distinctive (cognizable) groups in the community. 29 C4th at 856.

The "representative cross-section" requirement ensures the parties a trial by a jury selected without systematic or intentional exclusion of "cognizable" groups of people, *i.e.*, groups defined by race, ethnicity, gender, sexual orientation, or religion. See CCP §231.5; *People v Massie* (1998) 19 C4th 550, 580, 79 CR2d 816. This requirement is designed to protect the right to a trial by an impartial jury that is guaranteed by the Sixth Amendment to the U.S. Constitution and by Cal Const art I, §16. *Hernandez v Municipal Court* (1989) 49 C3d 713, 716 n1, 263 CR 513, overruled by 25 C4th at 1046 (with respect to the assumption that Sixth Amendment vicinage applied to states); *Williams v Superior Court* (1989) 49 C3d 736, 740, 263 CR 503.

Although the court's compliance with the representative cross-section requirement is most often raised as an issue in criminal cases, the need for compliance applies with equal force in civil cases. See *Holley v J & S Sweeping Co.* (1983) 143 CA3d 588, 592–593, 192 CR 74.

B. [§1.3] COGNIZABLE GROUPS

The Supreme Court, in attempting to define cognizable groups, has written that (*Rubio v Superior Court* (1979) 24 C3d 93, 98, 154 CR 734)

> [two] requirements must . . . be met in order to qualify an asserted group as "cognizable" for purposes of the representative cross-section rule. First, its members must share a common perspective arising from their life experience in the group, *i.e.*, a perspective gained precisely because they are members

> of that group. It is not enough to find a characteristic possessed by some persons in the community but not by others; the characteristic must also impart to its possessors a common social or psychological outlook on human events. . . . [Second, the] party seeking to prove a violation of the representative cross-section rule must also show that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded.

The issue of what is a cognizable group and whether members of the group have been systematically excluded can be raised when peremptory challenges have been used to eliminate certain groups from a jury. See §1.61 for a list of court-determined cognizable groups. The issue can also be raised in the context of the selection process used to create juror lists.

Groups may not be defined by a common age or income status as "cognizable" groups for purposes of the representative cross-section requirement. See *People v Stansbury* (1993) 4 C4th 1017, 1060–1062, 17 CR2d 174, reversed on other grounds (1994) 511 US 318, 114 S Ct 1526, 128 L Ed 2d 293; *People v DeSantis* (1992) 2 C4th 1198, 1215–1216, 9 CR2d 628. For example, a party is not denied a jury that is a representative cross-section of the community by the fact that the trial judge or jury commissioner grants hardship excuses to prospective jurors based on their inability to survive on the daily juror's fee for the probable duration of the trial. *People v Burgener* (2003) 29 C4th 833, 857, 129 CR2d 747; *People v Carpenter* (1999) 21 C4th 1016, 1034–1035, 90 CR2d 607.

C. [§1.4] PROCEDURE FOR RAISING THE ISSUE

The procedure for raising the issue of whether the jury pool complies with the representative cross-section requirement is governed by CCP §225(a), the procedure for challenging the panel for cause (see §§1.30–1.31). The motion must be made before the jury is sworn, but it is usually raised in limine before the panel is assigned to your court. *People v De Rosans* (1994) 27 CA4th 611, 620, 32 CR2d 680. You need not grant a continuance to allow the defendant time to file a written motion except in an unusual case, such as when new information concerning the selection of potential jurors becomes available during voir dire. *People v De Rosans, supra*.

The United States Supreme Court has established a test to show a prima facie violation of the representative cross-section requirement. The party must show that (1) the group alleged to be excluded from, or underrepresented in, the jury pool is a cognizable group in the area served by the court, (2) the group's representation in the jury pool is not fair and reasonable in relation to the number of this group's members in the area served by the court, and (3) the underrepresentation is due to systematic exclusion of the group by the method used to create the jury pool. *Duren v Missouri* (1979) 439 US 357, 364, 99 S Ct 664, 58 L Ed 2d 579 (establishes federal constitutional test); *In re Seaton* (2004) 34 C4th 193, 207, 17 CR3d 633; *People v Burgener* (2003) 29 C4th 833, 856, 129 CR2d 747.

When a party establishes a prima facie case of systematic underrepresentation, the burden shifts to the other party to provide either a more precise statistical showing that no constitutionally significant disparity exists or a compelling justification for the procedure that has resulted in the disparity. *People v Burgener, supra*, 29 C4th at 856.

D. [§1.5] UNDERREPRESENTATION

No litigant has a right to a jury that mirrors the demographic composition of the population or that includes members of his or her own group. *Taylor v Louisiana* (1975) 419 US 522, 538, 95 S Ct 692, 42 L Ed 2d 690; *Lockhart v McCree* (1986) 476 US 162, 173–174, 106 S Ct 1758, 90 L Ed 2d 137; *Williams v Superior Court* (1989) 49 C3d 736, 741, 263 CR 503; *People v*

Wheeler (1978) 22 C3d 258, 277, 148 CR 890. Generally, the issue of underrepresentation focuses on the master list or the venire, not the defendant's panel. *People v Bell* (1989) 49 C3d 502, 525–526, 262 CR 1; *People v DeRosans*, 27 CA4th at 618, 621.

Constitutional underrepresentation may be measured by "absolute disparity" or "comparative disparity." See *People v Sanders* (1990) 51 C3d 471, 491–493, 273 CR 537, and *People v Bell* (1989) 49 C3d 502, 526–528, 262 CR 1, in which the Supreme Court held that when Hispanic citizens made up 16.3 percent of Kern County's residents and only 8.3 percent of those persons appearing for jury service, the trial court could consider an absolute disparity of 8 percent or a comparative disparity of 49 percent. See also *People v Currie* (2001) 87 CA4th 225, 233–234, 104 CR2d 430 (defendant made prima facie showing of comparative disparity by presenting statistical evidence that African-Americans in county constituted 8.4 percent of adult population, but only 4.6 percent of persons who appeared for jury duty); *People v Ramirez* (2006) 39 C4th 398, 445–446, 46 CR3d 677 (3.5 percent absolute disparity and 20 percent relative disparity between the percentage of Hispanics who appeared for jury service and the percentage of Hispanics in the area was not of constitutional significance). Neither the California Supreme Court nor the U.S. Supreme Court has determined whether the "absolute disparity" test or the "comparative disparity" test better measures alleged violations of the cross-section right, or what degree of disparity is constitutionally permissible. See *People v Burgener* (2003) 29 C4th 833, 856–857, 859–860, 129 CR2d 747.

A party does not discharge the burden of demonstrating that underrepresentation is due to systematic exclusion merely by offering statistical evidence of a disparity, but must also show that the disparity is the result of an improper feature of the jury selection process. 29 C4th at 857–858. If the procedure employed by the court to summon and select persons for jury service is race-neutral, and the disparity in representation of African-Americans, for example, is because a disproportionately high number of African-Americans fail to appear when summoned for jury service, there is no violation of the fair cross-section requirement because the disparity is not the result of systematic exclusion by the court. *People v Currie*, *supra*, 87 CA4th at 235–237. A court is not constitutionally required, and may not be constitutionally permitted, to employ racially disparate practices, such as affirmative action quotas, busing, or other race-based programs, to correct any underrepresentation caused by factors unrelated to exclusionary features of the jury selection process. 87 CA4th at 236–237.

The California Supreme Court has expressed "grave doubt as to the propriety" of a superior court's occasional practice of making race-conscious assignments of prospective jurors to bolster minority representation in various courtrooms. *People v Burgener*, *supra*, 29 C4th at 860–861. It acknowledged that this action was taken for the benign purpose of increasing minority representation on a particular jury and thus forestalling a possible representative cross-section challenge, but found that race-conscious assignment, no matter how infrequent, is inconsistent with the representative cross-section requirement. Courts are prohibited from making race-conscious assignments from the jury assembly room to a courtroom. 29 C4th at 861.

A master list of prospective jurors that is compiled from voter registration lists and DMV records of registered drivers and holders of identification cards is considered to include a representative cross-section of the community, when the court has undertaken reasonable efforts to eliminate duplicate entries. 29 C4th at 857. See §1.7. A court is not required to supplement those lists with information from other sources. *People v Ochoa* (2001) 26 C4th 398, 426–428, 110 CR2d 324, abrogated on another point in 30 C4th at 263 n14 (failure of particular group to register to vote in proportion to its share of population does not constitute improper exclusion).

A party who seeks access to court records to establish a violation is not required to make a prima facie showing. The party need only make a particularized showing supporting a reasonable belief that underrepresentation of the master list or the venire exists because of practices of systematic exclusion. Your court must then make a reasonable effort to accommodate the party's relevant requests for information designed to verify the existence of the underrepresentation and to document its nature and extent. *People v Jackson* (1996) 13 C4th 1164, 1194, 56 CR2d 49.

Although a defendant may make a sufficient "particularized showing" entitling him or her to some discovery of information regarding the jury selection process, the scope of discovery must be determined in accordance with the showing made, *i.e.*, there must be a nexus of relevance between the information sought and the particularized showing. *Roddy v Superior Court* (2007) 151 CA4th 1115, 1137–1138, 1142, 60 CR3d 307 (no showing that practice of merging DMV and voter registration source lists and deleting duplicate names constituted systematic exclusion, and thus the defendant did not establish relevance of the DMV source list).

E. [§1.6] VICINAGE

The vicinage right is a geographic rather than a demographic requirement, which distinguishes it from the cross-section requirement. It is the right of a criminal defendant to be tried by a jury drawn from the population of the area in which the crime occurred. The vicinage right, although assertable by a criminal defendant, also protects the right of a community to pass judgment on the offending party. See *Price v Superior Court* (2001) 25 C4th 1046, 1075, 108 CR2d 409; *Hernandez v Municipal Court* (1989) 49 C3d 713, 717, 263 CR 513 (overruled by *Price* with respect to the assumption that Sixth Amendment vicinage applied to states). See also *People v Coddington* (2000) 23 C4th 529, 573, 97 CR2d 528, overruled by 25 C4th at 1069, to the extent that it suggested the vicinage clause of the Sixth Amendment was made applicable to the states by the Fourteenth Amendment. The right to a jury of the vicinage is also distinct from venue: vicinage refers to the geographical area from which the jury is summoned whereas venue is the place of trial. *People v Alvarado* (2006) 144 CA4th 1146, 1152–1153, 50 CR3d 923.

Vicinage, which has its basis in common law and the desire to have a jury be composed of neighbors who knew the parties, was included in the Sixth Amendment to the Constitution. If the Legislature authorizes a division of the county into judicial districts, the vicinage is the population in the judicial district served by the court and not the population of the entire county in which the judicial district is located. See *People v Mattson* (1990) 50 C3d 826, 843–844, 268 CR 802; *Williams v Superior Court* (1989) 49 C3d 736, 742–745, 263 CR 503 (involving judicial districts within Los Angeles County). See also *People v Currie* (2001) 87 CA4th 225, 233, 104 CR2d 430 (relevant community for purposes of representative cross-section requirement is community of qualified jurors in judicial district in which case is to be tried). But if the Legislature does not authorize a division of the county into judicial districts, a jury drawn from the entire county satisfies the vicinage right. *People v Coddington*, *supra*, 23 C4th at 573. In the latter case, the designation of a location other than the county seat for court sessions does not create a separate judicial district for purposes of vicinage. 23 C4th at 574. Intracounty transfer of cases is permitted, because the boundaries of vicinage are coextensive with the boundaries of the county. *People v Ochoa* (2001) 26 C4th 398, 425–426, 110 CR2d 324, abrogated on another point in 30 C4th at 263 n14 (rejecting defendant's challenge to court's transfer of case from one judicial district to another within county on grounds that transfer denied his rights both to vicinage and to jury chosen from fair cross-section of community).

The defendant's right to a trial by a jury of the vicinage, as guaranteed by Cal Const, art I, §16, is not violated by conducting the trial in a county that has a reasonable relationship to the

offense or to other crimes the defendant committed against the same victim. *Price v Superior Court* (2001) 25 C4th 1046, 1075, 108 CR2d 409 (upholding Pen C §784.7, which permits trial of more than one of several offenses in any county in which one of the offenses occurred if the defendant and the victim are the same in all of the alleged offenses); *People v Alvarado* (2006) 144 CA4th 1146, 1152–1153, 50 CR3d 923 (for receiving stolen property charge, vicinage in county from which goods were stolen, which has a reasonable relationship to the offense, is proper). Nor is the Sixth Amendment right to trial before a jury violated because the vicinage clause of the Sixth Amendment is not a fundamental feature of the right to a jury trial and does not apply to the states by virtue of the Fourteenth Amendment. 25 C4th at 1058.

If sessions of the superior court are held in a location other than the county seat, the names for master jury lists and qualified jury lists to serve in a session may be selected from the area in which the session is held, under a local superior court rule that divides the county in a manner that provides all qualified persons in the county an equal opportunity to be considered for jury service. CCP §198.5. This statute does not preclude a court, in its discretion, from ordering a countywide venire in the interest of justice. CCP §198.5.

In individual cases, the parties may waive the requirement that each juror must be a resident of the county or judicial district in which the juror is summoned to serve. CCP §203(a)(4); see *People v Hill* (1992) 3 C4th 959, 983–986, 13 CR2d 475, overruled on another point in 25 C4th at 1046 (parties waived challenge to juror who disclosed on voir dire that she no longer resided in county).

F. Sources of Prospective Jurors

1. [§1.7] Registered Voters and DMV Lists

All courts are now using the National Change of Address System to update jury source lists and to create as accurate a list as is reasonably practical. Cal Rules of Ct, Standards of J Admin 10.31.

✪ This standard adopts Recommendation 3.1 of the Blue Ribbon Commission on Jury System Improvement.

The list of registered voters and the Department of Motor Vehicles' list of licensed drivers and identification cardholders residing in the area served by the court are statutorily approved source lists for selection of prospective jurors because they are considered representative of a cross-section of the population served by the court. CCP §197(b)–(c). Most courts use only these lists. See *People v Burgener* (2003) 29 C4th 833, 857, 129 CR2d 747; *People v Ochoa* (2001) 26 C4th 398, 426–428, 110 CR2d 324, abrogated on another point in 30 C4th at 263 n14 (court is not required to supplement these lists with information from other sources). Courts are permitted, however, to use customer mailing lists, telephone directories, or utility company lists as additional sources. See CCP §197(a).

2. [§1.8] Understanding and Explaining the Process

Although creating the list of jurors may not be within your purview, you should be aware of how the lists are created and what sources are used. Trial judges may include a brief summary of the process in the orientation to new juror panels with an emphasis on the random nature of the selection process. This information can improve the perception of procedural fairness of the selection process by the parties, the prospective jurors, and interested people in the audience.

II. [§1.9] JURY POOL, VENIRE, AND JURY PANEL DEFINED

The "jury pool" is the master list of eligible jurors compiled for the year or shorter period from which persons are summoned for possible jury service. See CCP §194(e). A "venire" is the group of prospective jurors summoned from that list and made available for jury service, after excuses and deferrals have been granted. A "panel" is the group of jurors from the venire who are assigned to a courtroom and from which a jury may be selected for a particular case. *People v Massie* (1998) 19 C4th 550, 580 n7, 79 CR2d 816.

III. JUROR QUALIFICATIONS AND DUTY TO SERVE

A. [§1.10] OBLIGATION TO SERVE

All qualified persons have an equal opportunity to be considered for jury service and an obligation to serve as jurors when summoned for that purpose. CCP §191.

To enforce the obligation of jury service, any prospective juror who has been summoned for service and fails to attend as directed or to be excused may be compelled to attend. CCP §209. You may issue an order to show cause as to why the prospective juror should not be held in contempt and following a hearing, you may find the prospective juror in contempt, which is punishable by a fine, incarceration, or both. CCP §209.

B. [§1.11] PERSONS QUALIFIED TO SERVE; BASIS FOR INELIGIBILITY

All persons are qualified to serve as jurors, except those who (CCP §203(a)):

- Are not U.S. citizens,
- Are under 18 years of age,
- Do not live in California,
- Are not residents of the county or judicial district in which they are summoned to serve,
- Have been convicted of a felony or of malfeasance in office and whose civil rights have not been restored,
- Have insufficient knowledge of English (see *People v Szymanski* (2003) 109 CA4th 1126, 1129–1133, 135 CR2d 691 (trial court improperly found prospective juror fit to serve despite apparent inability to understand simple legal jargon such as "law enforcement" and "court proceedings")),

TIP: Prospective jurors in many counties may inform the judge that English is not their first language and express concern about their ability to speak and understand it. Some judges handle this situation by thanking the juror for his or her concern and then inquiring of the juror using plain and simple language and in some detail as to his or her occupation, family makeup, how long they studied and used English, and other basic questions. This allows you to learn the necessary information and to give the juror an opportunity to demonstrate the level of his or her command of English. If the juror's answers are responsive, you may find a sufficient command of the language and inform the juror that the law does not require a juror to speak perfect English or to understand the meaning of all English words and that counsel is expected to present the case in plain and simple English and to explain the meaning of technical or unfamiliar terms. Be careful, however, in these situations because some judges have found that some jurors use the language barrier as a way to avoid jury service.

Some courts provide jurors with a very short questionnaire when they arrive. The questions are designed to address those jurors who would need assistance understanding English, and these jurors could reasonably be expected to seek assistance from jury administrators, who can then screen them for language abilities. If they "pass" this hurdle, it makes it a bit easier for the trial court to find that the issue involves either jury avoidance or a lack of confidence, which can then be addressed directly

The key, whether using a questionnaire or direct questioning, is to distinguish between the juror who truly has little or no proficiency in English, the juror who is looking for language as a way to avoid service, and the juror who has no confidence in his or her ability to understand and doesn't think he or she can keep up. Judges should try to reassure this third group of potential jurors. One technique, if the attorneys have left such a juror on the panel, is to proceed with the trial, ensuring that this juror feels comfortable about asking to hear things again if there is any confusion. These jurors can also be reminded that virtually none of the other jurors have any expertise or extensive familiarity with the concepts they will be presented with, and that all jurors are invited to let the court know if there is any difficulty understanding a word or concept presented during the trial. Then at the end of the trial, you can inquire whether the juror feels able to proceed.

If the juror, after sitting through the actual trial and getting the full sense of the conflict, feels unable to participate, that juror can be substituted with an alternate, preferably by stipulation of all parties or a finding of cause by the court. The experience of many judges is that these jurors are grateful for the opportunity to participate, are surprised at their own ability to perform their functions, and become real advocates to others in similar situations.

- Are serving as trial or grand jurors in a California court, or
- Are subject to a conservatorship.

These are the exclusive bases for ineligibility. CCP §203(b). No person is exempt from jury service for any other reason, including occupation, economic status, or any characteristic listed or defined in Govt C §11135. CCP §204(a). Government Code §11135 lists race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, including the perception that a person has any of these characteristics or is associated with someone who or is perceived to have any of them. Govt C §11135(a), (f). See Cal Const art I, §4 (no person is incompetent to be juror because of his or her opinions or religious beliefs). No person may be excused from jury service except for undue hardship. CCP §204(b).

The jury commissioner should, however, accommodate a prospective juror's schedule by granting his or her request for a one-time deferral of jury service. If the request for deferral is made under penalty of perjury in writing or through the court's established electronic means, and in accordance with the court's local procedure, the jury commissioner should not require the prospective juror to appear in court to make the request in person. Cal Rules of Ct 2.1004(a).

C. [§1.12] PEACE OFFICERS

Peace officers fall into an unusual category: Their occupation does not exempt them from jury duty (see CCP §204(a)), but CCP §219(b)(1) provides that jury commissioners may not select certain peace officers (sheriffs and deputies, police officers, CHP and other peace officers with statewide authority, and certain BART police) for jury panels. See Pen C §§830.1, 830.2(a), 830.33(a). Members of the University of California and the California State University Police Departments may not be called for criminal cases, but may be called for civil cases. CCP §219(b)(2).

> TIP: Although this appears confusing, most officers know precisely where they fit under the designated code sections.

Courts are also required to establish procedures that give peace officers scheduling accommodations for jury service. CCP §219.5. The jury commissioner must make a scheduling accommodation for a prospective juror who is a peace officer on the officer's application setting forth the reason a scheduling accommodation is necessary. If the request for a scheduling accommodation is made under penalty of perjury in writing or through the court's established electronic means, and in accordance with the court's local procedure, the jury commissioner may not require the prospective juror to appear in court to make the request in person. Cal Rules of Ct 2.1004(b).

D. [§1.13] PHYSICAL DISABILITY

A person is not ineligible to serve as a juror solely because of a loss of sight or hearing or any other disability that impairs the person's mobility or ability to communicate. CCP §203(a)(6). The court must provide a juror who has such an impairment with someone who can facilitate communication for the juror. See CCP §224(c). You may excuse a person with such a disability for cause if you are satisfied that the person is incapable of performing the duties of a juror. See CCP §228(b).

TIP: Check with your court to see what services and devices are available. Most courts have some listening devices to help those with a hearing impairment. Other courts have provided real time transcription and interpreter services for the deaf. See CC §54.8 for statutory requirement. Also, judges should be extremely cautious about assuming that a disabled or otherwise physically restricted juror wants to be excused. Many seek to be an active participant in our justice system.

IV. USING QUESTIONNAIRES TO QUALIFY PROSPECTIVE JURORS AND TO ASSIST IN VOIR DIRE

A. [§1.14] QUALIFYING QUESTIONNAIRES

Courts may use written questionnaires that prospective jurors are required to complete *before* they come to court, as long as the questionnaires ask questions related only to juror identification, qualification, and ability to serve as a prospective juror. See CCP §§198(c), 205(a). Prospective jurors may be required to respond to the questions under oath. See CCP §196(a). Unless otherwise ordered by the court, a juror questionnaire may be used only for qualifying prospective jurors and managing the jury system, not for assisting in voir dire. CCP §205(b) (except as ordered by the court).

If the person to whom the questionnaire is addressed is unable to respond, any person having knowledge of the fact may do so. See CCP §196(b). A person who fails to respond to the questionnaire may be summoned to appear before the jury commissioner or the court to answer, or may be deemed qualified for jury service in the absence of a response. See CCP §196(c). Although a failure to respond to a jury summons is punishable by contempt (CCP §1209(a)(10)), the failure to respond to a juror questionnaire is not, because a questionnaire is not an "order," "process," or "proceeding" within the meaning of CCP §1209. See *Lister v Superior Court* (1979) 98 CA3d 64, 67–71, 159 CR 281.

B. [§1.15] ADDITIONAL QUESTIONNAIRES

You may require prospective jurors to complete additional questionnaires deemed relevant and necessary to assist in voir dire or to ascertain whether a fair cross-section of the population is represented as required by law. CCP §205(c). You may also require prospective jurors to complete additional questionnaires proposed by counsel in a particular case to assist in voir dire. CCP §205(d). See *People v Ramos* (2004) 34 C4th 494, 515–516, 21 CR3d 575 (use of written questionnaire with follow-up questions by judge to examine prospective jurors about their exposure to media accounts of case). Finally, you may strike portions of counsel's proposed juror questionnaire that are redundant or confusing, or that contain questions that might better be posed orally during voir dire. See *People v Navarette* (2003) 30 C4th 458, 486–487, 133 CR2d 89.

The Judicial Council has issued a Juror Questionnaire for Civil Cases (Judicial Council Form MC-001) (see Cal Rules of Ct 3.1540(b); Cal Rules of Ct, Standards of J Admin 3.25(a)(1)), and a Juror Questionnaire for Criminal Cases (Judicial Council Form MC-002) (Cal Rules of Ct, Standards of J Admin 4.30(b)), that you may use in voir dire.

You must advise the jurors that they have a right to request a hearing in chambers on sensitive questions rather than answering them on the questionnaire. *Copley Press, Inc. v Superior Court* (1991) 228 CA3d 77, 87, 278 CR 443.

TIP: Juror illiteracy is a hidden problem that you should be sensitive to and watch out for. If your system relies extensively on written material, you should consider developing a procedure (*e.g.*, asking jurors whether they understand the written materials and their responses could be something that is done in chambers or at sidebar along with other personal questions to prevent the need for a juror to discuss an inability to read before the entire panel) that makes these materials accessible to those who cannot read in a way that creates the least discomfort or embarrassment for the prospective juror. This is particularly important because a juror is often reluctant to admit to an inability to read.

V. PUBLIC ACCESS TO INFORMATION ABOUT PROSPECTIVE JURORS

A. [§1.16] MASTER LIST AS JUDICIAL RECORD

A court's master list of qualified jurors, including their names and addresses, is a judicial record regardless of the form in which it is maintained and is subject to inspection and copying. *Pantos v City & County of San Francisco* (1984) 151 CA3d 258, 260–263, 198 CR 489. The names of qualified jurors drawn from a court's qualified juror list must also be made available to the public, on request, unless the court determines that a compelling interest requires that this information be kept confidential or that its use be limited in whole or in part. CCP §237(a)(1). A "compelling interest" includes protecting jurors from threats or danger of physical harm. CCP §237(b). Trial courts also have inherent power to protect juror safety and juror privacy. *Townsel v Superior Court* (1999) 20 C4th 1084, 1091, 86 CR2d 602. A court may require the person to whom disclosure is made (or his or her agents or employees) to agree not to divulge jurors' identities or identifying information to others, and may otherwise limit disclosure in any manner it deems appropriate. CCP §237(d).

B. [§1.17] QUESTIONNAIRES

Questionnaires completed by prospective jurors to determine juror competence are not public records and are not subject to public inspection. *Pantos v City & County of San Francisco* (1984) 151 CA3d 258, 263–265, 198 CR 489. The public, however, has a right of access to written questionnaires completed by prospective jurors who are called to the jury box for voir dire. *Copley Press, Inc. v Superior Court* (1991) 228 CA3d 77, 87–88, 278 CR 443. Public access must be afforded to information in the questionnaire that is provided to assist in voir dire. Public access, however, does not extend to personal information that is furnished merely to determine juror qualification or that is necessary for management of the jury system, but that is not properly part of the jury selection process, *e.g.*, the prospective juror's telephone, Social Security, or driver's license numbers. 228 CA3d at 88.

You should tell jurors to note on the questionnaire any information they do not wish to make public instead of completing the item. See TIP below for alternatives to eliciting the information.

TIP: Jurors should be informed that they may request discussion of private matters in a sidebar or, in difficult situations, in chambers, with only counsel and parties present. They could also be advised that they can ask for the discussion to be sealed if they are very concerned. Although either procedure may be more time consuming, a more honest and candid voir dire process may result. You should also consider advising jurors that voir dire is a two-way street and that if the juror has information the court should know about, that information should be volunteered during voir dire. With written questionnaires, any confidential items could also be placed on a separate detachable sheet for review by the court and counsel. This is highly recommended. Often, items that jurors wish to remain confidential are of no interest or no relevance to the proceedings and require no further inquiry or discussion.

✪ The Commission has recommended that jurors be given the right to respond in chambers to questions during voir dire that elicit highly personal information and that judges inform jurors of this right. Commission Report, p 37. See also Cal Rules of Ct, Standards of J Admin 4.30(a)(3) that says the court should consider conducting sequestered voir dire on issues that are sensitive to prospective jurors, on questions concerning media reports of the case, and on any other issue the court deems advisable.

C. [§1.18] SEALING QUESTIONNAIRES

Jurors' responses to questionnaires used in voir dire are accessible by the public unless you order them to be sealed after expressly finding facts that establish (1) an overriding interest exists that overcomes the right of public access to the questionnaires and supports sealing them, (2) a substantial probability exists that the overriding interest will be prejudiced if the questionnaires are not sealed, (3) the proposed sealing is narrowly tailored, and (4) no less restrictive means exist to achieve the overriding interest. See Cal Rules of Ct 2.550(d). Any order that you make sealing the jurors' responses to questionnaires must contain particularized findings that reflect your assessment of the individual jurors' privacy needs. See *Bellas v Superior Court* (2000) 85 CA4th 636, 646, 102 CR2d 380. This opinion entreats judges to advise prospective jurors "in unambiguous language at the time questionnaires are distributed that they will become public records accessible to anyone and, as an alternative to writing in sensitive personal data, jurors can respond to questions asked on the questionnaire on the record in chambers with counsel present." 85 CA4th at 652–653.

TIP: Some courts allow jurors to write sensitive information on a separate sheet so that the court can seal just that sheet, in the event it is warranted.

D. [§1.19] SEALING JUROR IDENTIFYING INFORMATION

On the recording of a jury verdict in a criminal case, juror identifying information is automatically sealed. CCP §237(a)(2). In all other instances, the names of jurors are available to the public, unless you determine that a compelling interest requires that the information be kept confidential. Neither you nor your court may create a policy that automatically seals all juror information in any civil or criminal trial. See *Erickson v Superior Court* (1997) 55 CA4th 755, 757–759, 64 CR2d 230.

You may, however, use a jury selection procedure that limits reference to the jurors to assigned juror identification numbers, rather than by their names. This procedure has been held to be consistent with CCP §237 and does not deny a defendant in a criminal case the constitutional right to a public jury trial. *People v Goodwin* (1997) 59 CA4th 1084, 1087–1093, 69 CR2d 576; see *People v Phillips* (1997) 56 CA4th 1307, 1309–1310, 66 CR2d 380 (judge's refusal to disclose jurors' names to defendant during voir dire did not require reversal of judgment).

There is no constitutional right to have the jurors' names spoken in the courtroom. *People v Goodwin, supra,* 59 CA4th at 1092. Failure to have the jurors' names spoken and become part of the record does not make the jury anonymous when the judge and counsel have available to them a list with the prospective jurors' names and their corresponding identification numbers. 59 CA4th at 1087, 1089–1092 (jurors' names were merely withheld from record). Even an anonymous jury may be constitutional if warranted by the facts. 59 CA4th at 1092.

✪ The Commission has recommended that jurors be identified only by number and not by name throughout the juror selection process and that personal juror identifying information be elicited only for compelling need. Commission Report, p 36.

VI. HANDLING HARDSHIP EXCUSES

A. [§1.20] General Considerations

One of the more difficult tasks you face in selecting a jury is handling hardship excuses. Jury service, unless excused by law, is a responsibility of citizenship. A court and its staff must employ all necessary and appropriate means to ensure that citizens fulfill this important civic responsibility. Cal Rules of Ct 2.1008(a); see CCP §204(b); see also CCP §§195, 218. You should excuse a prospective juror only on a sufficient showing that individual circumstances make it "unreasonably difficult" for the juror to serve or that "hardship to the public" will occur if the juror must serve in the particular case. *People v Visciotti* (1992) 2 C4th 1, 44 n15, 5 CR2d 495.

The following principles govern the granting of excuses from jury service on grounds of undue hardship under CCP §204:

- No class or category of persons is automatically excluded from jury duty except as provided by law. Cal Rules of Ct 2.1008(b)(1); for discussion, see juror qualifications and duty to serve in §§1.11–1.13.
- You may grant a statutory exemption from jury service only to an eligible person. Cal Rules of Ct 2.1008(b)(2).
- Deferring jury service is preferred to excusing a prospective juror for a temporary or marginal hardship. Cal Rules of Ct 2.1008(b)(3).
- Inconvenience to a prospective juror or his or her employer is not an adequate reason to be excused from jury duty, but you may consider this as a ground for deferral. Cal Rules of Ct 2.1008(b)(4).
- Financial burden alone is not sufficient; the financial burden must be extreme. Cal Rules of Ct 2.1008(d)(3).

A prospective juror's request to be excused from jury service on the ground of undue hardship must be made in writing or placed on the court's record. Cal Rules of Ct 2.1008(c). The

request must be supported with facts specifying the hardship and a statement as to why the circumstances constituting the undue hardship cannot be avoided by deferring jury service. Cal Rules of Ct 2.1008(c).

B. [§1.21] Explaining Process to Prospective Jurors

The following are talking points most judges cover with prospective jurors before voir dire:

- The importance of jury service and how stringent the law is to get excused from jury service.
- The fact that hardship and inconvenience are not synonymous, and that judges are required to follow certain legal guidelines developed by the Legislature to determine whether hardship exists.
- Whether it would be difficult or impossible for prospective jurors to serve for the anticipated length of the trial. See Cal Rules of Ct, Standards of J Admin 3.25(c)(3), 4.30(b)(2).
- The fact that hardship applies to the juror and not to the juror's employer.

C. [§1.22] Sample Script

TIP: Jury Improvement Task Force member, the Hon. Jacqueline Connor of the Los Angeles Superior Court, has used the following instruction with some success in reducing hardship requests:

Jury duty is an honor and an obligation, but it is not an option. At the same time, all of us in the system are extremely sensitive to the competing demands on your time. Not a single one of you is here because you volunteered. We do, in fact, have citizens who volunteer, but the Constitution guarantees a random selection that precludes the gift that we most certainly wish we could accept. Your Constitution guarantees the right to a jury trial, and that right applies to every one of us, should we need to call upon the protection of the courts. The Legislature has established the standard of extreme hardship before a judge can legally excuse anyone from jury service. This applies to the Governor of the State of California as well as to the janitor who works down the street. Along this line, an employer's pay policy does not dictate to the court whether someone can serve or not serve. The hardship to your employer is not what the court is permitted to consider. Any hardship applies solely to you personally.

Your presence here is not taken lightly. We have done everything we can to resolve this matter before we call on you, as a last resort, to make the decision about what justice will look like in this trial. Is the system perfect? Well, not yet, but we have not stopped working on it.

Most judges will tell you candidly that this is the most uncomfortable part of their jobs—sifting through the excuses and making determinations about hardship. The good news is that although we can try to accommodate your schedules, and although we can try to postpone your service to a date that may be more convenient, everyone does equally share in this opportunity. It is truly a unique opportunity, and most jurors who serve appreciate the opportunity to serve the community and contribute to our system of justice. Those who serve tend to be our biggest supporters, and if you have not

previously served, I welcome you to this experience. The parties in this case thank you. The People of the State thank you, and I thank you.

D. [§1.23] GROUNDS FOR EXCUSAL

- *Undue hardship.* You may excuse a prospective juror from jury service on the ground of undue hardship for any of the following reasons:
- *No transportation.* The prospective juror has no reasonably available means of public or private transportation to the court. Cal Rules of Ct 2.1008(d)(1).
- *Excessive distance.* The prospective juror must travel an excessive distance. Unless otherwise established by statute or local rule, an excessive distance is reasonable travel time exceeding one and one-half hours from the juror's home to the court. Cal Rules of Ct 2.1008(d)(2).
- *Extreme financial burden.* The prospective juror will bear an extreme financial burden. In determining whether you should excuse a juror on this ground, you should consider all sources of the juror's household income, the availability and extent of income reimbursement, the expected length of jury service, and whether that service can reasonably be expected to compromise the juror's ability to support himself or herself or his or her dependents or will so disrupt the juror's economic stability as to be against the interests of justice. Cal Rules of Ct 2.1008(d)(3). Some reduction in income is not a valid hardship excuse. In short trials, the fact that the juror's employer does not pay employees who serve is seldom a valid hardship excuse. You should excuse a prospective juror only "when the financial embarrassment is such as to impose a real burden and hardship." See *People v Kwee* (1995) 39 CA4th 1, 5–6, 46 CR2d 230.

TIP: You may grant a hardship excuse on a showing of extreme financial hardship (long trial) because of an employer's unwillingness to pay a juror who is on jury duty. See *People v Kwee, supra*, 39 CA4th at 5–6. But if the issue is the threat of a loss of job or other sanction, you should know that Lab C §230 prohibits an employer from discriminating against or discharging an employee for taking time off to serve on a jury when the employee gives reasonable notice beforehand.

- *Risk to property.* The prospective juror will bear an undue risk of material injury to or destruction of property, and it is not feasible to make alternative arrangements to alleviate the risk. In determining whether a juror should be excused on this ground, you should consider the nature of the property, the source and duration of the risk, the probability that the risk will be realized, the reason alternative arrangements to protect the property cannot be made, and whether injury to or destruction of the property will so disrupt the juror's economic stability as to be against the interests of justice. Cal Rules of Ct 2.1008(d)(4).
- *Undue risk of physical or mental harm.* The prospective juror has a physical or mental disability or impairment, not affecting his or her competence to act as a juror, that would expose the juror to undue risk of mental or physical harm. You may require a juror under the age of 70 to furnish verification of the disability or impairment, its probable duration, and the particular reasons for his or her inability to serve as a juror. Cal Rules of Ct 2.1008(d)(5).

- *Public health and safety workers.* The prospective juror's services are needed immediately for the protection of public health and safety, and it is not feasible to make alternative arrangements to relieve the juror of those responsibilities during the period of jury service without substantially reducing essential public services. Cal Rules of Ct 2.1008(d)(6).
- *Care of others.* The prospective juror has a personal obligation to provide actual and necessary care to another, including sick, aged, or infirm dependents, or a child who requires the juror's personal care and attention, and no comparable substitute care is available or practical without imposing an undue economic hardship on the juror or the person for whom care is needed. If the request to be excused is based on care provided to a sick, disabled, or infirm person, you may require the juror to furnish verification that the person being cared for is in need of regular and personal care. Cal Rules of Ct 2.1008(d)(7). You must excuse a mother who is breast-feeding a child for up to one year at her request and may extend the period on request. See CCP §210.5; Cal Rules of Ct 2.1006.

✪ The Commission has recommended that jurors who are not employed and who must make special child care arrangements because of jury service should be reimbursed for the actual, reasonable expenses of licensed day care. Commission Report, p 27. Legislative attempts to implement this recommendation have been unsuccessful so far. Some courts, such as Riverside, however, have begun providing child care services for jurors.

- *Previous service.* On request, you must excuse from jury service a prospective juror who has served as a juror or grand juror, or was summoned and appeared for jury service in any state or federal court during the previous year. Cal Rules of Ct 2.1008(e).

TIP: Judges should also be sensitive to the alternative of postponing rather than excusing jurors. In many instances, postponements should be the preferred response to any "excuse" that applies only to the moment. Postponing instead of excusing will also discourage irresponsible efforts to avoid jury service.

E. [§1.24] WHO GRANTS EXCUSAL REQUESTS

You or the jury commissioner may grant excusal requests. See CCP §§195, 218. The jury commissioner may accept an undue hardship excuse without the prospective juror's personal appearance. CCP §218. Some judges prefer to hear and determine prospective jurors' hardship excuses themselves before voir dire. In courts that use juror questionnaires, the judge may review the completed questionnaire with the attorneys before voir dire and rule on any excusal requests.

When the jury commissioner conducts the hardship screening of prospective jurors, the judge, on a party's request, must require the commissioner to keep records concerning the number of jurors screened, the number excused from service, and the reasons given by the excused jurors in claiming financial hardship. *People v Basuta* (2001) 94 CA4th 370, 395–396, 114 CR2d 285. The parties do not, however, have a right to be present when the commissioner is screening the pool of jurors to determine which jurors would be financially unable to serve on the case. 94 CA4th at 395–396.

TIP: Many courts have established policies that direct jury staff to grant or deny excusal requests based on these policies. Granting or denying requests under a court-established policy can save a significant amount of court time; therefore, you should consider implementing such a policy in your court if it is not already in place. But some judges urge caution and believe that having a jury commissioner prescreen jurors for hardship in the jury assembly room without a stipulation of the parties may violate the parties' right to have a randomly selected jury and for the jury to represent a fair cross-section of the community. See CCP §219 and *People v Bautista* (2001) 94 CA4th 370, 114 CR2d 285.

F. [§1.25] HEARING HARDSHIP REQUESTS

You may handle hardship requests by:

- Hearing all of the prospective jurors' claims of hardship in the presence of the other jurors and ruling on these claims without consulting the attorneys;
- Examining each juror who requests excusal individually, on the record, and outside the presence of the other jurors; or
- Hearing all the jurors' claims of hardship without comment, and then calling the attorneys forward to discuss the claims at sidebar or at a recess for the panel and to obtain their stipulation to the excusal of a particular juror.

TIP: Some judges believe that the first procedure is preferable to save time. If you hear all claims in the presence of other jurors, however, you should consider ruling after hearing all the requests rather than as you go to avoid having subsequent requests take on a distinct similarity to the first few that you grant. Other judges believe that the first method can be an invasion of privacy especially with respect to possible excusal for financial hardship.

You might also consider explaining the concept of one-day/one-trial service and the impact that this might have on the number of jurors available. Although the jurors may have had this concept explained to them in their orientation, they may understand the concept better if they hear a judge discuss it, and there may be fewer requests to be excused from jury duty because of hardship. The explanation of this concept should include the need for a greater number of jurors but for a much reduced period of time that benefits all jurors.

This is an excellent thought to include in judicial greetings to all jurors in assembly rooms before being sent to courtrooms. Personal greetings from a bench officer have been found to be extremely well-received from jurors and make a strong statement of the commitment of the judiciary to the interests of justice and the protection of and respect for jurors.

G. [§1.26] VARIOUS STANDARDS FOR GRANTING EXCUSAL REQUESTS

You will find that different judges apply different standards to the granting of excusal requests. Many judges are very strict about granting these requests, believing that if a juror can meet the necessities of life during the period of jury service, there is no undue hardship. Some judges are particularly strict about such claims for trials expected to last only one to two weeks. They may permit deferral of jury service for a brief period, but will excuse a prospective juror from further jury service only for the most compelling reasons. Other judges are more lenient about granting hardship excuses, believing that an unwilling juror may not be very effective, and that if few people on the panel claim hardship, it is more expedient to excuse those who do so than to retain them.

TIP: It is critical to communicate with other judges in your court to develop consistent and firm standards. Judges need to be aware of what other judges are doing in their courts. Hardship decisions are not exercised in a vacuum and judges who are too lenient and excuse jurors with the flimsiest of excuses create problems for other judges who don't take such a casual approach to jury duty and juror excuses.

Differing treatment of similarly situated jurors with respect to the granting of excusal requests is a significant source of juror dissatisfaction. Differing treatment becomes more obvious to jurors as they are recycled from one court to another during their one day of service. Undue leniency by in even one court impacts every other court. None operate in a vacuum, and the misuse or dismissal of jurors absent good cause ("extreme hardship") unduly shifts the responsibility of service to those few who welcome the opportunity to participate. In addition, it has been repeatedly documented that regardless of the initial reluctance to serve, those who complete actual service become the court's best advocates.

VII. OBTAINING PARTIES' AGREEMENT TO JURY OF FEWER THAN 12 PERSONS

A. [§1.27] IN GENERAL

A trial jury must consist of 12 persons, except in civil actions and misdemeanor cases in which the parties may stipulate to a smaller number. Cal Const art I, §16; CCP §220. It is unclear whether an attorney has the implied authority to enter into such a stipulation without the client's express consent. See *Giouzelis v McDonald* (1981) 119 CA3d 436, 446, 174 CR 58 (stating in dictum that attorney may so stipulate). Therefore, some judges have the parties join in the stipulation or put their consent on the record.

The California Constitution mandates a 12-person jury trial for a *felony* defendant unless the defendant waives the right to such a jury. A defendant accused of a felony can waive a portion of the 12-person jury, provided the waiver conforms to that required for trial without a jury, *i.e.*, the waiver must be by the consent of both parties expressed in open court by the defendant and the defendant's counsel. *People v Trejo* (1990) 217 CA3d 1026, 1033, 266 CR 266 (stipulation to trial by six jurors).

TIP: Some judges routinely attempt to obtain such a stipulation in the appropriate cases and a stipulation regarding the number of jurors required to render a verdict. You should be careful, however, of attempting to save time in jury selection by reducing the number of alternates available. If a juror becomes sick and there is no replacement available, defense counsel may have the option of choosing a mistrial over a stipulation to a verdict with fewer jurors.

B. [§1.28] EXPEDITED JURY TRIALS (EJT) AS ALTERNATIVE

An EJT is a consensual, binding jury trial before a reduced jury panel and a judicial officer. CCP §630.01(a). See Cal Rules of Ct 3.1546 (presiding judge assigns judicial officers to conduct EJTs and may assign temporary judges, other than temporary judges requested by the parties,

under Cal Rules of Ct 2.810–2.819). It differs from other jury trials in several significant respects:

- A case may proceed as an EJT only if *all* parties agree. CCP §630.03(a).
- Even if all parties agree, the court may, for good cause, refuse to allow the case to proceed as an EJT. CCP §630.03(f).
- A court *must* allow a case to proceed as an EJT when it involves a self-represented litigant or a minor, an incompetent person, or a person for whom a conservator has been appointed. CCP §630.03(d).
- The parties may enter into a "high/low" agreement in the consent order, which specifies a minimum amount of damages that the plaintiff is guaranteed to receive from the defendant, and a maximum amount of damages for which the defendant will be liable, regardless of the jury's verdict. CCP §630.01(b). See Cal Rules of Ct 3.1547(a)(2). Neither the existence of, nor the amounts contained in, any high/low agreement may be disclosed to the jury. CCP §630.01(b).
- The jury will be composed of no more than eight jurors, with no alternates. CCP §630.03(e)(2)(C).
- Each side has a limit of three hours in which to present its case, including opening statements and closing arguments. CCP §630.03(e)(2)(B); Cal Rules of Ct 3.1550. A judge may allow additional time for good cause. Cal Rules of Ct 3.1550. The goal, however, is to complete an EJT within one full trial day and, to that end, parties should be encouraged to streamline the trial process by limiting the number of live witnesses. Cal Rules of Ct 3.1550.
- The parties may agree to use relaxed rules of evidence. CCP §630.06(b).
- The jury's verdict is binding. CCP §630.07(a).
- The parties have only a limited right to appeal or to seek post-judgment relief in the trial court. CCP §§630.08-630.09.

VIII. [§1.29] DETERMINING SIZE OF JURY PANEL

The size of the jury panel is not prescribed by statute or court rule and is left to the judge's discretion. You should, however, make an effort to keep the panel as small as possible. One-day/one-trial jury service means that large juror panels waste resources because those who are called are not available for a year even if they are never questioned.

To avoid wasting juror resources, most jury commissioners encourage judges in their courts to limit the size of the jury panels to the minimum number the judge determines is reasonably necessary. If more prospective jurors are needed, panels can always be augmented. See CCP §211. Many judges find it easier and faster to select a jury from a smaller panel than from a larger panel. This occurs in part because there is a change in the psychological dynamic in that jurors become more valuable when there are not large numbers available to waste.

TIP: Your court administrator and jury commissioner have access to juror usage data that allows them to accurately predict jury panel size needs based on many variables. They are excellent resources to use in determining the size of the panel to call. Many judges now look to the predicted length of trial to gauge the size of the jury panel required. An AOC study in 2004 found that nearly 30 percent of jurors called are not needed, and that a quarter of a million jurors called never get to a courtroom at the cost to the public and business of $27.5 million. Fewer than 6 percent of panels require additional jurors, and keeping panel sizes within a margin of five unused jurors when selecting a jury saves the state $16.5 million annually. One tip that many judges have used, borrowed from strategies in capital cases, is to shift the jurors who express some kind of problem that fails to support a cause challenge (whether time problems, work problems, or any other issues) to the end of the list. Such jurors would therefore not be called into the box for consideration until after all other jurors have been exhausted. This can only be done if hardship issues are addressed before such juror is "in the box." It is important to get the sides to stipulate to the process. Although generally it is easy to obtain stipulations from all sides because this allows the attorneys to proceed without using up ("wasting") their peremptory challenges and permits each side to focus on jurors they know are able to stay for the duration of the trial. It also provides incentives for all sides to make sure the jury is selected before dipping into this latter group of more questionable jurors.

Many judges believe that in an ordinary, two-party civil action or in a criminal trial for a minor offense, a panel of 20 to 30 prospective jurors is sufficient. (Studies show the average number of jurors reached in moderately complex cases is 28.) This takes into account the following:

- The number of jurors that need to be selected (*i.e.*, 12, unless the parties stipulate to a lesser number in a civil action or misdemeanor case).
- The number of alternates to be selected (generally 2, or 1 for trials of a week or less).
- The total number of peremptory challenges that may be exercised. See CCP §231(b)–(c) (studies show that rarely are all peremptory challenges used).
- A limited number of challenges for cause.

A larger panel of 50 to 60 (check with the court administrator) might be necessary in a civil action or in a criminal action other than a death penalty or minor case if

- There are more than two parties and, as a result, 16 or more peremptory challenges may be exercised in the civil case. See CCP §231(c).
- Prospective jurors might have a relationship with one or more of the parties (*e.g.*, a party that is a large employer in the area) and thus may be challenged for cause.
- A case involving a criminal offense (except for minor offenses, death or life case, or cases with multiple defendants), in which the defendant and the prosecution are each entitled to ten peremptory challenges. See CCP §231(a).

An even larger panel, up to 100 to 150 (again check with the court administrator), might also be required in

- A criminal case in which the offense charged is punishable by death or life imprisonment, and, therefore, the defendant and the prosecution are each entitled to 20 peremptory challenges plus those for alternates. See CCP §§231(a), 234. A larger than usual panel may be required in a death penalty case because: (1) the trial may be protracted and many prospective jurors may be unable to serve beyond the ordinary term, and (2) a number of jurors may seek to be or will be excused because of their attitudes toward the death penalty.
- Criminal cases in which two or more defendants are tried jointly and in which each defendant is entitled to five additional challenges and the prosecution is entitled to the same total number of additional challenges. See CCP §231(a).
- A civil or criminal case that has received considerable local publicity, so that prospective jurors may have knowledge of, and biases about, the case and thus may be challenged for cause.
- A case that involves sensitive issues, making it likely that a number of prospective jurors will be challenged for cause.

A case in which the trial will last more than two weeks, making it likely that a number of prospective jurors will ask to be excused for undue hardship.

> TIP: If you decide that a large panel is required, you should give the court administrator or jury commissioner advance notice (check with your court; it could be 4-6 weeks or more) so that additional jurors may be summoned. Most courts send out summons several weeks before the day of appearance as a standard. You should also keep in regular contact with the parties to avoid calling a large panel for a case that is settled or that pleads out. If a panel is wasted when there is a last-minute settlement or plea, it is highly recommended that the judge address this "wasted panel" to explain that their presence was critical in reaching the resolution and that though they will not have to make the decision as a juror, their presence was extremely valuable.

IX. [§1.30] CALLING PANEL AND CASE; ADMINISTERING OATH TO PANEL

The process of calling the panel in most courts consists of the clerk summoning the panel into the courtroom, indicating where panel members are to be seated, and calling roll. You then take the bench and call the case by name. For example:

Ladies and gentlemen, this is a [civil/criminal] case entitled _____ versus _____.

After the case is called, you should ask the clerk to swear the entire jury panel. The oath under CCP §232(a) follows:

Do you, and each of you, understand and agree that you 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; and that failure to do so may subject you to criminal prosecution?

Note: In some courts the judge does not take the bench until after the panel is sworn.

X. CHALLENGE TO PANEL FOR CAUSE

A. [§1.31] REQUIREMENTS

A party may challenge the entire jury panel for cause. CCP §225(a). Any challenge to the panel as a whole must be made before any challenge to an individual juror (see CCP §227(a)–(b)) and before the trial jury is sworn (CCP §225(a)(1); see *People v Gore* (1993) 18 CA4th 692, 703–705, 22 CR2d 435 (challenge to entire panel was timely when made after original 12 jurors were sworn but before selection and swearing of alternates)). The challenge must be made in writing, and must plainly and distinctly state the facts constituting the grounds of the challenge. CCP §225(a)(1). Reasonable notice of the challenge must be given to all parties and to the jury commissioner by service of a copy of the challenge. CCP §225(a)(2). The jury commissioner is entitled to be represented by legal counsel in connection with the challenge to the panel. CCP §225(a)(3).

B. [§1.32] GROUNDS

Grounds for challenges to the entire jury panel are not specified by statute or court rule. The usual basis for such a challenge is that the panel was not drawn from a jury pool representative of a cross-section of the population of the area served by the court (see, *e.g.*, *People v De Rosans* (1994) 27 CA4th 611, 616–622, 32 CR2d 680), or that a prospective juror's prejudicial and biased comments during voir dire have so "tainted" the entire panel that it should be dismissed (see, *e.g.*, *People v Nguyen* (1994) 23 CA4th 32, 41–42, 28 CR2d 140; *People v Martinez* (1991) 228 CA3d 1456, 1465–1467, 279 CR2d 858).

In *People v Seaton* (2001) 26 C4th 598, 110 CR2d 441, the California Supreme Court rejected the defendant's contention that he was denied a trial by an impartial jury because of comments made by two prospective jurors, who were not selected to sit on the jury, that defendants in death penalty cases were wasting the court's time. The Court noted that "[o]ccasional criticism of the judicial system by prospective jurors is an inevitable by-product of voir dire . . . [and] [w]hen, as here, the critical comments are isolated and do not pertain to the facts of the offense charged, the prospective jurors who hear them are rarely if ever 'contaminated' to such a degree that they cannot be fair." 26 C4th at 634–635.

XI. [§1.33] FILLING THE JURY BOX

After the clerk administers the oath to the prospective jurors, you should ask the clerk to fill the jury box with the appropriate number of prospective jurors depending on the method selected for filling the box.

A. [§1.34] RANDOM SELECTION OF JURORS

The clerk must randomly select the names of the prospective jurors who will be seated in the box. See CCP §222(a). With a stipulation of the parties to reorder jurors (such as the technique of reseating the difficult jurors at the end of the list to preserve the exercise of peremptory challenges), there is no violation of this section providing there is no showing that this represents any systematic exclusion of any cognizable groups. See also CCP §202 (mechanical, electric, or electronic equipment approved by jury commissioner may be used to select or draw jurors). If the jury commissioner has provided you with a listing of the jury panel in random order, you must seat the prospective jurors in the jury box in that order. See CCP §222(b).

Although the following cases did not result in reversals, under the Supreme Court's analysis, alternative methods are generally disfavored. Calling prospective jurors for voir dire in alphabetical order by their last names does not violate the random selection requirement when there is no evidence that jurors of either gender or of any religious, racial, or ethnic group were present in disproportionate numbers in the group of jurors who were not called for voir dire because their last names began with a letter in the second half of the alphabet. *People v Mayfield* (1997) 14 C4th 668, 728–729, 60 CR2d 1. See *People v Seaton* (2001) 26 C4th 598, 637–638, 110 CR2d 441 (court rejected defendant's objection that judge's procedure of calling jurors in order in which they were voir dired violated random selection process because there was no evidence that process systematically excluded any racial or ethnic group). See also *People v Visciotti* (1992) 2 C4th 1, 37–39, 5 CR2d 495.

B. [§1.35] METHODS

How the jury box is filled from the jury panel for voir dire depends on the method you adopt. One of the following methods is generally used:

- *Traditional Method.* The judge or the clerk calls the first 12 prospective jurors into the box. The judge and the attorneys examine all 12, and then the judge entertains the attorneys' challenges with respect to any of the 12. An additional prospective juror is called into the box to replace each excused juror.
- *Individual Method.* The judge calls prospective jurors into the box one at a time to voir dire each juror individually and to entertain challenges to a particular juror before calling the next juror into the box.

CAUTION: If you use this method, you should allow peremptory challenges to be exercised after the panel is full as required by CCP §231(d).

"Six-Pack" Method. The judge begins voir dire with more than 12 prospective jurors. Typically, 18 jurors are called by the clerk. Jurors 13 through 18 constitute the six-pack. The judge examines all 18 jurors, permits the attorneys to examine them, and then considers the attorneys' challenges for cause with respect to all 18 jurors. If the judge grants a challenge for cause with respect to any of the first 12 jurors, replacement jurors are selected from the six-pack. For example, if the judge grants challenges for cause to juror 4 and juror 8, juror 13 is asked to take the seat of juror 4 and juror 14 is asked to take the seat of juror 8. (Some courts replace the challenged juror from the box with a random draw from the "six pack" in an effort to prevent intentional stacking.) If the judge grants challenges for cause with respect to jurors 13 through 18, these jurors are excused. The judge then asks the attorneys for their peremptory challenges to jurors 1 through 12. As the peremptory challenges are exercised, the judge draws replacements for the challenged jurors from the remaining members of the six-pack. If all members of the original six-pack are selected to replace the original group of 12, the judge calls for and voir dires an additional group of seven. Although this method of jury selection is generally referred to as a six-pack, there is no magic number of spare jurors you may call. Some judges routinely call 21 jurors. The physical layout of your courtroom may determine how many additional prospective jurors you call. In a multiparty case involving a large number of peremptory challenges, some judges will call 36 jurors if the courtroom seating permits doing so.

TIP: You will find it easier to track the jurors and challenges if you use a seating chart that shows the name of each juror assigned to a seat in the jury box. Many judges use post-its on the seating chart to make it easy to change as jurors are moved around and replaced. An alternative method is to use one-page written questionnaires that jurors can fill out in advance, either on a triplicate form or by making copies. This avoids the lengthy recitation of "name/rank/serial number" information and provides an easier format for the court to keep notes on each juror.

XII. CONDUCTING VOIR DIRE

A. [§1.36] PURPOSE OF VOIR DIRE

The duty to select a fair and impartial jury is specifically imposed on the court. *People v Mattson* (1990) 50 C3d 826, 845, 268 CR 802. Without an adequate voir dire, the judge cannot fulfill his or her responsibility to remove prospective jurors who will not be able to follow the judge's instructions and evaluate the evidence impartially. *People v Roldan* (2005) 35 C4th 646, 689, 27 CR3d 360, disapproved on another point in 45 C4th at 390.

TIP: You may set time limits on jury selection, providing they are neither unreasonable nor arbitrary. CCP §§222.5, 223. Time limits are an excellent tool to force the lawyers to focus on a real elicitation of information, which has the beneficial effect of reducing the various pretrial strategies that are often seen in voir dire.

Voir dire is not a platform from which counsel may

- Attempt to precondition the prospective jurors to a particular result, indoctrinate them, or question them about the pleadings or the applicable law. CCP §222.5 (civil cases); Cal Rules of Ct, Standards of J Admin 4.30(c) (criminal cases).
- Compel them to commit themselves to a particular disposition of the case.
- Ask them to promise to do or not to do something.
- Prejudice them for or against a party.
- Argue the case.
- Instruct them on matters of law. *People v Visciotti* (1992) 2 C4th 1, 47–48, 5 CR2d 495; *Rousseau v West Coast House Movers* (1967) 256 CA2d 878, 882, 64 CR 655.
- Attempt to obtain the jurors' advisory opinion based on a preview of the evidence. *People v Mason* (1991) 52 C3d 909, 939–940, 277 CR 166.

You should not permit the attorneys to ask questions about the comfort of the jurors or the meaning of particular words or phrases, or to comment on the personal lives and families of the parties or their attorneys (Cal Rules of Ct, Standards of J Admin 3.25(f), 4.30(c)). For example, allusions to experiences, schools, or memberships shared by a party or attorney and a juror are improper.

In unusual circumstances, you may permit questions that would generally be improper if you conclude that they are necessary to ensure the selection of a fair and impartial jury (Cal Rules of Ct, Standards of J Admin 3.25(f)), *e.g.*, in a case involving substantial pretrial publicity or sensitive issues (such as racial discrimination, child abuse, or sexual orientation). For

example, questioning aimed at determining relevant personal experiences may be necessary. You may allow attorneys then to ask questions of the jurors, when relevant to the case, about the jurors' family history, previous dealings with the government, prior health problems, individual criminal records, racial attitudes, and religious prejudice if you decide this information is necessary for the attorney to intelligently exercise his or her peremptory challenges. *Pantos v City & County of San Francisco* (1984) 151 CA3d 258, 263–264, 198 CR 489.

TIP: You should not allow attorneys to elicit personal identifying information from jurors. The judge is the jurors' sole advocate and the only one charged with protecting their privacy interests. A good practice is to scrutinize every question to determine if it in fact elicits information that is relevant to the case at hand. Juror concerns about privacy have escalated in a culture of sensitivity to identify theft, and the court should be protective of the jurors. Studies have shown that one of the sources of stress for jurors entering the judicial arena is the prospect of disclosing personal, private information in a public setting that goes into a public record and becomes accessible in perpetuity. For example, a question asking what bumper stickers are on a juror's car would allow that juror's car to be identified in a courthouse parking lot. You should also be sensitive to jurors' discomfort in giving the names of their children's school, the name of their employer, or the location of their work. Depending on the nature of the case and the nature of the county, questions that otherwise seem innocent can cause a great deal of discomfort among jurors. Although California Rules of Crt, Standards of Judicial Administration 4.30(b)(22) suggests asking those types of personal questions, they are recommended and not required, and if a fair and impartial jury can be selected without the use of that line of questioning, you may preclude counsel from asking such questions.

B. [§1.37] CRIMINAL CASES—EXAMINING PROSPECTIVE JURORS

Protecting defendant's constitutional rights. Voir dire plays a critical function in ensuring that a criminal defendant's Sixth Amendment right to an impartial jury will be honored. *People v Roldan* (2005) 35 C4th 646, 689, 27 CR3d 360, disapproved on another point in 45 C4th at 390. A voir dire examination should be extensive enough to protect a defendant's right to a fair trial by exposing possible biases, both known and unknown, on the part of potential jurors. 35 C4th at 689.

Defendant's right to be present. The defendant has a right to be present during jury selection, but this right may be waived. *People v Edwards* (1991) 54 C3d 787, 809–811, 1 CR2d 696; *People v Marks* (2007) 152 CA4th 1325, 1334, 62 CR3d 322 (due process violated by conducting portion of jury selection outside presence of defendant and prospective jurors). But this does not include a right to be present when the commissioner is screening the pool of jurors to determine which jurors would be financially unable to serve on the case. *People v Basuta* (2001) 94 CA4th 370, 395–396, 114 CR2d 285.

Voir dire conducted in open court. Voir dire should be presumptively conducted in open court; this presumption may be overcome only on specified express findings by the court. *Press-Enterprise Co. v Superior Court* (1984) 464 US 501, 510, 104 S Ct 819, 824, 78 L Ed 2d 629. You must conduct voir dire in open proceedings unless there is an overriding interest supported by adequate findings that closure is necessary to preserve that interest. You must also consider alternatives to closure that might harmonize the rights of the public and the defendant before

making any narrowly tailored order for closure. See *Ukiah Daily Journal v Superior Court* (1985) 165 CA3d 788, 790, 211 CR 673. A bare assertion of a defendant's Sixth Amendment rights is insufficient to justify closure, absent findings that nonclosure specifically threatens that interest. *Press-Enterprise Co. v Superior Court, supra,* 464 US at 510–511.

Initial examination. You must conduct an initial examination of prospective jurors in criminal cases. CCP §223. In conducting your initial examination you may want to review the areas set forth in Cal Rules of Ct, Standards of J Admin 4.30(b). Your examination should include all questions necessary to ensure the selection of a fair and impartial jury. Cal Rules of Ct, Standards of J Admin 4.30(a)(2). You may consider conducting sequestered voir dire on issues that are sensitive to the prospective jurors, on questions concerning media reports of the case, and on any other issue you deem advisable. Cal Rules of Ct, Standards of J Admin 4.30(a)(3). See §1.38.

Juror questionnaire. You may want to use the Juror Questionnaire for Criminal Cases (Judicial Council Form MC-002) when examining prospective jurors. This is an optional form and is not intended to constitute the complete examination of prospective jurors. Instead, it is a tool you may use to make the initial examination of prospective jurors more efficient. If you decide to use this form, its use and any supplemental questions submitted by counsel must be discussed at the pre-voir dire conference. See §1.37. It is generally not advisable to excuse jurors based on questionnaire answers alone. Cal Rules of Ct, Standards of J Admin 4.30(b).

Counsel's questions. You may ask any additional questions requested by the parties that you determine are proper. CCP §223. After you have completed your initial examination, the attorneys have a right to examine the prospective jurors, but only to aid in the exercise of challenges for cause. You have the discretion to limit their examination. CCP §223.

A good place to start, in advance of trial, is to ask counsel for an estimate of the amount of time each needs. You have the option of specifying the maximum amount of time each party's counsel may question an individual juror, or specifying an aggregate amount of time for each party's counsel that he or she may then allocate among the prospective jurors. CCP §223. Counsel's questions must be restricted to those used to aid in the exercise of challenges for cause. CCP §223. Counsel are, however, entitled to ask questions that are specific enough to determine if the prospective jurors harbor bias as to some fact or circumstance that will be shown by the evidence, which would cause them not to follow the judge's instructions. *People v Coffman & Marlow* (2004) 34 C4th 1, 47, 17 CR3d 710.

Death penalty cases. If the case is a death penalty case, you must conduct a meaningful death-qualifying voir dire that will yield sufficient information regarding the prospective jurors' state of mind to permit a reliable determination as to whether their views on capital punishment would prevent or substantially impair the performance of their duties; otherwise, you may commit reversible error. See *People v Stitely* (2005) 35 C4th 514, 539–540, 26 CR3d 1 (judge has broad discretion over number and nature of questions about death penalty; voir dire is adequate if judge and/or counsel ask additional questions to clarify ambiguous responses and to reliably expose disqualifying bias); *People v Stewart* (2004) 33 C4th 425, 445–452, 15 CR3d 656 (over defense objection, judge erroneously excused prospective jurors for cause based on inherently ambiguous responses to questionnaire). A court has discretion in a capital case as to whether to sequester each potential juror during voir dire for death qualification. *People v Lewis* (2008) 43 C4th 415, 493–495, 75 CR3d 588.

TIP: In death penalty trials where all proceedings must be transcribed by the court reporter, some courts use a remote microphone at the sidebar away from the jurors' hearing to allow the court reporter to transcribe the conversation when the discussion of the motion needs to be outside the jurors' hearing.

In a capital case, the federal and state constitutional guarantees of a trial by an impartial jury include the right to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence. *People v Roldan, supra,* 35 C4th at 690. A death qualification voir dire must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors; it must also not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. You have considerable discretion in deciding how to strike the appropriate balance in a particular case. See *People v Coffman & Marlow, supra,* 34 C4th at 47. In this regard, it is within a court's discretion to prohibit defense counsel from mentioning a jailhouse killing involving defendant during voir dire, although the jurors would learn about it at the penalty phase. *People v Butler* (2009) 46 C4th 847, 858–860, 95 CR3d 376.

When an African-American defendant is charged with murdering a white person, it is essential that the voir dire include questions concerning the potential juror's possible biases. *People v Taylor* (2010) 48 C4th 574, 608, 108 CR3d 87.

Avoiding "Mello error." You must not instruct prospective jurors to lie under oath about any racial or other bias they might harbor against the defendant, and invent another reason to be excused. This practice violates the defendant's right to a fair and impartial jury and to due process. *People v Mello* (2002) 97 CA4th 511, 515–519, 118 CR2d 523. Such a "*Mello* error" is so shocking that it requires reversal even in the absence of any objection. *People v Abbaszadeh* (2003) 106 CA4th 642, 645–650, 130 CR2d 873.

TIP: When you have a criminal case in which the witnesses and defendants come from different racial backgrounds, the better practice is to always include the question in Cal Rules of Ct, Standards of J Admin 4.30(b)(20) regarding racial and lifestyle biases. *People v Mello, supra,* 97 CA4th at 516. See *People v Wilborn* (1999) 70 CA4th 339, 342–348, 82 CR2d 58 (failure to examine jury about racial bias when defendant was black, police officers were white, and credibility of police officers' testimony was at issue was basis for reversal of conviction). You might add a prefatory statement, such as the following: "In a perfect world, I wouldn't have to ask you if you might harbor possible bias against a person because of his or her [*race, nationality, sexual orientation, etc.*], but it is important to all of the parties in this case that [*race, nationality, sexual orientation, etc.*] not play any part in your decision in this case." You might also consider using a standard questionnaire containing those questions. Use of such a questionnaire should also avoid the *Wilborn* problems.

C. [§1.38] CRIMINAL CASES—PRE-VOIR DIRE CONFERENCE

Before jury selection begins in criminal cases, you must conduct a pre-voir dire conference with counsel to discuss:

- A brief outline of the nature of the case, including a summary of the criminal charges.

- The names of persons counsel intend to call as witnesses at trial.
- The prosecution's theory of culpability and the defendant's theories.
- The procedures for deciding requests for excuse for hardship and challenges for cause.
- The areas of inquiry and specific questions to be asked by the court and by counsel and any time limits on counsel's examination.
- The schedule for the trial and the predicted length of the trial.
- The number of alternate jurors to be selected and the procedure for selecting alternate jurors; and
- The procedure for making *Wheeler/Batson* objections. Cal Rules of Ct 4.200(a)(4)–(8); see CCP §223.
- The time limits for attorney voir dire (CCP §§222.5 (civil), 223 (criminal)) and questions posed to the court for judicial voir dire.

You may also wish to discuss using mini-opening statements. See §1.44. Although not customarily done, you may require counsel to submit to you and opposing counsel before the conference all the questions that counsel requests the court to ask of prospective jurors either orally or by written questionnaire. Cal Rules of Ct 4.200(b). This provision may be particularly helpful if a litigant is known to cross the line and to abuse the goodwill of jurors.

TIP: Make a written record summarizing what was discussed, the areas of inquiry that will be allowed, and the areas of inquiry that will not be allowed.

D. [§1.39] CRIMINAL CASES—EXAMINING PROSPECTIVE JURORS

When practicable, in all criminal cases, including death penalty cases, you must conduct the voir dire of each juror in the presence of the other jurors. CCP §223; *People v Stitely* (2005) 35 C4th 514, 536–539, 26 CR3d 1 (approving limited sequestration procedure in death penalty case); *People v Vieira* (2005) 35 C4th 264, 286–288, 25 CR3d 337 (no abuse of discretion in proceeding with group voir dire; possibility that prospective jurors were answering questions in manner they believed judge wanted to hear identifies at most potential rather than actual bias and is not basis for reversing judgment). Code of Civil Procedure §223 creates a preference for nonsequestered voir dire, even in capital cases. *People v Roldan* (2005) 35 C4th 646, 691, 27 CR3d 360, disapproved on another point in 45 C4th at 390. It abrogates the holding in *Hovey v Superior Court* (1980) 28 C3d 1, 168 CR 128, which required individual sequestered voir dire during the death qualification portion of a capital case. See *Covarrubias v Superior Court* (1998) 60 CA4th 1168, 1171, 71 CR2d 91. You still, however, have the discretion to conduct sequestered voir dire. *People v Lewis* (2008) 43 C4th 415, 493–495, 75 CR3d 588.

The Standards of Judicial Administration do not include questions requiring jurors to indicate their area of residence (Cal Rules of Ct, Standards of J Admin 3.25(c)(20), 4.30(b)(22)).

Note: The change was made as a result of a report of the Access and Fairness Advisory Committee to the Judicial Council stating that a juror’s residence rarely had anything to do with the juror’s ability to be fair, but was sometimes used by counsel as a proxy for group bias.

E. [§1.40] CIVIL CASES—EXAMINING PROSPECTIVE JURORS

In civil cases, you conduct the initial examination of prospective jurors. CCP §222.5. The areas of inquiry that you should cover in voir dire are set forth in a recommended script in Cal Rules of Ct, Standards of J Admin 3.25(c).

You must allow counsel for each party to examine any prospective juror in order to enable counsel to intelligently exercise peremptory challenges and challenges for cause. CCP §222.5. You do not have discretion to refuse an attorney's request to examine the jurors. See Cal Rules of Ct 3.1540(c).

Note: You should note the differences in the statutory language between voir dire conducted by attorneys in civil and criminal cases. Compare CCP §222.5 with CCP §223. In civil cases, counsel are given the right to examine to "intelligently exercise both peremptory challenges and challenges for cause. Attorneys in criminal cases, however, are specifically limited to voir dire to "aid in the exercise of challenges for cause."

You should permit counsel to conduct a "liberal and probing examination" of the prospective jurors to discover any biases or prejudices the jurors may have about the case. CCP §222.5; Cal Rules of Ct, Standards of J Admin 3.25(a)(1). In determining the form and subject matter of the questions the attorneys may ask, you should consider any legal or factual elements of the case that are unique or complex. You should also consider any juror's conduct or responses that may indicate unsuitability to serve as a fair and impartial juror in the case. Questions regarding the personal relationships of jurors should be relevant to the subject matter of the case. CCP §222.5; Cal Rules of Ct 3.1540(b); Cal Rules of Ct, Standards of J Admin 3.25(a)(2). Even though you may have asked about a particular topic when examining the jurors, you should allow the attorneys to ask additional nonrepetitive or nonduplicative questions on the same topic. CCP §222.5.

As indicated above, the Standards of Judicial Administration no longer include questions requiring jurors to indicate their area of residence in both criminal and civil cases (Cal Rules of Ct, Standards of J Admin 3.25(c)(20), 4.30(b)(22)). Further, inquiries that also address significant others define the latter as "any member of your family, a close friend, or anyone with whom you have a significant personal relationship." Many judges address such questions to the juror "or anyone close to them."

F. [§1.41] CIVIL CASES—PRE-VOIR DIRE CONFERENCE

You should consider conducting a pre-voir dire conference, which is often done at the trial management conference, with counsel in a civil case to discuss specific questions or areas of inquiry that should be part of the voir dire, including using mini-opening statements (see §1.44). At the conference, you should advise counsel of the voir dire procedure. Cal Rules of Ct, Standards of J Admin 3.25(b).

G. [§1.42] CIVIL CASES—CONDUCTING VOIR DIRE OUTSIDE JUDGE'S PRESENCE

If the attorneys for all parties appearing in the action so stipulate, you may permit the attorneys to examine the prospective jurors outside your presence. CCP §222.5. This very rarely occurs because of the opportunity for abuse, but it is a method for getting a trial under way while you are finishing another trial. Most judges would consider this only when they know and trust the integrity of all the attorneys and are engaged in extremely pressing business. Most judges

believe that it is very important for the judge to establish a relationship with the jurors at the outset of the case and to ensure that the limits under CCP §222.5 are followed.

H. [§1.43] IMPOSING LIMITATIONS ON ATTORNEYS' EXAMINATION

You may place reasonable limits on the scope of the examination to be conducted by the attorneys. CCP §§222.5 (civil), 223 (criminal); *People v Visciotti* (1992) 2 C4th 1, 48, 5 CR2d 495. The attorneys have a right only to a reasonable examination of the prospective jurors—reasonable in length, method, purpose, and content. *People v Wright* (1990) 52 C3d 367, 419, 276 CR 731, overruled on another ground in 49 C4th at 405. The right to voir dire the jury is not a constitutional right but is a means to achieve the end of an impartial jury. There is no constitutional right to any particular manner of conducting voir dire and selecting the jury, as long as settled legal principles deemed essential in securing an impartial jury are followed. *People v Ramos* (2004) 34 C4th 494, 512, 21 CR3d 575.

> TIP: Many judges require the attorneys to address their questions to the jurors as a group, not to each individual juror, and to permit follow-up questions to particular jurors as necessary. This shortens the time required for voir dire. It is also your obligation to make certain that the attorneys' voir dire is reasonable in length and content and does not embarrass the jurors or waste their time. You should not allow repetitive questions to avoid preconditioning. Also, judges should continue to be vigilant in protecting the privacy rights of jurors. Invasions of privacy are a documented source of great stress to jurors, and worries about identity theft and disclosure of personal information are legitimate concerns of jurors that only the court can intervene on. Any question posed should be able to pass a relevancy test to the specific trial at hand.
>
> All of these issues disappear when the court imposes time limits, assuming they are reasonable and not too generous. If counsel insist that more time is needed, one successful technique is to advise the attorneys that as the court observes their use of the allotted minutes, ***if*** circumstances warrant, additional time will be provided. The judge can then monitor how much repetition there is and how much actual information is elicited from the jurors. Counsel can be advised that the court will be checking the "flow of sound." If most of the sound comes from counsel and not the jurors, additional time will not be permitted. If most of the sound comes from jurors responding to questions, additional time can be permitted if it appears appropriate.

I. [§1.44] GENERAL CONSIDERATIONS

During voir dire, you should take the time to impress on the jurors the importance of the proceedings and their part in them. When explaining voir dire, many judges emphasize the significance of the collective wisdom that a jury brings to the decisionmaking process.

You should

- Encourage the jurors to participate openly in voir dire, *e.g.,* by telling them that (1) they should mention matters even if they are not sure they are relevant; (2) if they wish to answer a particular question outside the hearing of the other jurors, they should so

indicate; and (3) they should not hesitate to raise their hands at any time during the trial if they realize they failed to state something concerning an earlier question.

- Ensure that the voir dire questions are simply phrased.
- Look at the jurors.
- Listen closely, display your interest in the jurors' answers, and follow up.
- Maintain nonjudgmental appearance, *e.g.,* you should never express displeasure with a juror's response but should thank the juror for his or her candor.
- Refrain from interrupting the jurors during their answers and give them sufficient time to formulate their answers.
- Watch the jurors' facial expressions and follow up on quizzical or confused looks or hesitation in response to your questions or those of counsel.
- Be courteous to, and patient with, each juror and require the same respect from all parties in the case.
- Make certain that the examination includes all questions necessary to ensure the selection of a fair and impartial jury. Cal Rules of Ct, Standards of J Admin 3.25(a)(1), 4.30(a)(2).
- Raise issues and topics designed to discover hidden prejudice or bias so that counsel will have enough information to make challenges for cause, if appropriate, and to exercise their peremptory challenges.
- Ask questions that elicit more than just "yes" or "no" answers. You may be used to rejecting questions that call for narrative answers, but in this case they are quite useful for discovering bias or prejudice. The judge's minimum obligation to the parties is to get every juror talking.
- Schedule court business to allow for uninterrupted jury selection to the extent possible. See Cal Rules of Ct, Standards of J Admin 2.25.
- Take advantage of the excellent educational materials developed by CJER or other appropriate materials, or attend CJER or other appropriate educational programs devoted to conducting voir dire and the treatment of jurors. Cal Rules of Ct 10.469(b).
- Consider using a catchall question at the end of voir dire to allow potential jurors to give more information about themselves that may not have been covered by any of the questions. Some judges use a question such as: "Is there anything about yourself that we should know in selecting a fair and impartial jury even if we haven't been clever enough to ask for the information?"

Although judges are not statutorily required to admonish prospective jurors not to discuss the case, or read or listen to media accounts about the case, giving such an admonition regularly at the beginning of voir dire and before recesses during voir dire is sound judicial practice. *People v Weaver* (2001) 26 C4th 876, 908–909, 111 CR2d 2.

> TIP: It is even more critical in this digital age, where stories abound of jurors, regardless of admonitions or sometimes out of misunderstanding of admonitions, continue to use smart phones, BlackBerrys, and iPads, and other new technologies to look up words, names, places, and events. Studies reflect that the current phenomenon is among younger jurors who search the web as a routine and are rarely separated from these sources of information. A suggested juror admonition is included in the appendix though repeated reminders are strongly suggested.

J. [§1.45] CHECKLIST FOR CONDUCTING VOIR DIRE

You may consider covering the following matters with the prospective jurors after the jury box is filled (see Cal Rules of Ct, Standards of J Admin 3.25 (civil), and 4.30 (criminal), for a comprehensive list of recommended questions and topics):

> TIP: Some judges believe these matters should be covered before the jury box is filled because they believe that jurors who have not been selected are less likely to pay attention. The value of mini-opening statements become very evident as jurors understand the context of the questions they will be required to respond to, and the presentation of the conflict has been found to generate interest and reduce efforts to avoid service.

❑ *General explanation of voir dire.* Explain to the jurors what voir dire is without using the term voir dire, *e.g.*:

The attorneys for the parties in this case and I will be asking you questions to determine if you will be the jurors in this case. If any of these questions embarrass you or cause you discomfort, please raise your hand and tell me that you prefer to respond to the question in private. You will then do so in a sidebar conference (or my office) with just the reporter, the attorneys, and me present.

> TIP: Some prospective jurors may be too embarrassed to raise their hand in response to a particular question such as whether they or any family member has been the victim of child abuse. Some judges attempt to minimize the potential for embarrassment by advising the panel during voir dire that they will frequently ask if any prospective juror would like to discuss *any* subject privately. The prospective juror would then not have to "signal" that he or she would like to discuss a particular sensitive subject. Also, any questions that would appear to call for sensitive information should be referred to "the juror and anyone close to them" to provide some distance for the juror personally in front of the other jurors.

You may explain why some of the jurors will be selected and others will not, *e.g.*:

Based on your responses to the questions we ask, we may conclude that this may not be the best type of case for you to serve on, and we may excuse you with our thanks to return to the jury assembly room for assignment to jury service on another case.

❑ *Statement to jurors not in box.* Ask the jurors not in the box to listen closely to the questions asked of jurors in the box, *e.g.*:

If you are called into the jury box, I will ask if you heard and understood the questions asked and answers given by the other jurors, and if you have answers to any of the questions asked so far. If you have responses, feel free to volunteer that information.

This approach saves time and keeps these jurors engaged in the proceedings. See *People v Bolden* (2002) 29 C4th 515, 538–539, 127 CR2d 802 (judge sufficiently alerts prospective jurors not originally seated in jury box of their obligation to disclose any information about their acquaintance with counsel, witnesses, or parties by asking them "to pay attention to the questions" and to "make a little mental or written note" if any questions apply to them so that if they are called into jury box, they may then direct judge's attention to questions that apply to them). Some judges tell these jurors, however, that because it is generally impossible for anyone to remember all the questions asked of the original jurors seated in the box, most of the significant questions will be repeated for jurors called into the box later. It might be suggested that if jurors find that they have many responses, they may want to jot down some notes of their answers.

- ❑ *Introduction of parties and attorneys.* Introduce the parties and attorneys and ask them to stand and face the jurors to see if the jurors recognize them.
- ❑ *Mini-opening statements:* Provide the opportunity for each side to describe the case from their perspective on a two- to five-minute time limit, to let the jurors know "why they will want to stay" (see the following TIP for discussion of mini-opening statements).
- ❑ *Names of witnesses.* Name the witnesses who may be called or referred to by other witnesses. Some judges request the attorneys to read the names of their witnesses.
- ❑ *Statement of the case.* Read a statement of the case to the jurors.

TIP: Before the examination of prospective jurors, you should permit brief opening statements by counsel to the panel. CCP §222.5. These statements are not substitutes for opening statements. Their purpose is to place voir dire questions in context and to generate interest in the case so that prospective jurors will be less inclined to claim marginal hardships.

Benefits of this technique are that the jurors have a context for the questions they are asked and therefore give more responsive answers, and significantly fewer jurors seek hardship excuses once their interest is piqued. Jurors are also less resistant to the intrusiveness of questions when they understand why the information is necessary and relevant. Mini-opening statements have been found to engage the entire panel of jurors' attention and interest in the proceedings at the outset and improve the jury selection process by eliciting prospective jurors' potential areas of bias or conflict as early as possible. If you intend to employ this procedure, at the trial management conference, you should advise the attorneys of any ground rules for their mini-opening statements, *e.g.*, the time limits on the statements (generally, no more than five minutes for each side), and the scope of the statements. For example, you might say:

Each side will have three minutes to summarize its opening statement to give the prospective jurors its view of the case on which we are about to question them. Your mini-opening statement should be a brief, factual summary, not an argument, and should not be a substitute for your opening statement. Its purpose is to impart basic information to the panel to help us all do a better job in selecting an informed, fair, and impartial jury, and to let the jurors know why they want to stay on your jury.

Note: In establishing the time limits you can not simply establish a blanket policy of a time limit for voir dire. CCP §222.5.

❑ *Possible bias.* Tell the jurors that they have a duty to disclose possible bias or prejudice. You might seek disclosure from each juror individually, *e.g.*:

Do you believe that a case of this nature should not be brought to court? Is there anything about the nature of this case that makes you believe you tend to favor one side over the other?

TIP: Some judges commend prospective jurors for their candor about bias, as a means of encouraging them to respond honestly, finding that this is often accomplished by thanking jurors for sharing their views without ridicule or reproach. In an attempt to encourage jurors to be candid, you might relate an example of bias on voir dire by a prospective juror in a prior case over which you presided, and conclude with a statement, such as, "I and the parties in that case appreciated the juror's candor in making a difficult admission." In a case involving more than one type of potential bias, you may find it advantageous to address each type of bias separately. Because prospective jurors may be sensitive about admitting to bias, you might advise them that if they would prefer not to answer in open court any question regarding possible bias, they may ask you if they might give their response at the bench. In addition, because of the sensitive nature of this line of questioning, you should ensure that the jurors are given plenty of time to respond and that counsel are allowed to ask follow-up questions.

❑ *Length of trial.* Inform the prospective jurors of the anticipated length of the trial, and ask if there is any reason why they could not serve as jurors for this time period, *e.g.*:

Although we discussed this early in the jury selection process, I want to remind you that the attorneys in this case estimate that the trial will take _____ [days/weeks]. The trial will not be in session on weekends or the following dates: _____. Generally, trial will begin at _____ each morning and end at _____ each afternoon. Upon further reflection, would any of you find it unreasonably difficult or impossible to serve as jurors on this trial for the time indicated?

TIP: If the trial is expected to last seven days or less, many judges do not ask the jurors if the length of the trial would be a hardship. Hardship requests should have already been covered by now and you can assume that jurors can serve on shorter trials without suggesting to jurors that there might be another reason to get off the jury panel. If the trial is going to last longer than seven days, then this question can be asked. Some judges ask this question first, especially for longer trials, to hear and determine jurors' requests to be excused for hardship.

❑ *Juror background information.* In some courts, the jurors complete a background questionnaire before they are assigned to a panel. In other courts, judges list these questions on a chart posted in the front of the courtroom and ask each juror individually to answer them, *e.g.,* name, , number of children and their ages, educational level, present and past occupations, name of present employer, spouse's occupation and employer, prior jury service, etc.

> TIP: You should keep in mind that ultimately you are asking questions to find out if there are relationships in the juror's life that could affect his or her ability to be a fair and impartial juror in the case at hand. Many judges refer to the catchall phrase "You or anyone close to you."
>
> TIP: In gang crime, murder, or other high-profile criminal trials, you should be sensitive to jurors' discomfort and real fear in being identified by name, job, and address. You should consider using juror ID numbers to identify and address jurors.

- ❑ *General questions regarding case.* Usually you will address general questions regarding the case to the jurors as a group and ask them to answer out loud or by raising their hands. You might ask:

  Do any of you know the facts of this case?

  Are you acquainted with the location where the accident in this case occurred? If so, will you be able to rely on the witnesses and not on your own memory in deciding this case?

- ❑ *Witnesses and lawyers*. You should ask whether the jurors know of or are acquainted with any of the lawyers, parties, or prospective witnesses.
- ❑ *Follow-up questions to particular jurors.* Ask any follow-up questions of particular jurors based on their answers to either the general questions about themselves or regarding the case.
- ❑ *Examination by attorneys.* Ask the attorneys to raise any additional questions for the jurors as a group or for any particular juror. You may establish reasonable limits on the length and scope of the attorneys' examination. See CCP §§222.5 (civil cases), 223 (criminal cases); see also imposing limitations on attorneys' examination in §1.42.
- ❑ *Challenges for cause.* After the attorneys complete their examination, call them to the sidebar and request their challenges for cause. If none, ask, "Do the attorneys pass the jury for cause?" When they answer yes, allow peremptory challenges.
- ❑ *Peremptory challenges.* Ask the attorneys to exercise any peremptory challenges. The plaintiff or prosecution exercises the first peremptory challenge.
- ❑ *Replacement jurors.* With the traditional method of seating jurors, ask the clerk to call another juror to take the seat of any challenged juror, then examine this new juror. If the six-pack method has been used, select the replacement juror from the six-pack.

> TIP: Consider selecting replacement jurors from the six-pack in random order. Using this method may reduce the exercise of peremptory challenges to jurors already in the box.

After asking the standard background questions, if this information hasn't already been obtained in a background questionnaire, ask the replacement juror questions such as the following:

TIP: Consider creating a page to give to replacement jurors that summarizes the questions asked of the first group. This "cheat sheet" helps them remember and can speed the process.

Did you hear and understand the mini-opening statements by counsel or the statement of the case that I previously read?

Did you hear and understand the questions asked and answers given by the other jurors? Would you volunteer any responses you have to these questions?

Would your answers differ in any substantial respect from the answers given by the other jurors, except their answers about personal matters such as prior jury service, place of residence, employment, and family? (If so, in what respect?)

After concluding this examination, you should give the attorneys a brief opportunity to examine the replacement juror. Challenges for cause with respect to the replacement juror and peremptory challenges may then continue. Note that if you have imposed a time limit for attorney voir dire, it should be clear whether that time limit included both the initial panelists as well as replacement jurors. Ideally, the total time should include all jurors—original as well as replacement jurors.

K. [§1.46] PRETRIAL PUBLICITY

You should examine the prospective jurors concerning their exposure to any media coverage of the case. For example:

Have you read or heard anything about this case?

If the answer is yes, you should inquire as to what the prospective juror has read or heard, and then ask:

Do you believe that you have the ability to make a decision based on the evidence and not on what you have read or heard about this case?

See, *e.g., People v McPeters* (1992) 2 C4th 1148, 1176–1177, 9 CR2d 834, superseded by statute on another point as stated in 43 C4th at 1096.

TIP: Some judges recommend that questions about media exposure be posed to the jurors in chambers or at a sidebar, individually, or in a written questionnaire, so that one panel member who has formed an opinion about the case based on this publicity does not taint the rest of the panel.

The U.S. Supreme Court has determined that a jury seated in the face of a great deal of pretrial publicity can be unbiased when there has been an extensive jury questionnaire (drafted largely by defendant), followed by individual voir dire of each juror by the judge out of the presence of other prospective jurors, after which parties were permitted to ask follow-up questions, and when no bias toward defendant was elicited by this extensive voir dire. *Skilling v U.S.* (2010) __ US __, 130 S Ct 2896, 2919–2921, 177 L Ed 2d 619.

L. [§1.47] LANGUAGE BIAS

If one of the parties or witnesses will require an interpreter, you may wish to examine the prospective jurors about any possible language bias. For example:

[Plaintiff's/Defendant's] first language is [*e.g., Spanish*]. Therefore, an interpreter has been provided by the court. Does this bother or offend you in any way or make any difference to you as a judge?

Will the fact that an interpreter is provided in this proceeding affect your decision on the evidence? Does it cause you to make any assumptions about the person assisted by the interpreter?

Can you use the same standard to evaluate the credibility of a witness regardless of which language the witness speaks?

Do any jurors understand [*e.g., Spanish*]? [If so, you must rely solely on the translation provided by the interpreter, even if you understand the language spoken by the witness. You must not retranslate any testimony of other jurors.] Will you rely on the translation provided by the interpreter and not your own translation of the testimony?

If you believe the court interpreter translated testimony incorrectly, will you let me know immediately by writing a note and giving it to [clerk/bailiff]?

XIII. CHALLENGES FOR CAUSE—GROUNDS AND PROCEDURE

A. [§1.48] GENERAL DISQUALIFICATION

Attorneys may challenge a prospective juror for cause on the ground of general disqualification if the juror is not qualified to serve as a juror. CCP §§225(b)(1)(A), 228(a). For example, you must excuse a juror who does not understand English well enough to follow the proceedings and fully participate in deliberations on the ground of general disqualification for cause. *People v Szymanski* (2003) 109 CA4th 1126, 1130–1133, 135 CR2d 691. Take time to distinguish between jurors with language problems and confidence issues, and those jurors who deliberately try to excuse themselves from service. See discussion in §1.44.

In order to lessen the burden on the courts, some courts have started to screen prospective jurors to test their knowledge of English while they are in the assembly room. Jurors are asked an unrelated question that requires a working knowledge of English. If they are able to answer the question, they have essentially passed one more English screening. Often jurors with language problems make it through to the court even without a working knowledge of English with the aid of family members or friends who help them fill out the forms. If such a juror has trouble with this screening question, this is an additional opportunity for assembly room personnel to intervene and excuse such jurors under the statutory guidelines.

You must also grant a challenge for cause on the ground of general disqualification if you are satisfied that the challenged juror is incapable of performing the duties of a juror without prejudice to the substantial rights of the challenging party because of the existence of an incapacity. CCP §§225(b)(1)(A), 228.

If a prospective juror discloses grounds for disqualification on the juror questionnaire, and the party fails to challenge that juror for cause, any objection is deemed waived. *George F. Hillenbrand, Inc. v Insurance Co. of N. Am.* (2002) 104 CA4th 784, 821–822, 128 CR2d 586 (juror disclosed that he was convicted felon).

B. [§1.49] ACTUAL BIAS

General considerations. A prospective juror may also be challenged for cause on the ground of actual bias, *i.e.*, a state of mind that would prevent the juror from acting impartially and without prejudice to the substantial rights of any party. CCP §225(b)(1)(C); *People v Lancaster* (2007) 41 C4th 50, 74–76, 58 CR3d 608; *People v Horning* (2004) 34 C4th 871, 896–897, 22 CR3d 305 (judge properly denied challenges for cause after questioning jurors further); *People v Hillhouse* (2002) 27 C4th 469, 488, 117 CR2d 45. See *People v Holt* (1997) 15 C4th 619, 654–656, 63 CR2d 782 (challenge for cause was justified based on fact that challenged juror had lawsuit pending against district attorney); *People v Hecker* (1990) 219 CA3d 1238, 1243, 268 CR 884 (actual bias shown by juror's admission that he could not decide case solely on evidence and judge's instructions); *People v Lewis* (2006) 39 C4th 970, 1006, 47 CR3d 467 (prospective juror may be excused if his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath). A challenge for cause may be based on a prospective juror's response when informed of the facts or circumstances likely to be present in the case. *People v Coffman & Marlow* (2004) 34 C4th 1, 47, 17 CR3d 710.

Death penalty cases. In a death penalty case, you may excuse a prospective juror for cause if he or she admits to being unable to impose the death penalty. See *People v Schmeck* (2005) 37 C4th 240, 252, 33 CR3d 397, abrogated on another point in 52 C4th at 610; *People v Wilson* (2005) 36 C4th 309, 324–325, 30 CR3d 513; *People v Haley* (2004) 34 C4th 283, 306–308, 17 CR3d 877; *People v Coffman & Marlow, supra,* 34 C4th at 47–48 (prospective juror who would be unable conscientiously to consider all sentencing alternatives, including death penalty, if appropriate, is properly subject to excusal for cause). See also *People v Gray* (2005) 37 C4th 168, 194, 33 CR3d 451 (juror who indicates he or she could never vote to execute someone is properly excused for cause). You may also excuse a prospective juror for cause if the juror indicates he or she would have a "hard time" voting for the death penalty or would find the decision "very difficult." See *People v Roldan* (2005) 35 C4th 646, 697, 27 CR3d 360, disapproved on another point in 45 C4th at 390. A prospective juror's bias against the death penalty need not be proven with unmistakable clarity. You may properly excuse such a juror for cause if you have the definite impression that the juror would be unable to apply the law faithfully and impartially in the case before the juror. See 35 C4th at 697–698. See also *People v Schmeck, supra,* 37 C4th at 252 (judge properly excused prospective jurors who were unable to state that they could consider imposing the death penalty in case before them as a reasonable possibility). Jurors were properly excused in these situations:

- Juror was philosophically against the death penalty, but could apply the law as instructed and "theoretically" vote for death. *People v Martinez* (2009) 47 C4th 399, 429–430, 432–433, 97 CR3d 732.
- Juror was opposed to the death penalty but believed that there was a small possibility that she could vote for death. 47 C4th at 437.
- Juror stated that he could not vote for the death penalty after consulting with his pastor. *People v Watson* (2008) 43 C4th 652, 696–697, 76 CR3d 208.
- Prospective juror is unsure of whether it would be possible to enter the courtroom and actually vote for the death penalty. *People v Bramit* (2009) 46 C4th 1221, 1234–1236, 96 CR3d 974.

A prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law. *People v Avila* (2006) 38 C4th 491, 531, 43 CR3d 1.

The court has no sua sponte duty to instruct prospective jurors that they have a civic duty to subordinate their own views on the death penalty to the law and their oaths. *People v Mills* (2010) 48 C4th 158, 170, 106 CR3d 153. Nor does a death-qualified jury violate a capital defendant's right to an impartial jury despite evidence that death qualified juries are more prone to convict. 48 C4th at 170–171.

Moreover, a court does not act with bias when it treats jurors who categorically state that they would refuse to impose the death penalty differently from other jurors. 48 C4th at 189–190 (judge engaged in lengthier dialogues and occasionally used leading questions with prospective jurors who were unsure about the death penalty, while spending very little time with those who were unequivocally anti-death penalty).

See §1.52 for discussion of the record to be made of why the challenge is granted or denied.

C. [§1.50] IMPLIED BIAS

A prospective juror may also be challenged for cause on the ground of implied bias. A juror is subject to challenge on this ground if the juror (see CCP §225(b)(1)(B)):

- Is related by blood or marriage within the fourth degree to any party, officer of a corporate party, or witness in the case. CCP §229(a).
- Is a member of the family of either party. CCP §229(b). But a juror's relationship to a defendant through a dissolved marriage does not give rise to implied bias under CCP §229. *Herrera v Hernandez* (2008) 164 CA4th 1386, 1391–1392, 80 CR3d 491.
- Has a relationship (or is the parent, spouse, or child of a person who has a relationship) to a party as guardian and ward, conservator and conservatee, master and servant, employer and employee, landlord and tenant, principal and agent, or debtor and creditor. CCP §229(b).
- Is a business partner of either party. CCP §229(b).
- Is a surety on a bond or obligation for either party. CCP §229(b).
- Holds bonds or shares of stock of a corporate party. CCP §229(b).
- Had an attorney-client relationship with either party or with the attorney for either party within one year before the filing of the complaint in the action. CCP §229(b).
- Served as a juror or a witness in another trial between the same parties or involving the same cause of action. CCP §229(c).
- Served as a juror in a civil action or proceeding within the previous year in which either party was the plaintiff or defendant, or in a criminal action in which either party was the defendant. CCP §229(c).
- Has an interest in the event of the action or in the main question involved in the action, apart from his or her interest as a member of the community. See CCP §229(d).
- Has an unqualified opinion or belief regarding the merits of the action based on knowledge of one or more material facts about the action. See CCP §229(e).

- Has a state of mind evincing enmity against, or bias toward, either party. See CCP §229(f).
- Is a party to an action set for trial before the jury panel of which the juror is a member. See CCP §229(g).

In a death penalty case, a prospective juror who has conscientious opinions that would preclude finding the defendant guilty may be challenged for cause on the ground of implied bias. CCP §229(h).

D. [§1.51] When To Hear Challenge

After the attorneys for both sides have completed their examination of the prospective jurors seated in the jury box, you must hear and determine any challenges for cause, first from the defendant's attorney and then from the prosecutor or the plaintiff's attorney. See CCP §§226(d), 230. The attorneys may also stipulate to a juror's dismissal for cause, which you have the discretion to accept or reject.

> TIP: Caution should be taken with attorneys willing to stipulate to many challenges for cause, which could have the effect of increasing their pool of peremptory challenges. Also you can be proactive with attorneys "wasting time" with jurors who are clearly going to be excused one way or the other. Sometimes gentle intervention is called for.

A party's challenges for cause need not all be taken at once, but may be taken separately in the following order, including in each challenge all the causes of challenge belonging to the same class and type: (1) any challenge for general disqualification; (2) any challenge for implied bias; (3) any challenge for actual bias. CCP §227.

Some judges entertain challenges for cause at any time during voir dire rather than waiting for the completion of the attorney's examination. You may also excuse a prospective juror for cause on your own motion without a challenge for cause from either party. See *People v Jimenez* (1992) 11 CA4th 1611, 1621, 15 CR2d 268 (disapproved on other grounds in 11 C4th at 419). You do not, however, have a sua sponte duty to excuse a juror for cause on your own motion. *People v Kipp* (1998) 18 C4th 349, 365, 75 CR2d 716; *People v Bolin* (1998) 18 C4th 297, 315–316, 75 CR2d 412.

E. [§1.52] Determine Process for Handling Challenge for Cause at Pretrial Conference

At the pretrial conference, you should determine with the attorneys how challenges for cause will be handled to minimize any embarrassment to the challenged jurors. For example, although challenges are generally made orally, they may instead be made in writing. See CCP §226(b). Typically, a judge asks the attorneys to approach the bench and, outside of the jurors' hearing, asks them to state which jurors, if any, they challenge for cause. You may then consider any objections and, finally, determine whether to grant the challenges. You should inform any challenged jurors that they are excused, thank them, and instruct them to return to the jury assembly room. If the challenge is denied following a *Wheeler* motion, the prospective juror will never know and can be reseated without prejudice to the offending side (see §§1.64–1.74).

TIP: Some judges use the following script when excusing a juror:

There are many reasons why an attorney may choose to excuse you in the interest of the party he [*or she*] represents. Please, do not feel that you are somehow a less fair juror if you are excused. Thank you for your attention and service here, and please report to the jury room for further information if you are excused.

F. [§1.53] GRANTING CHALLENGE FOR CAUSE

Before granting a party's challenge for cause over another party's objection, you must have sufficient information about the prospective juror's state of mind to make a reliable determination as to whether the juror's views would prevent or substantially impair his or her performance of the duties of a juror. *People v Stewart* (2004) 33 C4th 425, 445, 15 CR3d 656. The party making the challenge has the burden of demonstrating, through questioning, that the potential juror is not impartial. 33 C4th at 445.

You should grant a challenge for cause if the prospective juror's views would "prevent or substantially impair" the performance of any duties as a juror in accordance with the instructions and oath. *People v Bolden* (2002) 29 C4th 515, 536–537, 127 CR2d 802. See *People v Coffman & Marlow* (2004) 34 C4th 1, 47, 17 CR3d 710 (challenge for cause may be based on juror's response when informed of facts or circumstances likely to be present in case); *People v McDermott* (2002) 28 C4th 946, 981, 123 CR2d 654 (same legal standard governs inclusion or exclusion of prospective juror).

Some judges are liberal in granting challenges for cause if there is *any* doubt about a juror's impartiality or ability to decide the case fairly. Others grant a challenge only if a juror exhibits strong, resolute bias, believing it is up to the attorneys to use their peremptory challenges to remove jurors whose background or circumstances make them more likely to be persuaded by one side or the other.

For example, a judge may excuse a prospective juror who indicates on the jury questionnaire or in voir dire his or her belief in jury nullification. *People v Merced* (2001) 94 CA4th 1024, 1029–1031, 114 CR2d 781. Before excusing a prospective juror on this ground, it need not be shown that there is a demonstrable reality that the juror will not follow the law. The "demonstrable reality" standard only applies when the judge is considering discharging a juror on this ground during deliberations. *People v Merced, supra,* 94 CA4th at 1030–1031. See §3.25. The judge may decide, based on the prospective juror's statements that he or she might not follow the law, that seating the juror presents an unacceptable risk that a subsequent trial might be required. 94 CA4th at 1030. The judge is not required to explore further the prospective juror's views. 94 CA4th at 1030–1031.

You may also discharge a juror for cause when he or she knows a family member of the victim and has been told that defendant is guilty. *People v Gutierrez* (2009) 45 C4th 789, 805, 89 CR3d 225. In determining whether to discharge a juror, you must question that juror and permit both counsel to do the same. 45 C4th at 805–806. But a court has discretion to eliminate jurors for cause with no oral in-person examination based solely on questionnaire responses. *People v Wilson* (2008) 44 C4th 758, 789–790, 80 CR3d 211 (jurors stated that they could never apply the death penalty).

TIP: Many judges recommend that a complete record be made of why a challenge for cause was granted or denied. This might include such observations as tone of voice, level of confidence, and demeanor. A record devoid of these observations may not provide an accurate description of the context within which the decision was made. It is particularly important to make a complete record whether a challenge for cause is granted or denied, because the ruling often becomes an issue on appeal.

When you grant a challenge for cause with respect to a particular juror and the traditional or individual seating method has been used, the court clerk draws the name of a replacement juror at random from the panel; you then examine this new juror. With the six-pack method, the replacement juror is selected from the six-pack.

There is no limit on the number of challenges for cause, but all must be exercised before any peremptory challenges are made. CCP §226(c).

G. [§1.54] Appeal for Failure To Grant Challenge for Cause

On appeal, a party may not complain that the judge should have granted its challenge for cause unless the party used an available peremptory challenge to remove the juror in question; exhausted all of its peremptory challenges, or can justify the failure to do so; and expressed dissatisfaction with the selected jury. *People v Beames* (2007) 40 C4th 907, 924, 55 CR3d 865 (failure to use peremptory challenges or express dissatisfaction with jury); *People v Horning* (2004) 34 C4th 871, 896, 22 CR3d 305 (defendant challenged jurors in question peremptorily but never expressed dissatisfaction with jury selected); *People v Millwee* (1998) 18 C4th 96, 146, 74 CR2d 418 (defendant did not meet this procedural requirement because he had eight peremptory challenges remaining at time he accepted impaneled jury). See *People v Hillhouse* (2002) 27 C4th 469, 486–487, 117 CR2d 45 (defendant's alleged justification for failure to exhaust his peremptory challenges—that he was faced with a pattern of the judge's denial of his challenges for cause—did not justify his failure to preserve the issue for review by exercising his peremptory challenges to remove all jurors at issue); *Paterno v State* (1999) 74 CA4th 68, 99, 87 CR2d 754 (court rejected appellant's contention that his failure to exercise his peremptory challenges was justified because he was afraid he would end up with a more biased jury if he had used them).

A party is not required, however, to use all of its peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire. *People v Bolden* (2002) 29 C4th 515, 532, 127 CR2d 802.

A party's claim of prejudice on the ground that prospective jurors were not removed until the end of jury selection and were thus able to "intermingle and influence the objectivity of those potential jurors who ultimately become members of [the] panel" must be based on more than "sheer speculation." *People v Panah* (2005) 35 C4th 395, 438, 25 CR3d 672.

XIV. PEREMPTORY CHALLENGES

A. [§1.55] Number of Challenges—Civil

After the prospective jurors in the jury box have been passed for cause, the attorneys are entitled to exercise a limited number of peremptory challenges. See CCP §231(a)–(c). In *civil cases*, the number of peremptory challenges is determined under CCP §231(c) as follows:

- *Two parties.* Each party is entitled to six challenges.

- *More than two parties.* You must divide the parties into two or more "sides" according to their respective interests in the issues. Each side is entitled to eight challenges.
- *Several parties on a side.* If there are several parties on a side, you must divide the challenges among them as equally as possible.
- *More than two sides.* You must grant any additional peremptory challenges to a side that the interests of justice may require. One side's peremptory challenges may not exceed the aggregate number of challenges of all other sides.
- *Unused challenges on a side with two or more parties.* If any challenges of one party are not used, any other party or parties on that side may use them.

Each side is also entitled to one peremptory challenge for each alternate juror called. CCP §234.

These provisions also apply to "special proceedings" that are civil in nature. *People v Calhoun* (2004) 118 CA4th 519, 523–524, 527, 13 CR3d 166 (applying CCP §231(c) to trial under Sexually Violent Predator Act (Welf & I C §§6600 et seq), which is a civil commitment scheme).

B. [§1.56] NUMBER OF CHALLENGES—CRIMINAL

In *criminal cases,* the number of peremptory challenges is determined under CCP §231(a) as follows:

- *Offense punishable by death or life imprisonment.* If the offense charged is punishable by death or life imprisonment, the defendant and the prosecution are each entitled to 20 peremptory challenges.
- *Other offenses.* Except as provided in CCP §231(b), discussed below, in a trial of any other offense, the defendant and the prosecution are each entitled to ten peremptory challenges.
- *Two or more defendants.* When two or more defendants are jointly tried, they must exercise their challenges jointly, but each defendant is also entitled to five additional challenges, that may be exercised separately. The prosecution is also entitled to additional challenges equal to the number of all additional challenges allowed the defendants.

In *criminal cases* in which the offense charged is punishable by a maximum term of imprisonment of 90 days or less, the number of peremptory challenges is determined under CCP §231(b) as follows:

- *One defendant.* The defendant and the prosecution are each entitled to six peremptory challenges.
- *Two or more defendants.* When two or more defendants are jointly tried, they must exercise their challenges jointly, but each defendant is also entitled to four additional challenges that may be exercised separately. The prosecution is also entitled to additional challenges equal to the number of all additional challenges allowed the defendants.

Each side is also entitled to one peremptory challenge for each alternate juror called. CCP §234.

C. [§1.57] EXPLANATION TO JURORS

Before peremptory challenges begin, most judges explain to the jurors that

- The attorneys are about to exercise their peremptory challenges.
- Each side is given a specified number of these challenges by law.

TIP: Some judges do not tell the jury the number of challenges available, but others do, using an explanation such as:

Ladies and gentlemen, the Legislature sets the number of challenges that are available to the attorneys, and in this case there are [*number*] challenges. These attorneys, however, are very experienced, and I do not expect that they will need to exercise all of them, but I do ask your patience as we start with the selection process.

- Such a challenge means that the attorney is asking to excuse a juror without giving a reason.
- Jurors who are excused should not be offended nor feel that their honesty, integrity, or abilities are being challenged. There are many valid reasons why jurors are excused at this stage.
- Jurors who are excused should return for further jury service as instructed by the court (unless they are entitled to be released).
- The remaining jurors should not speculate as to why certain jurors were excused and others were not.

D. [§1.58] ORDER OF EXERCISING CHALLENGES

Beginning with the plaintiff or the prosecution, the sides must alternate in taking or passing on their peremptory challenges. Passing on a challenge (the same effect as accepting the panel) does not diminish a side's remaining challenges. CCP §231(d)–(e). If there are more than two sides, many judges require the side with the greatest number of challenges to exercise every second challenge, *i.e.*, alternate with each of the other sides rather than rotate challenges from one side to a second side to a third side. For example, assume that a case has three sides: a plaintiff (P) who has eight peremptory challenges and two defendants (D1 and D2) who each have four peremptory challenges. The order of challenges would be: P, D1, P, D2, P, D1, P, D2, etc. This method ensures that the side with the greatest number of challenges will not end up with several unused challenges after the other sides have exhausted theirs and thus gain an unfair advantage in selecting the jury. If one party runs out of challenges, the remaining parties may exercise challenges one after another until they either pass or run out of challenges.

E. [§1.59] MANNER OF EXERCISING CHALLENGES—PRETRIAL CONFERENCE

At the pretrial conference, you should advise the attorneys on how they should exercise their peremptory challenges. Many judges suggest that, instead of excusing a juror, the attorneys should request the judge to do so. You should then tell the juror that he or she is excused, thank the juror, and request that he or she return to the jury assembly room. When a juror is excused under the traditional or individual seating method, the court clerk draws the name of a replacement juror at random from the panel; you then examine this new juror. With the six-pack method, the replacement juror is selected from the six-pack.

F. [§1.60] PERMISSIBLE SCOPE OF CHALLENGES

No reason need be given for a peremptory challenge, and you *must* exclude any juror who is challenged peremptorily (CCP §226(b)), unless an objection is made to the challenge on the ground of group bias.

The attorneys are entitled to use their peremptory challenges to excuse jurors without cause, for example, when an attorney believes that a particular juror may be consciously or unconsciously biased, but the bias cannot be shown sufficiently to establish a challenge for cause. See *People v Jackson* (1992) 10 CA4th 13, 17, 12 CR2d 541. See also, *e.g., People v Gray* (2001) 87 CA4th 781, 789, 104 CR2d 848 (permissible to exclude jurors who have had, or whose family members have had, negative experiences with the criminal justice system); *People v Catlin* (2001) 26 C4th 81, 117–118, 109 CR2d 31 (prosecutor may properly exercise peremptory challenge against juror who is skeptical about imposing the death penalty).

It is permissible to use a peremptory challenge to exclude a prospective juror based on:

- Factors indicating that the prospective juror will have difficulty in focusing on the evidence. *People v Gutierrez* (2002) 28 C4th 1083, 1124, 124 CR2d 373 (on voir dire, prospective juror appeared extremely emotional and overwhelmed by outside stresses, conditions that might compromise juror's ability to concentrate or fairly deliberate on the evidence).
- The juror's indication that he or she might rely unequivocally on expert opinion testimony. 28 C4th at 1124–1125 (this attitude may reasonably be found to reflect bias in favor of class of potential witnesses, *i.e.*, expert witnesses).
- The juror's comments that he or she would not be influenced by the opinion of anyone else, leading to the conclusion that the juror would not be able to consider the opinions of the other jurors. 28 C4th at 1125.
- The challenging party's sincere belief that the juror would be skeptical of that party's evidence. 28 C4th at 1125.
- The challenging party's sincere belief that the juror will be unable to understand the case. *People v Muhammad* (2003) 108 CA4th 313, 322, 133 CR2d 308.
- A pastor who has a propensity toward forgiveness. *People v Semien* (2008) 162 CA4th 701, 708, 75 CR3d 880.

It is also proper for an attorney to use a peremptory challenge to excuse a juror based on the attorney's subjective reaction to the juror's body language and appearance. *People v Gutierrez, supra*, 28 C4th at 1125 (hostile looks from prospective juror directed toward challenging party). See *People v Ward* (2005) 36 C4th 186, 202, 30 CR3d 464 (prosecutor may properly challenge juror who is antagonistic toward prosecutor during questioning). Peremptory challenges may be made on an "apparently trivial" or "highly speculative" basis. They may be made "without reasons or for no reason, arbitrarily, and capriciously." *People v Box* (2000) 23 C4th 1153, 1186 n6, 99 CR2d 69; *People v Jones* (1998) 17 C4th 279, 294, 70 CR2d 793.

G. [§1.61] ILLEGAL USE OF PEREMPTORIES

It is illegal to use a peremptory challenge to remove a prospective juror on the basis of the attorney's "assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds." CCP §231.5; *People v Gutierrez* (2002) 28 C4th 1083, 1122, 124 CR2d 373. Exercising peremptory challenges to

remove prospective jurors solely on the ground of presumed bias based on membership in a cognizable group violates the right to a trial by a jury drawn from a representative cross-section of the community. *People v Lewis* (2006) 39 C4th 970, 1008, 47 CR3d 467; *People v Morrison* (2004) 34 C4th 698, 709, 21 CR3d 682; *People v Crittenden* (1994) 9 C4th 83, 115, 36 CR2d 474; *People v Wheeler* (1978) 22 C3d 258, 276, 148 CR 890; see §§1.61, 1.64–1.74.

Thus a prosecutor's systematic challenges to all Spanish-speaking Hispanics, without other reasons, constitutes unconstitutional racial bias, even though English-speaking Hispanics were not challenged. *People v Gonzales* (2008) 165 CA4th 620, 630–631, 81 CR3d 205. But the justification for a peremptory challenge need not meet the standards required for a challenge for cause and even a trivial reason, if genuine and neutral, will be sufficient to withstand a claim of bias in its exercise. *People v Mills* (2010) 48 C4th 158, 176, 106 CR3d 153.

The constitutional implications of exercising peremptory challenges in this fashion are to violate the following constitutional rights:

- The equal protection rights of a defendant when the defendant is a member of the same cognizable group as a juror improperly challenged. *Batson v Kentucky* (1986) 476 US 79, 103, 106 S Ct 1712, 90 L Ed 2d 69.
- The equal protection rights of the challenged juror regardless of what party improperly challenged the juror. *J.E.B. v Alabama* (1994) 511 US 127, 145–146, 114 S Ct 1419, 128 L Ed 2d 89.
- The right to a trial by a jury drawn from a representative cross-section of the community. *People v Morrison, supra*.

Note: Peremptory challenges are coming under increasing attack because of their widespread illegal use. They were abolished in England, their country of origin in 1988, and three United States Supreme Court justices have called for their abolition: Justices Thurgood Marshall (*Batson v Kentucky* (1986) 476 US 79, 103, 106 S Ct 1712, 90 L Ed 2d 69 (concurring decision)), Breyer, and Souter (*Rice v Collins* (2006) 546 US 333, 126 S Ct 969, 976–977, 163 L Ed 2d 824 (concurring decision)).

This prohibition against challenging jurors based on group bias applies in both civil and criminal cases. *Edmonson v Leesville Concrete Co*. (1991) 500 US 614, 624, 111 S Ct 2077, 114 L Ed 2d 660; *Di Donato v Santini* (1991) 232 CA3d 721, 737–738, 283 CR 751.

H. [§1.62] COGNIZABLE GROUPS

Cognizable groups are generally distinguished by race, ethnicity, gender, sexual orientation, or religion. *People v England* (2000) 83 CA4th 772, 782, 100 CR2d 63; see CCP §231.5. The inclusion of cognizable groups in the jury venire does not ensure a particular position; it only ensures that the facts will be viewed from a variety of angles. *People v Garcia* (2000) 77 CA4th 1269, 1277, 92 CR2d 339.

TIP: Neither you nor the attorneys should ask the jurors whether they belong to a cognizable group. *People v Motton* (1985) 39 C3d 596, 604, 217 CR 416; *People v Garcia* (2000) 77 CA4th 1269, 1280, 92 CR2d 339. Such questions can be offensive and may leave prospective jurors with the impression that their group association is a factor that is being considered by the court and the parties. It is not necessary to establish the true ethnic, racial, or other group identity of challenged jurors because discrimination is often based on appearances rather than verified group association. A showing that the opposing party is excusing jurors who appear to be members of a cognizable group could establish a prima facie case. *People v Motton, supra*.

The following are cognizable groups:

- African-Americans. *Edmonson v Leesville Concrete Co.* (1991) 500 US 614, 628, 111 S Ct 2077, 114 L Ed 2d 660; *People v Young* (2005) 34 C4th 1149, 1173, 24 CR3d 112 (African-American women are cognizable subgroup). See *People v Gray* (2005) 37 C4th 168, 187 n3, 33 CR3d 451 ("Blacks" as a cognizable group include black jurors who are of African-American, Caribbean, African, or Latin American descent; rejecting prosecutor's contention that *Wheeler* did not apply to black juror who was born and grew up in British Guyana).
- Latinos, Hispanics, or Spanish-surnamed persons. *People v Ochoa* (2001) 26 C4th 398, 426, 110 CR2d 324, abrogated on another point as noted in 30 C4th at 263 n14; *People v Alvarez* (1996) 14 C4th 155, 193–195, 58 CR2d 385; *People v Garceau* (1993) 6 C4th 140, 170–171, 24 CR2d 664, overruled on other ground in (2003) 31 C4th 93, 117–118, 2 CR3d 186. See *People v Gutierrez* (2002) 28 C4th 1083, 1123, 124 CR2d 373 (prospective juror who acquired Hispanic surname through marriage was not member of cognizable group Hispanic when she indicated to court she was white).
- Asian-Americans. *People v Lopez* (1991) 3 CA4th Supp 11, 15–17, 5 CR2d 775.
- Women. *J.E.B. v Alabama* (1994) 511 US 127, 131–134, 114 S Ct 1419, 128 L Ed 2d 89; *People v Panah* (2005) 35 C4th 395, 439–442, 25 CR3d 672.
- Men. *J.E.B. v Alabama, supra; People v Willis* (2002) 27 C4th 811, 821, 118 CR2d 301 (white males).
- Lesbians and gay men. *People v Garcia* (2000) 77 CA4th 1269, 1276–1278, 92 CR2d 339; CCP §231.5 (codifying *Garcia*).

I. [§1.63] NONCOGNIZABLE GROUPS

The following are not cognizable groups:

- Nonwhites. *People v Clay* (1984) 153 CA3d 433, 455 n4, 200 CR 269.
- Resident aliens. *People v Beeler* (1979) 9 C4th 953, 998, 39 CR2d 607 (resident aliens not constitutionally required to be in jury pool); *Rubio v Superior Court* (1979) 24 C3d 93, 99–100, 154 CR 734; see CCP §203(a)(1) (jury members must be citizens).
- Non-English speakers. *People v Lesara* (1988) 206 CA3d 1304, 254 CR 417.
- People of color. *People v Neuman* (2009) 176 CA4th 571, 574, 578–579, 97 CR3d 715.
- The hearing impaired. *People v Fauber* (1992) 2 C4th 792, 816–817, 9 CR2d 24.

- Low-income persons and persons who claim financial hardship. *People v Carpenter* (1997) 15 C4th 312, 352, 63 CR2d 1; *People v Burgener* (2003) 29 C4th 833, 856, 129 CR2d 747.
- Young people (*People v Henderson* (1990) 225 CA3d 1129, 1153, 275 CR 837), overruled on other grounds (1994) 7 C4th 797, 30 CR2d 50; see *People v Stansbury* (1993) 4 C4th 1017, 1061, 17 CR2d 174, reversed on other grounds (1994) 511 US 318, 114 S Ct 1526, 128 L Ed 2d 293 (California Supreme Court has not spoken on issue of whether young are cognizable group, but Courts of Appeal and federal courts have rejected claim).
- Persons 70 years of age or older. *People v McCoy* (1995) 40 CA4th 778, 783–786, 47 CR2d 599.
- Less-educated persons *People v Estrada* (1979) 93 CA3d 76, 90–92, 155 CR 731.
- Blue-collar workers. *People v Estrada, supra.*
- Obese persons. *U.S. v Santiago-Martinez* (9th Cir 1995) 58 F3d 422, 423.
- Persons previously arrested, crime victims, and believers in law and order. *People v Fields* (1983) 35 C3d 329, 348, 197 CR 803.

J. [§1.64] RELIGIOUS AND PERSONAL BELIEFS

Religious groups are cognizable groups. *People v Schmeck* (2005) 37 C4th 240, 266, 33 CR3d 397, abrogated on another point in 52 C4th at 610; CCP §231.5; see *In re Freeman* (2006) 38 C4th 630, 643, 42 CR3d 850 (Jews). But exclusion of a juror on the basis of his or her relevant personal views about the case or the applicable law is not improper, even if these views are founded on the juror's religious beliefs. *People v Martin* (1998) 64 CA4th 378, 384–385, 75 CR2d 147. See *People v Cash* (2002) 28 C4th 703, 723–725, 122 CR2d 545 (prosecutor in capital case could properly exclude juror who was Jehovah's Witness and who, based on his religious training, might be unwilling to vote for death penalty).

K. OBJECTION TO DISCRIMINATORY USE OF CHALLENGES—*WHEELER/BATSON* MOTION

1. 1. [§1.65] Time for Objecting

A party must object to an opposing party's discriminatory use of peremptory challenges (commonly called a *Wheeler/Batson* motion) before impanelment of the jury is complete. *People v Thompson* (1990) 50 C3d 134, 179–180, 266 CR 309; see *People v Wheeler* (1978) 22 C3d 258, 276, 148 CR 890 (codified in part in CCP §231.5). An objection made after the 12-member jury is sworn, but before the alternate jurors are selected, is timely. *People v Rodriguez* (1996) 50 CA4th 1013, 1023–1024, 58 CR2d 108. Discriminatory motive may become sufficiently apparent to establish a prima facie case only during the selection of alternate jurors. Therefore, a motion promptly made before the alternates are sworn, and before any remaining unselected prospective jurors are dismissed, is timely not only as to the prospective jurors challenged during the selection of the alternates but also as to those dismissed during selection of the 12 jurors already sworn. *People v McDermott* (2002) 28 C4th 946, 969, 123 CR2d 654.

You must consider a party's timely objection. See *People v McGee* (2002) 104 CA4th 559, 568, 128 CR2d 309. Litigants waive their objections to the improper use of peremptory challenges, however, if they do not assert them in a timely manner. *People v Morrison* (2004) 34 C4th 698, 710, 21 CR3d 682; *People v Overby* (2004) 124 CA4th 1237, 1244, 22 CR3d 233.

A party may make more than one *Wheeler* motion. *People v McGee, supra,* 104 CA4th at 572. However, on each motion, the party has the initial burden of establishing a prima facie case, *i.e.,* of raising a reasonable inference that the opposing party has challenged jurors because of their race or other group association. 104 CA4th at 572. See §1.66. *McGee* is disapproved, however, to the extent it requires a sua sponte review of all prior challenges once the court finds a prima facie case of group bias. When a *Wheeler* motion is made, the issue is not whether there is a pattern of systematic exclusion, but whether a particular prospective juror was improperly challenged based on group bias. *People v Avila* (2006) 38 C4th 491, 548–550, 43 CR3d 1.

Although you have no sua sponte duty to revisit earlier *Wheeler/Batson* challenges that you previously denied, on request you may do so when the prosecutor's subsequent challenge casts the prosecutor's earlier challenges of the jurors of the same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors. But the burden is on the party making the later motion to so clarify because that party ultimately has the burden of proof. 38 C4th at 552.

2. 2. [§1.66] Procedure for Determining Objection

The manner in which *Wheeler/Batson* motions should be raised should be discussed with counsel during the voir dire conference. Cal Rules of Ct 4.200(a). The motion should be made outside the presence of the jury. See *People v Willis* (2002) 27 C4th 811, 821–822, 118 CR2d 301 (court suggested that the motion be initially heard at sidebar).

Immediately after a party makes an objection that peremptory challenges are being used to exclude jurors based on group bias, you must determine whether a prima facie case of improper exclusion exists. You may not defer the determination until the conclusion of jury selection. *Di Donato v Santini* (1991) 232 CA3d 721, 741, 283 CR 751.

> TIP: Generally you should not hear prosecution's justifications for their challenges *in camera*. Excluding the defense violates a defendant's due process right to be present at critical stages of the trial and inhibits the defendant's ability to rebut the prosecution's justifications and to make an adequate record on appeal. See *People v Silva* (2001) 25 C4th 345, 384, 106 CR2d 93; *People v Ayala* (2000) 24 C4th 243, 261–264, 99 CR2d 532. In the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion may be permissible. *People v Ayala, supra*. But under California's discovery rules, such an occasion should be rare. An *in camera* presentation is not warranted if the opposing party seeks only to prevent the moving party from learning its jury selection strategy. The moving party should be permitted to hear an explanation of the opposing party's system or strategy for exercising challenges. *People v Ayala, supra*.

At a *Wheeler/Batson* hearing, it is not necessary that the prosecutor turn over his or her notes to the defense. *People v Kelly* (2008) 162 CA4th 797, 803, 76 CR3d 315.

3. [§1.67] Burden of Proof/Prima Facie Standard

The moving party bears the initial burden of making a prima facie showing of purposeful discrimination. It must establish that the challenged jurors are members of a cognizable group and that, from all the circumstances, there is a reasonable inference that these persons are being challenged because of their group association. *Johnson v California* (2005) 545 US 162, 168–170, 125 S Ct 2410, 162 L Ed 2d 129. Merely stating that the opposing party has used its

peremptory challenges to exclude members of a particular group is not enough to make a prima facie showing of group bias (*People v Panah* (2005) 35 C4th 395, 442, 25 CR3d 672; *People v Adanandus* (2007) 157 CA4th 496, 503–504, 69 CR3d 25), nor is merely stating that the challenged jurors and the objecting party are members of the same group enough to make a prima facie case. (*People v Box* (2000) 23 C4th 1153, 1188–1189, 99 CR2d 69).

> *Note*: In *Johnson v California* (2005) 545 US 162, 168–170, 125 S Ct 2410, 162 L Ed 2d 129, the Supreme Court held that the moving party is not required to show that it is more likely than not (California's "strong likelihood" test) that the other party's peremptory challenges were based on impermissible group bias. Instead, the moving party makes a prima facie case under *Batson* (*Batson v Kentucky* (1986) 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69) by producing sufficient evidence to permit the judge to infer reasonably that discrimination has occurred. See *People v Bonilla* (2007) 41 C4th 313, 341, 60 CR3d 209.

A claim of purposeful discrimination can be supported by any evidence demonstrating that the challenges were based on group bias, including statistical evidence and differences in the questions posed to the challenged jurors. *Miller-El v Cockrell* (2003) 537 US 322, 341–345, 123 S Ct 1029, 154 L Ed 2d 931 (court could consider that prosecution challenged 10 of 11 prospective African-American jurors, that 10 of prosecution's 14 challenges were used against African Americans, and that prosecution asked different questions of African-American jurors than of white jurors about their views on capital punishment and minimum punishments); *People v Yeoman* (2003) 31 C4th 93, 115, 2 CR2d 186 (defense counsel's cursory references to challenged jurors by name, number, occupation, and race is insufficient without other relevant details, such as jurors' individual characteristics, nature of prosecutor's voir dire, or jurors' answers to questions). But "systematic exclusion" is not required, and the exclusion of only one juror based on group bias is enough to constitute a violation. *Batson v Kentucky* (1986) 476 US 79, 95, 106 S Ct 1712, 90 L Ed 2d 69; *People v Montiel* (1993) 5 C4th 877, 909, 21 CR2d 705.

TIP: You should avoid using the term "systematic exclusion" because a reviewing court could conclude you have used the wrong standard. *People v Fuentes* (1991) 54 C3d 707, 715, 716 n10, 286 CR 792.

Be sure to make an express finding whether the prima facie showing is sufficient. *People v Montiel* (1993) 5 C4th 877, 910 n8, 21 CR2d 705. A good practice to consider, even if you haven't found a prima facie showing, is to ask the party who challenged the jurors to state for the record the reasons for their peremptory challenges. For example, you might state, "Even though I find no prima facie showing, I nevertheless invite . . . ." This protects the record for appeal. You should also allow the challenging party to make a record of their reasons if they desire to do so. *People v Gray* (2001) 87 CA4th 781, 788, 104 CR2d 848. The inability at a later time to remember what the reason for a challenge was, a common phenomenon, can be reversible error. Also, if the record is not made by the attorneys making the challenge, efforts on appeal to discern what those reasons might have been may be far from what was actually contemplated and can also be potentially fatal to the offending side.

If you ask the party exercising the challenge to justify the peremptory challenges, then the question of whether the objecting party made a prima facie showing is either considered moot, or a finding of a prima facie showing is implied in your request. *People v Jurado* (2006) 38 C4th 72, 104, 41 CR3d 319; *People v Welch* (1999) 20 C4th 701, 745–746, 85 CR2d 203. But you can avoid this by stating that you do not believe a prima facie case has been made and asking the party exercising the challenge to justify it for purposes of making a record as suggested in the Tip, above. In this instance the question of whether a prima facie case has been made is *not* moot, and a finding of a prima facie showing is *not* implied. *People v Box, supra,* 23 C4th at 1188. But if you rule on the validity of the reasons, the prima facie issue is moot and a reviewing court will focus on your ruling of the reasons given. *People v Mills* (2010) 48 C4th 158, 174, 106 CR3d 153.

If you do not find a prima facie showing has been made as to a specific juror, you do not have to consider an explanation for the challenge with regard to that juror even if you find that a prima facie showing has been made as to other jurors. *People v Phillips* (2007) 147 CA4th 810, 817–818, 54 CR3d 678. Comparative juror analysis is not appropriate in a first-stage *Wheeler/Batson* case. *People v Howard* (2008) 42 C4th 1000, 1019–1020, 71 CR3d 264.

4. [§1.68] Factors in Establishing Prima Facie Showing

In determining whether a prima facie showing has been made, you must consider the totality of the circumstances. *Johnson v California* (2005) 545 US 162, 168–170, 125 S Ct 2410, 162 L Ed 2d 129; *People v Wheeler* (1978) 22 C3d 258, 280, 148 CR 890. Appellate courts have noted the following circumstances:

- Whether the defendant and the challenged juror are members of the same cognizable group. *Powers v Ohio* (1991) 499 US 400, 416, 111 S Ct 1364, 113 L Ed 2d 411; *People v Wheeler* (1978) 22 C3d 258, 281, 148 CR 890.
- Whether motive to challenge group jurors because race or gender is an issue in the case or the case has "group overtones," *e.g.*, the defendant is a group member and the victim is not. *People v Wheeler, supra*; *People v Fuller* (1982) 136 CA3d 403, 419, 186 CR 283.

- Whether many or all of the members of the identified group from the jury panel are challenged. *Miller-El v Cockrell* (2003) 537 US 322, 331, 123 S Ct 1029, 154 L Ed 2d 931; *People v Moss* (1986) 188 CA3d 268, 277, 233 CR 153; but see *People v Bonilla* (2007) 41 C4th 313, 343, 60 CR3d 209 (challenge of the only two African Americans from pool of 78 not sufficient to establish prima facie case considering small, absolute size of sample).
- Whether a disproportionate number of peremptory challenges is used against group members. *Miller-El, supra*; *Williams v Runnels* (9th Cir 2006) 432 F3d 1102, 1103, 1107.
- Whether the challenging party engages the challenged juror in no more than a cursory or routine voir dire or asks the juror no questions at all. *People v Wheeler, supra*; *People v Fuller, supra,* 136 CA3d at 420.
- Whether the challenging party engaged in disparate questioning of group jurors. *Miller-El v Dretke* (2005) 545 US 231, 240, 254–256, 125 S Ct 2317, 162 L Ed 2d 196.
- Whether the challenged jurors share only one characteristic—their membership in the group—and in other respects they are as heterogeneous as the community as a whole. *People v Wheeler,* 22 C3d at 280 n27; *People v Turner* (2001) 90 CA4th 413, 417, 109 CR2d 138.
- Whether the defendant is a member of the challenged jurors' group. *People v Bell* (2007) 40 C4th 582, 598–599, 54 CR3d 453 (challenged group was African-American women and defendant was African-American man; victim was daughter of African-American woman; African-American men not challenged).
- Whether the challenged jurors have backgrounds that suggest that had they been members of a noncognizable group, they would not have been challenged. *People v Taylor* (1986) 42 C3d 711, 719, 230 CR 656; *People v Allen* (2004) 115 CA4th 542, 548, 550, 9 CR3d 374.
- Whether nongroup jurors with similar characteristics have not been challenged by the challenging party. *People v Turner, supra,* 90 CA4th at 419.
- Whether there is no apparent reason for the challenge. *People v Gray* (2001) 87 CA4th 781, 788–789, 104 CR2d 848; *Paulino v Castro* (9th Cir 2004) 371 F3d 1083, 1092.
- Whether the challenging party passed the jury as constituted when it still included members of the cognizable group. *People v Reynoso* (2003) 31 C4th 903, 926, 3 CR3d 769. But you should consider whether passing the jury as constituted is a strategy to mask group bias. *People v Motton* (1985) 39 C3d 596, 603, 607–608, 217 CR 416.

5. Justification of Challenges

a. [§1.69] Shift of Burden

If the moving party meets its initial burden, the burden then shifts to the opposing party to provide an explanation for the peremptory challenges that is race or group neutral, and related to this particular case. *Purkett v Elem* (1995) 514 US 765, 767, 115 S Ct 1769, 131 L Ed 2d 834; *People v McDermott* (2002) 28 C4th 946, 970, 123 CR2d 654. This party need only identify facially valid race-neutral reasons why the prospective jurors were excused; the explanations need not justify a challenge for cause. *People v Gutierrez* (2002) 28 C4th 1083, 1122, 124 CR2d 373; *People v Jordan* (2006) 146 CA4th 232, 254, 53 CR3d 18 (gum chewing was disrespectful

to court as valid basis). Even a trivial reason will suffice if it is group neutral and genuine. *People v Arias* (1996) 13 C4th 92, 136, 51 CR2d 770.

You must determine whether the reasons given are group neutral reasons. *Purkett v Elem* (1995) 514 US 765, 768, 115 S Ct 1769, 131 L Ed 2d 834. If the opposing party does not provide group neutral reasons, you must grant the motion.

The general standard of proof on the issue of whether the neutral reasons are genuine or pretextual is preponderance of evidence, not clear and convincing evidence. *People v Hutchins* (2007) 147 CA4th 992, 997–998, 55 CR3d 105.

b. [§1.70] Valid Reasons Exercising Peremptories

The following have been held to be valid reasons for exercising peremptory challenges:

- The prospective juror or relative of the juror has had negative experiences with the criminal justice system. *People v Gray* (2005) 37 C4th 168, 172, 33 CR3d 451; *People v Gutierrez* (2002) 28 C4th 1083, 1124, 124 CR2d 373; *People v Panah* (2005) 35 C4th 395, 441–442, 25 CR3d 672; *People v Calvin* (2008) 159 CA4th 1377, 1383−1384, 72 CR3d 300 (it is race-neutral reason to use peremptory challenges to excuse African American jurors who express skepticism about the judicial system).
- Prospective juror arrived late and seemed unable to follow directions. *People v Davis* (2008) 164 CA4th 305, 313, 78 CR3d 809. Moreover, prosecutor's "gut instinct" to eliminate a potential juror who was a certified nursing assistant because of prior bad experiences also was race neutral. *People v Davis, supra* (subjective judgment was due to person's profession, not skin color).
- The prospective juror believes the justice system is not fair or has other negative opinions about the justice system. *People v Yeoman* (2003) 31 C4th 93, 116, 2 CR3d 186; *People v Cornwell* (2005) 37 C4th 50, 70, 33 CR3d 1; see *People v Lewis* (2006) 39 C4th 970, 1015, 47 CR3d 467 (fact that prospective juror shares biased views more common to racial group of which he is a member does not preclude challenge to juror based on his actual biases).
- The prospective juror has expressed sympathy for or bias in favor on the defendant based on his race or age. *People v Stanley* (2006) 39 C4th 913, 940, 47 CR3d 420 (fact that prospective juror is same race as defendant does not preclude valid peremptory challenge based on sympathy for the defendant).
- The prospective juror is young. *People v Arias* (1996) 13 C4th 92, 139, 51 CR2d 770.
- The prospective juror works in an occupation that the attorney has a stereotype about. *People v Reynoso* (2003) 31 C4th 903, 924–925, 3 CR3d 769; *People v Davis, supra* (prospective juror was certified nursing assistant, and prosecutor had negative experiences with such a person in the past).
- The prospective juror displays demeanor and body language, or makes comments suggestive of apathetic attitude, and displays hostility toward the attorney who exercised the challenge, showing that juror may have potential difficulty in deliberating with others. *People v Griffin* (2004) 33 C4th 536, 556, 15 CR3d 743, disapproved on another point in 54 C4th at 758; *People v Gutierrez, supra*, 28 C4th at 1125.
- The prospective juror makes statements that indicate a bias for or against the victim or prospective witnesses from certain professions. *People v Gutierrez, supra*

- The prospective juror has unfavorable views about, is indifferent about, or has reservations about imposing the death penalty. *People v Ward* (2005) 36 C4th 186, 201, 30 CR3d 464; *People v Catlin* (2001) 26 C4th 81, 117–118, 109 CR2d 31; *People v Montiel* (1993) 5 C4th 877, 910 n9, 21 CR2d 705.
- The prospective juror speaks Spanish and expresses some difficulty in accepting a translator's version of Spanish-language testimony. *People v Cardenas* (2007) 155 CA4th 1468, 1475–1477, 66 CR3d 821.

c. [§1.71] Invalid Reasons for Exercising Peremptories

The following have been held to be invalid reasons:

- Nongroup or other group jurors excused by moving party, and the opposing party does the same only to achieve balance. *People v Snow* (1987) 44 C3d 216, 224, 242 CR 477; *U.S. v DeGross* (9th Cir 1993) 960 F2d 1433, 1443 (prosecutor's explanation that he challenged a prospective woman juror because the defense challenged a number of men was not group neutral).
- Assumed sexual or physical attraction to the defendant by prospective jurors of the opposite gender. *U.S. v Omorouryi* (9th Cir 1993) 7 F3d 880, 881–882.
- Assumed bias against the police based on the juror's place of residence. *U.S. v Bishop* (9th Cir 1992) 959 F2d 820, 827, overruled on another point in 598 F3d at 1158; but see *Boyde v Brown* (9th Cir 2005) 404 F3d 1159, 1171 n10 (court considers only whether explanation is facially race-neutral in *Batson*'s second step; to extent that *Bishop* suggests an explanation's race neutrality depends on its persuasiveness has been effectively overruled).
- Stereotypical belief that an African-American juror from a city that happened to be heavily populated with African-Americans might view drugs less seriously than jurors who live in other communities. *People v Turner* (2001) 90 CA4th 413, 420, 109 CR2d 138.
- Prosecutor's systematic challenges to all Spanish-speaking Hispanics, without other reasons, was unconstitutional racial bias, even though English-speaking Hispanics were not challenged. *People v Gonzales* (2008) 165 CA4th 620, 630–631, 81 CR3d 205.

6. [§1.72] Judge's Determination

You must determine whether a prima facie case of improper exclusion exists when a party makes an objection that peremptory challenges are being used to exclude jurors based on group bias. You may not defer the determination until the conclusion of jury selection. *Di Donato v Santini* (1991) 232 CA3d 721, 741, 283 CR 751.

You must determine whether the moving party has established group bias by determining whether the otherwise group neutral reasons proffered by the opposing party are genuine or whether they are a pretext for group bias. *Hernandez v New York* (1991) 500 US 352, 365, 111 S Ct 1859, 114 L Ed 2d 395; *Purkett v Elem* (1995) 514 US 765, 768, 115 S Ct 1769, 131 L Ed 2d 834; *People v Alvarez* (1996) 14 C4th 155, 197–198, 58 CR2d 385. Your focus must be on the subjective genuineness of the proffered reasons. *People v Reynoso* (2003) 31 C4th 903, 924, 3 CR3d 769; *People v Adanandus* (2007) 157 CA4th 496, 506, 69 CR3d 25.

You must make a "sincere and reasoned" evaluation of the proffered reasons. *People v Ward* (2005) 36 C4th 186, 200, 205, 30 CR3d 464; *People v Hall* (1983) 35 C3d 161, 167–168, 197 CR 71. You must evaluate each stated reason as applied to each challenged juror. *People v Fuentes* (1991) 54 C3d 707, 720, 286 CR 792.

If there are inconsistencies between the party's explanation and the record of the jurors' responses in voir dire, you must ask the party probing questions about his or her reasoning and make detailed findings. *People v Silva* (2001) 25 C4th 345, 385–386, 106 CR2d 93. Conversely, if the party's stated reasons are inherently plausible and supported by the record on voir dire, you need not question the party or make detailed findings. *People v McDermott* (2002) 28 C4th 946, 980, 123 CR2d 654. Inconsistencies between a party's proffer and the actual voir dire evidence and proffers that are not supported by the record of voir dire may suggest that the justification is pretextual. *Miller-El v Dretke* (2005) 545 US 231, 241–246, 125 S Ct 2317, 162 L Ed 2d 196; *People v Silva*, *supra*, citing *McClain v Prutny* (9th Cir 2000) 217 F3d 1209, 1221–1222; *People v Turner* (1986) 42 C3d 711, 727–728, 230 CR 656.

In determining whether the challenging party's race-neutral explanations are credible, you should consider the totality of the circumstances. *Miller-El v Dretke*, *supra*, 545 US at 239–240, 251–252; *People v Wheeler* (1978) 22 C3d 258, 282, 148 CR 890. In addition to the circumstances supporting the prima facie showing, you may consider the party's demeanor, how reasonable or how improbable the explanations are, and whether the party's rationale for the challenges has some basis in accepted trial strategy. *Miller-El v Cockrell* (2003) 537 US 322, 123 S Ct 1029, 154 L Ed 2d 931; *People v Stevens* (2007) 41 C4th 182, 198 , 59 CR3d 196 (best evidence of whether a race-neutral reason should be believed is often the demeanor of the attorney who exercises the challenge). You should scrutinize the party's reasons for exercising the challenges and determine whether the party retained prospective jurors who have the same shortcomings as the group of jurors challenged by that party. See *Miller-El v Dretke*, *supra*, 125 S Ct at 2323. If a party's proffered reason for striking a cognizable group juror applies to an otherwise similar nongroup juror who is retained, this is evidence that may prove purposeful discrimination. 125 S Ct at 2325. See *People v Gray* (2005) 37 C4th 168, 189–192, 33 CR3d 451 (finding plausible and credible reasons supporting prosecutor's challenge of black juror when making a side-by-side comparison with jurors who were not excused).

Accepting other jurors of the same cognizable group as the challenged group is an indication of the prosecution's good faith in exercising peremptories. *People v Huggins* (2006) 38 C4th 175, 236, 41 CR3d 593,

You are not required to make a specific and detailed statement on the record in evaluating a *Wheeler* motion as long as you adequately make a sincere and reasoned effort to evaluate the prosecutors' reasons for the challenges after having required the prosecutor to explain the reasons for the peremptory challenge and having given the defense attorney the opportunity to respond. *People v Davis* (2008) 164 CA4th 305, 312, 78 CR3d 809.

7. [§1.73] Sua Sponte Objection by Trial Court

On your own motion, you may also object to an attorney's discriminatory use of peremptory challenges. See *People v Lopez* (1991) 3 CA4th Supp 11, 15, 5 CR2d 775. Most judges would not hesitate to exercise this power in cases of obvious and blatant group exclusion.

8. [§1.74] Remedies

The "usual remedy" for a *Wheeler/Batson* violation in California requires quashing the panel, declaring a mistrial, and selecting a new jury. *People v Willis* (2002) 27 C4th 811, 824,

118 CR2d 301; *People v Wheeler* (1978) 22 C3d 258, 280–282, 148 CR 890. This is because the moving party is entitled to a random draw from an entire venire, not one that has been partially stripped of members of a cognizable group by the improper use of peremptory challenges. *People v Willis*, *supra,* 27 C4th at 813; *People v Wheeler*, *supra,* 22 C3d at 282. If the moving party requests or agrees to waive the "usual remedy," however, you may impose alternative remedies.

Possible alternative remedies include seating the improperly challenged juror or giving the moving party additional peremptory challenges if the improperly challenged jurors have been discharged. *People v Willis*, *supra,* 27 C4th at 821. Waiver of the "usual remedy" by the moving party is a prerequisite to imposing these alternative remedies, and if the moving party does not waive the "usual remedy," you must quash the panel, declare a mistrial, and select a new jury. 27 C4th at 823; *People v Overby* (2004) 124 CA4th 1237, 1242, 22 CR3d 233; *People v Morris* (2003) 107 CA4th 402, 411, 131 CR2d 872. If the moving party waives the "usual remedy," you should ordinarily honor that waiver. *People v Willis*, *supra*, 27 C4th at 824.

You may impose monetary sanctions under CCP §177.5 if you have issued an order to not violate *Wheeler/Batson* or admonished the parties that a violation will result in monetary sanctions. *People v Boulden* (2005) 126 CA4th 1305, 1314, 24 CR3d 811; *People v Muhammad* (2003) 108 CA4th 313, 325–326, 133 CR2d 308. You may wish to issue such an order or warning during the pre-voir dire conference. See *People v Boulden*, *supra*. Waiver of the "usual remedy" is not a prerequisite to imposing monetary sanctions. *People v Muhammad*, *supra,* 108 CA4th at 324. If you impose a fine, it should be "severe enough to guard against a repetition of the improper conduct." *People v Willi*s, *supra,* 27 C4th at 823. See §1.74 for factors you might consider in determining the amount of the fine. If monetary sanctions are imposed, you must issue a written order reciting the conduct or circumstances that justify imposing the sanctions. *People v Muhammad, supra,* 108 CA4th at 324; CCP §177.5.

9. [§1.75] Judicial Code of Ethics Canon 3D(2)

A *Wheeler/Batson* violation is both "illegal and unprofessional." *People v Muhammad* (2003) 108 CA4th 313, 326, 133 CR2d 308. By violating the constitutional rights of the opposing party and the constitutional rights of the improperly challenged juror, counsel violates the Rules of Professional Conduct. Bus & P C §§6067, 6068(a) (oath and duty to uphold the constitution of the United States and of the State of California); Cal Rules of Prof Cond 1–100(A) (incorporating by reference the State Bar Act, Bus & P C §§6000 et seq, and opinions of California courts). Consequently, you have a duty to take "appropriate corrective action" under Canon 3D(2). To fulfill your obligation under Canon 3D(2), you could take any one of or a combination of the following corrective actions:

- Discuss the violation directly with counsel.
- Report the violation to the presiding judge of the court, or report the violation to the other judges of the court. An attorney's track record of *Wheeler/Batson* violations is relevant in future *Wheeler/Batson* hearings. See *Miller-El v Dretke* (2005) 545 US 231, 263–266, 125 S Ct 2317, 162 L Ed 2d 196 (prosecutor's office policy was a circumstance tending to establish a prima facie case and pretext); see *People v Turner* (1994) 8 C4th 137, 168, 32 CR2d 762, reversed on other grounds in 33 C4th at 536 ("The trial court stated it was conscious of the basis for the earlier reversal and had this history in mind when it ruled that no prima facie case had been established. That is sufficient").

- Report the violation to the head of the agency if the attorney is employed by a government agency;
- Report the violation to the appropriate evaluation or peer review committee if counsel is on a panel for court appointments,

Report the violation to the California State Bar.

Some factors to consider in determining the appropriate "corrective action" and/or fine include:

- Whether the attorney has a history of *Wheeler/Batson* violations;
- Whether you issued an order not to violate *Wheeler/Batson* or gave an admonition that such a violation would result in a fine or other corrective action.
- The number of jurors improperly challenged;
- The nature of the explanation for the challenge;
- Whether you had to quash the panel and start jury selection anew with a new panel of jurors. In connection with this factor you might also consider the length of time and resources expended on jury selection up to the point of the motion being granted, the size of the original panel, and the size of the substitute panel.

L. [§1.76] JURY SELECTION COMPLETE WHEN SIDES HAVE PASSED CONSECUTIVELY

When each side has passed consecutively, jury selection is complete, and the jury must be sworn, unless you order otherwise for good cause. See CCP §231(d)–(e). In a two-party case, when the plaintiff or prosecution passes and then the defendant passes, jury selection is considered complete. In a multiparty case, jury selection is complete when all sides have passed consecutively.

Once the jury is sworn, neither side can exercise peremptory challenges, even if alternates have not been selected and a sworn juror raises questions about his or her qualifications but is not discharged for cause. *People v Cottle* (2006) 39 C4th 246, 254–255, 46 CR3d 86.

Nevertheless, it was within the court's discretion to reopen jury selection after both sides had passed consecutively when the court learned that one of the jurors could not serve. *People v DeFrance* (2008) 167 CA4th 486, 504, 84 CR3d 204 (juror worked at night and would not be able to sleep during the day for several days if he served on the jury).

XV. [§1.77] SELECTING ALTERNATE JURORS

You must determine the number of alternate jurors that may be required based on the anticipated length and complexity of the trial. At the pretrial conference, you should discuss with the attorneys how many alternate jurors will be required. You should set forth your determination on the record. See CCP §234; Pen C §1089.

The purpose of selecting alternate jurors is to protect against a possible mistrial if it should become necessary to excuse one of the jurors before a verdict is returned. See CCP §233. Some judges select one alternate for each week of trial, while others select a set number, *e.g.*, two alternates for a one- to two-week trial.

Alternate jurors are selected immediately after the regular jurors are impaneled and sworn. CCP §234; Pen C §1089. The alternate jurors must be drawn from the same source and in the same manner, and have the same qualifications as the regular jurors. See CCP §234; Pen C §1089. Some judges begin selection of the alternate jurors by stating:

The court finds that due to [*describe applicable factors, e.g., the anticipated length of the trial*], alternate jurors will be chosen and seated in this case. The clerk will call the names of panelists to sit in the alternate seats. The number of the seat has no special significance. If an alternate is required, one of the alternates' names will be drawn at random.

The alternate jurors should undergo the same voir dire and are subject to the same challenges as the regular jurors. CCP §234; Pen C §1089. Some judges add the following to their voir dire of alternate jurors:

An alternate sits with the jury and hears all the evidence, argument, and instructions on the law. Unless a vacancy occurs and the alternate is selected to replace a juror, the alternate does not go into the jury room with the regular jurors and does not participate in their deliberations. However, an alternate must be ready at any time to replace a juror, and should expect, at all times, that he or she will be making the final decision in the trial. Is there anything about being an alternate that would make you feel uneasy or unable to serve?

Each side is entitled to one peremptory challenge for each alternate juror called (*e.g.*, if two alternates are to be selected, each side gets two additional peremptory challenges). See CCP §234; Pen C §1089.

XVI. [§1.78] ADMINISTERING OATH TO JURY

The following agreement must be obtained from the jurors, acknowledged by the statement, "I do" (CCP §232(b)):

Do you, and each of you, understand and agree that you will well and truly try the cause now pending before the court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?

Each alternate juror must take the oath given to the regular jurors. CCP §234. The oath may be preceded by the phrase, "If called on to be a juror . . . ." See *People v Cruz* (2001) 93 CA4th 69, 72–74, 113 CR2d 86 (no reversible error resulted from omission in jurors' oath of their obligation to follow judge's instructions).

The oath is typically administered by the clerk.

After jury selection has been completed and the oath has been administered, you should excuse the remaining members of the jury panel and order them to return to the jury assembly room.

XVII. [§1.79] ONE-DAY/ONE-TRIAL RULE

Every county trial court system must have a juror management program in place under which a person is deemed to have fulfilled his or her jury service obligation when he or she has (Cal Rules of Ct 2.1002(c)):

- Served on one trial until discharged,
- Been assigned on one day to one or more trial departments for jury selection and has served through the completion of jury selection or until excused by the jury commissioner,

- Attended court but was not assigned to a trial department for selection of a jury before the end of that day,
- Served one day on call, or
- Served no more than five court days on telephone standby.

This rule implements Govt C §68550, which is intended to make jury service more convenient and alleviate the problem of potential jurors refusing to appear for jury duty by shortening the time a person is required to serve to one day or one trial. Cal Rules of Ct 2.1002(a).

✪ The one-day or one-trial rule was a recommendation of the Commission and was written and implemented by the Task Force. The Commission's recommendation that a person who has completed jury service should be excused from further service for at least one year is reflected in Cal Rules of Ct 2.1008(e). See Commission Report, pp 39–41.

XVIII. [§1.80] EDUCATION ON JURY SELECTION AND TREATMENT OF JURORS

A judge who is assigned to hear jury trials should take advantage of the educational materials developed by CJER or other appropriate materials, or should attend CJER programs or other appropriate educational programs devoted to the conduct of jury voir dire and the treatment of jurors. Cal Rules of Ct 10.469(b).

The presiding judge of each court should ensure that all court administrators and any court employee who interacts with jurors is properly trained and supervised in the appropriate treatment of jurors. Court administrators and jury staff employees should use educational materials developed by CJER or other appropriate materials, or should attend CJER programs or other appropriate programs devoted to the treatment of jurors. Cal Rules of Ct 10.479(b).

✪ The Commission has recommended *mandatory* judicial, court administrator, and jury staff training on juror treatment. Commission Report, p 30. The Commission has also recommended that CJER produce educational materials and programs focused on conducting voir dire, particularly in criminal cases, that can be distributed to all judges for use and review. Commission Report, p 52.

XIX. [§1.81] WEBSITE FOR JURORS

The Administrative Office of the Courts has developed a website (www.courtinfo.ca.gov/jury) that provides prospective jurors with answers to frequently asked questions, a summary of the trial process and of the role of jurors, commonly used legal terms, and other information on jury service. Jurors may also ask questions online and express their views about jury service. Your trial court may have juror information on its website and/or a link to the AOC website.

Chapter 2
JURY MANAGEMENT GUIDELINES

I. I. [§2.1] TREATMENT OF JURORS

The Commission has written, "To bring jurors back in the system, we must radically adjust our perceptions, and we must treat jurors as critical participants in the justice system. We must reinforce a sense of community in the courthouse that includes jurors." In addition, the former Jury Task Force, in furtherance of the work of the Commission, has recommended reforms needed to make those changes to the justice system.

Many of the improvements suggested by the Commission are not within your power to change, although you can be a forceful advocate within your court for improving the experience of jurors. Increased juror fees, transportation and parking, improved juror facilities, one-day/one-trial service, and other suggested and implemented improvements are generally beyond your

province. But there is one critical area in which you, as a judge, can make a difference—direct contact between you and your court staff and jurors and prospective jurors.

Studies confirm that the jurors most upset with the justice system are those who have not served, but who have been either required to be available and never called into court or excused from serving. Therefore, any courtesies extended to participating jurors should also be extended to the large proportion of those who are never impaneled.

In your courtroom, the court staff and attorneys take their cues from you as to how jurors are treated. If they see you treating jurors' concerns and time constraints as important issues, they will follow by regarding the jurors with greater respect. Extending these common courtesies goes a long way toward making each juror's experience a more meaningful one.

The jury pool that has been made to wait, taken for granted, or otherwise poorly treated quickly becomes tainted and filled with prospective jurors who would do almost anything to avoid jury duty. In fact, disgruntled jurors from one court will often give advice to newer jurors on the most effective ways to escape selection on a trial.

You can avoid this situation by treating all jurors with the utmost respect, encouraging your court staff to do the same, and advocating within your court system for jury reforms that make the best possible use of juror time. These approaches include things as simple as honoring time schedules, avoiding making jurors wait, not permitting counsel to infringe on jury time, explaining delays whenever possible, and ensuring that bailiffs or court liaisons understand that they are charged with the responsibility of handling and even anticipating juror concerns.

TIP: Many courts now routinely have judges welcoming incoming jurors in the jury assembly room, and some judges take the time to go to the jury assembly room to explain to waiting jurors what happened and why they were not used, *e.g.*, when a case is settled or continued. These simple acts help jurors understand that they are not being subjected to the arbitrary whims of the court, and it also serves to encourage staff to treat jurors with similar respect. Judges should be cautious when giving the welcome. Some staff and judges have become apologetic about the inconvenience of jury service. And jurors have indicated that the result of multiple apologies for the inconvenience has the effect of making it more acceptable to avoid service. See Appendix C for a sample welcome speech.

TIP: Unless facilities do not allow for jurors to use the jury room during the pendency of the trial, jurors should never be required to wait in hallways or outside the courtroom Many judges don't let jurors use otherwise available jury rooms until deliberation starts either because staff have taken over the rooms for their convenience and use, or because of a concern about jurors possibly overhearing conversations if they walk through the courtroom to gain access to their jury room. Both of these are easily remedied.

TIP: Being made to wait outside is both disrespectful to jurors and opens up problems of tainting or intimidation or the possibility of overhearing something that could cause a mistrial. Jurors are told to avoid the parties in a case, and jurors have reported hiding in other hallways or running down corridors in order to comply with the court's order not to have contact with the parties. Providing a place for them to wait in comfort is a minimum benefit the court should guarantee jurors. Having them stay together also encourages them to keep communications and trust open between them, promoting bonding and more productive discussions during deliberations.

To implement these and other similar ideas, many courts have created jury committees comprised of judges and others who monitor and promote programs to enhance respect for jurors.

II. [§2.2] ADVISING JURY OF TRIAL SCHEDULE

After the jury has been impaneled and sworn and before inviting opening statements, you should advise the jury of the trial schedule, *e.g.*, that the typical trial schedule will be 9:00 a.m. to noon and 1:30 p.m. to 4:00 p.m. You should also indicate any days on which trial will not be held. You should also prepare the jurors for the possibility that the schedule may change because of developments in the case or because of your other duties or those of the attorneys.

TIP: Some courts believe it is a better practice to give this information at the beginning of voir dire before hearing hardship excuses.

TIP: Some courts give jurors written guidelines describing how the trial will proceed. See Appendix C for examples. These guidelines also usually contain procedures for reaching the court in the case of an emergency or delay. Whether or not the jury is given written guidelines, you should do your best to keep it informed of any schedule changes just as you expect counsel to keep you so informed. Also some judges give jurors an actual calendar that delineates the expected trial dates and times. This can be helpful for both longer and shorter trials.

A. [§2.3] TIMELINESS AND PUNCTUALITY

You will establish your own style for making sure that the court and juror time is used most efficiently. Most judges have found that timeliness and punctuality go a long way toward using court time efficiently. They start by advising the jurors of the need for punctuality, *i.e.*, they must be in their seats when court begins each day and return promptly at the conclusion of each recess during the court day. Be careful not to send the wrong message by allowing attorneys to argue "just one more thing" while the jurors are left in the hall unaware of what is going on. This counteracts the desired message of respect for the jurors' time.

Some judges request jurors to call and leave a phone number with the courtroom clerk if they are unexpectedly detained from appearing promptly at any sessions. Most judges have found that leading by example is the most common way of ensuring timeliness. The best way to impress on the jurors (and the attorneys) the importance of punctuality is by being punctual yourself. Some judges go so far as to take the bench even when a juror (or an attorney) has not returned and the appointed time to reconvene has arrived. This sends a silent message to the late arriver that is loud and clear.

B. [§2.4] TRIAL MANAGEMENT TECHNIQUES

You should consider the following techniques set forth in the California Rules of Court for managing trials efficiently:

- Ensure that once trial has begun, momentum is maintained. Cal Rules of Ct, Standards of J Admin 2.20(b)(4).
- Attempt to maintain continuity in days of trial and hours of trial. Cal Rules of Ct, Standards of J Admin 2.20(b)(6).
- Schedule arguments on legal issues at the beginning or end of the day so as not to interrupt the presentation of evidence. Cal Rules of Ct, Standards of J Admin 2.20(b)(7).

TIP: Some judges have found that scheduling oral argument on legal issues at the end of the day has a way of making the arguments offered more concise than when scheduled earlier in the day.

- Permit sidebar conferences only when necessary and keep these conferences as short as possible. Cal Rules of Ct, Standards of J Admin 2.20(b)(8).

- In longer trials, consider scheduling trial days to give the jurors time to conduct personal business. Cal Rules of Ct, Standards of J Admin 2.20(b)(9).

✪ This standard and the others set forth above are based on recommendations by the Commission. Commission Report, pp 101–102.

III. [§2.5] GIVING JURORS GENERAL DESCRIPTION OF TRIAL COURT AND ITS OPERATION

You should explain the various stages of a jury trial, *e.g.,* (1) the attorneys' opening statements, (2) the plaintiff's or prosecution's case, (3) the defendant's case, (4) the attorneys' final arguments, (5) jury instructions, (6) jury deliberations, (7) the verdict, and (8) the general functions of (a) the jury (*i.e.,* to determine the facts), (b) the judge (*i.e.,* to instruct the jury on the law applicable to the facts), and (c) the attorneys (*i.e.,* to present evidence and argue the law). See CACI 100 and 101, and CALCRIM 100 and 200.

In criminal cases, after the jury has been sworn and before opening statements, you must instruct the jury generally concerning its basic functions, duties, and conduct. Pen C §1122(a).

For examples of written information that might be given, see Appendix C.

IV. [§2.6] ADMONITION TO JURORS

In both criminal and civil trials, you must admonish jurors at the beginning, throughout the trial, and when they are dismissed at recesses and at the end of a day that they have a duty to refrain from (1) communicating about the case with any other person, which includes reading about the case on the Internet or sending or receiving e-mail or Twitter messages, and (2) forming or expressing an opinion about the case until it is finally submitted to them. CCP §611 (civil cases); Pen C §§1121, 1122(b) (criminal cases); see CACI 100 and CALCRIM 101.

In criminal cases, you must give the following admonitions before opening statements (see Pen C §1122(a)). Some judges give some or all of these admonitions in civil cases even though they are not required:

- Jurors must not converse among themselves, or with anyone else, conduct research, or disseminate information on any subject connected with the trial.

Note: You must clearly explain, as part of the admonishment, that the prohibition on conversation, research, and dissemination of information applies to all forms of electronic and wireless communication.

- Jurors must not read or listen to any accounts or discussions of the case reported by newspapers or other news media.
- Jurors must 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.
- Jurors before, and within 90 days of, discharge, must 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.
- Jurors must promptly report to the court any incident within their knowledge involving an attempt by any person to improperly influence any member of the jury.

Many judges believe that the admonition is the most important part of the instructions and present it in the context of the significance of the jury's role in the proceedings. Some judges inform the jurors that they may be held in contempt of court or cause a mistrial by violating the admonition. After giving the admonition, some judges add a statement similar to the following:

> **You are directed not to speak to any party, attorney, or witness in this case during the course of the trial. Likewise, the attorneys, parties, and witnesses are directed not to speak to any juror during the course of the trial. Counsel, please instruct your clients and witnesses not to converse where they may be overheard by any juror. Ladies and gentlemen of the jury, please wear your juror badges during the trial so that you may be easily recognized.**

Because attorneys often ask for help on handling jurors who approach them with questions, many judges add the following admonition:

Not approaching the attorneys means that they are also not allowed to have any personal communication with you during the course of the trial. The reason for this is not that we don't trust the attorneys, but that we are extremely sensitive to the appearance of justice in a trial. If one side sees you having a short conversation with the attorney of the opposing party, it looks bad, however innocent the conversation might be. Therefore if you speak to one of the attorneys and they don't respond, please understand that until the trial is over, they can't communicate with you directly. Any questions or concerns you have should be directed to the court [attendant/bailiff], who will either resolve your issue or bring it to me.

In criminal cases, you may admonish the jurors at each adjournment that, before discharge, they may not accept, agree to accept, or benefit directly or indirectly from any payment or other consideration for supplying information about the trial. Pen C §1122.5(a). If they violate this admonition, they may be found in contempt of court. Pen C §1122.5(a).

In most cases, cautionary admonitions and instructions to the jury are presumptively effective, *e.g.*, they are a suitable alternative to courtroom closure. See *NBC Subsidiary (KNBC-TV), Inc. v Superior Court* (1999) 20 C4th 1178, 1222–1224, 86 CR2d 778. See also *People v Gray* (2005) 37 C4th 168, 227–231, 33 CR3d 451 (judge's admonition to jurors during delay in deliberations not to discuss case, to avoid improper influences, not to speculate about reason for delay, and to inform judge if any such improper contact occurred, was sufficient); *People v Cornwell* (2005) 37 C4th 50, 84–88, 33 CR3d 1 (judge properly determined that audible comments from spectators were minor and innocuous and did not distract or prejudice jury); *People v Houston* (2005) 130 CA4th 279, 309–320, 29 CR3d 818 (judge's prompt admonitions to jury cured any inherent prejudice to defendant from spectators' displays in courtroom of buttons and placards bearing victim's likeness; judge admonished jury that these displays were not evidence and should not be considered for any purpose; better practice, however, is for judge to order such displays removed from courtroom promptly on becoming aware of them to avoid disruption of trial process).

TIP: Some of this can be handled with a welcome letter that is provided to jurors when they first arrive at the courtroom. See Appendix A.

V. [§2.7] JUROR NOTEBOOKS

You should encourage counsel in complex civil cases to include key documents, exhibits, and other appropriate materials in notebooks for use by jurors during trial to assist them in performing their duties. Cal Rules of Ct 2.1032. Although this rule is intended to apply to complex civil cases, there may be other types of civil cases in which notebooks may be appropriate or useful. Advisory Committee Comment to Cal Rules of Ct 2.1032.

Juror notebooks provide an opportunity for jurors to organize materials as a means of assisting in their comprehension and recall of information about the case. The notebooks may contain materials intended to help familiarize jurors with the parties to the case, the names of the attorneys, the witnesses, the courtroom layout, basic terminology, and different items of evidence. Notebooks can be relatively simple for a short trial and expanded to include more multifaceted information for a longer, more complex trial.

Juror notebooks are generally prepared by the attorneys and approved by the judge before the trial begins in civil cases. In criminal trials and smaller counties, however, the judge and staff often prepare the notebooks. Suggested notebook tabs include:

(1) orientation or "housekeeping" that includes information about the court staff and common questions asked by jurors;

(2) a diagram showing the courtroom layout and a seating chart identifying the trial participants;

(3) a statement of the case, which for civil cases might also include the parties' claims and defenses;

(4) individual copies of preliminary instructions;

(5) a glossary of terms;

(6) a witness list;

(7) instructions and blank forms jurors may use to ask questions;

(8) blank exhibit forms;

(9) note paper;

(10) suggestions on how to conduct deliberations; and

(11) a juror evaluation or survey.

Other contents might include qualifications of experts (be careful that hearsay evidence is not included), photos of trial participants, photographic exhibits, pertinent parts of transcripts entered in evidence, other key exhibits, and maps of local sites of interest and restaurants. Jurors are generally permitted to take their notebooks into the jury room once deliberations begin.

TIP: If you are providing notebooks for jurors, you should consider admonishing jurors that they should not add or delete materials from the notebooks. Some jurors have been known to add materials to the notebooks that were never part of the trial.

VI. NOTE TAKING BY JURORS

A. [§2.8] MUST BE PERMITTED

Jurors must be permitted to take written notes in all civil and criminal trials. At the beginning of a trial, you must inform jurors that they may take written notes during the trial and must provide materials suitable for this purpose. Cal Rules of Ct 2.1031. Jurors should be cautioned that they may take notes only for their own personal use, and that they may not remove their notes from the courtroom until the case is completed and they are discharged. Most judges have the bailiff or courtroom clerk collect the jurors' notes at the end of each court day and keep them in a secure place until the next court session, when they are returned to the jurors. Jurors may take their notes into the jury room once they begin deliberations. CCP §612.

B. [§2.9] INSTRUCTIONS

You should give CACI 102 or CALCRIM 102 as a preinstruction regarding notes. Cal Rules of Ct 2.1050(e); see *People v Mayfield* (1993) 5 C4th 142, 180, 19 CR2d 836.

VII. JURORS' QUESTIONS

A. [§2.10] WRITTEN QUESTIONS SHOULD BE ALLOWED

You should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury. Cal Rules of Ct 2.1033.

The ability to submit questions provides jurors with an extra modicum of control, reduces the potential for rank speculation on questions that the attorneys may never know they should address, and eliminates the stress caused when jurors wait for a concern to be answered while missing other important evidence being presented.

You should give a pretrial admonition that includes either CACI 112 or CALCRIM 106 as a preinstruction regarding asking questions. See Cal Rules of Ct 2.1050(e).

Some judges provide the jurors with a form, such as the following, that they may use to submit questions to the court:

Name of case_____ Case No._____
Judge _____ Dept. No._____
QUESTIONS/REQUESTS FROM JURORS
All questions from jurors or requests regarding the trial (other than for a recess) must be presented in writing on this form.
QUESTIONS/REQUESTS:

Date _____
Time _____

RESPONSE:

Date _____ Time _____

_____

IMPORTANT: The judge and the attorneys will review your question. Please remember that there may be legal reasons that might prevent your question from being asked. Therefore, you should not feel slighted or disappointed if your question is not asked.

Other judges take a much less formal approach and have the jurors write out questions on a sheet torn out of their notebooks.

B. [§2.11] PROCESS

Most judges handle this process by advising jurors to write down any questions and, at the recess or before the witness is discharged, to give them to the bailiff or courtroom clerk, who then passes them on to the judge. Other judges allow juror questions at any time and advise the jurors to get the bailiff's attention and give the bailiff their questions.

CACI 112 and CALCRIM 106 tell the jurors that their questions might not be answered for legal reasons or because they may be addressed by testimony or other evidence presented later in the trial as is also done in the sample form in §2.10.

If you receive questions from jurors, you should inform the attorneys of the questions and make the written question a part of the record. See Cal Rules of Ct 2.1030.

> TIP: You should have the questions passed to the attorneys and let the attorneys choose whether to ask them. Regardless of how you feel about the question, it's better not to ask the question yourself. You don't know the case as well as the attorneys do, and some questions may open a Pandora's box that neither side wishes to delve into and about which you may have no knowledge. You should remind the attorneys that the Evidence Code controls juror questions as it does any other questions and that objectionable questions shouldn't be asked. There is usually no need for advance objections.

C. [§2.12] NO DIRECT QUESTIONING

In no event should you permit direct questioning of witnesses by jurors. Any question that a juror has for a witness should be submitted to you in writing for your and the attorneys' consideration. If you consider the question appropriate, you or the attorneys may then pose it to the witness. *People v Cummings* (1993) 4 C4th 1233, 1305–1306, 18 CR2d 796.

VIII. PREINSTRUCTING THE JURY

A. [§2.13] JUDGE'S DISCRETION TO PREINSTRUCT

Immediately after the jury is sworn, you may, in your discretion, preinstruct the jury concerning the elements of the charges or claims, its duties, its conduct, the order of proceedings, the procedure for submitting written questions for witnesses as set forth in Cal Rules of Ct 2.1033 if questions are allowed, and the legal principles that will govern the proceeding. Cal Rules of Ct 2.1035.

There is a growing trend for judges to give juries instructions in installments at different stages of the trial when they are actually relevant, with a comprehensive set of final instructions at the end of the trial. You may find, as many judges do, that it is advantageous to give the jury the first set of instructions at the beginning of the trial, immediately before opening statements. As one appellate court has noted: "The process of instructing jurors at the end of a trial is long and tedious. Breaking instructions into phases of the trial does not tax the attention span of the jurors, provides timely and useful information to jurors as the trial progresses, and arguably benefits the parties." *People v Chung* (1997) 57 CA4th 755, 760, 67 CR2d 337.

In civil cases, there has been a growing trend to preinstruct as is evidenced by the 13 introductory instructions provided by the Judicial Council of California. Civil Jury Instructions (CACI) 100-112 are preinstructions, and the directions for using CACI 100 indicate that it should be given at the outset of every case, even as early as when the jury panel enters the courtroom (although without the first sentence). In criminal cases, the Judicial Council of California Criminal Jury Instructions (CALCRIM) 100–106 and 120–124 should be given after the jury is selected and before the trial begins. By statute, in criminal cases, you are specifically authorized to give the jury such instructions on the law applicable to the case at the beginning of trial or from time to time during the trial, as you deem necessary to guide the jury in hearing the case. Pen C §1093(f).

> TIP: The concept of providing instructions on the basic elements of the case in advance of the commencement of trial has arisen from multiple studies as well as common sense. Jurors become better listeners and better judges of the facts if the issues are framed for them and they know what to listen for. Studies have shown that this simple modification is extremely helpful to jurors. As lay participants, jurors are rarely clear about the issues involved in a legal proceeding. Generally, the only mention of these issues occurs during introductory remarks. At this early stage, so much new information is being provided that jurors commonly do not recall what is at issue. Providing instructions on the basic elements involved in the case gives the jurors a framework for the trial and prepares them for their obligation as judges. It is particularly helpful to provide such preliminary instructions on the basic elements in the form of individual written copies for the jurors to keep through the trial.

B. [§2.14] COMMON PREINSTRUCTIONS

Preinstruction may be used to guide the jury in properly discharging its function as the trier of fact. See *Westover v City of Los Angeles* (1942) 20 C2d 635, 639, 128 P2d 350; see CACI introductory instructions. Its purpose is to point out to the jury the significant matters in the trial of the particular case and what the jury should look for during the course of the trial. In general,

you may preinstruct on any matters you deem helpful to the jury, as long as the preinstruction is fair and accurate. See *Kelly v Trans Globe Travel Bureau, Inc.* (1976) 60 CA3d 195, 203–204, 131 CR 488.

Many judges' preinstructions include the relevant instructions from CACI or CALCRIM that address the following: (1) the role of the judge and the jury, (2) the difference between evidence and argument, (3) the difference between direct and circumstantial evidence, (4) the credibility of witnesses, and (5) the burden of proof. Some judges also preinstruct the jurors that the attorneys' objections to evidence and the bases of these objections are irrelevant to the jury, *e.g.,*

> **…If I sustain an objection, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did…. CALCRIM 104.**

You may instruct the jurors that they are not to give any significance to the fact that certain instructions are given at the beginning of trial and other instructions are given at the end. *People v Chung* (1997) 57 CA4th 755, 757, 67 CR2d 337. Also, any preinstructions should be limited and focused. Flooding jurors with too much information at the beginning of the trial becomes counterproductive.

C. [§2.15] PREINSTRUCTIONS ON SUBSTANTIVE LAW

You have the discretion to preinstruct on substantive law provisions. Many jurors have found that preinstruction on the basic elements of the charges or causes of action helps them to listen and better understand the significance of the testimony being presented. It also operates to avoid misunderstandings that can impact on one side or the other. For example, in a rape case, jurors have been known to resent a prosecutor for insensitivity when they ask the rape victim if she was married to the rapist, not knowing that this fact is an element of the charge. You should, however, limit preinstruction to the basic elements of the charges or causes of action.

These basic elements may include instructions on defense issues. In instances in which a defense is known and a request is made, you should include basic instructions, keeping in mind the goal of simplicity.

If you use preinstructions, you should also tell the jurors that the instructions are preliminary and are intended to assist them in following the evidence. Advising them that they will receive final instructions at the end of the trial, which may differ depending on the state of the evidence, should also eliminate any problems that might arise if the evidence fails to support a theory, claim, charge, or defense. Also if you preinstruct the jury on a theory or defense that is not shown, you may cure any harm by subsequently instructing the jury that it may not consider the theory or defense as an issue in the case. See *McShane v Cleaver* (1966) 247 CA2d 260, 266, 55 CR 427.

Although some judges use preinstruction only in complex cases, many judges do so on a regular basis. Cases that appear relatively simple to a practitioner or judicial officer are seldom seen as simple by jurors, especially those serving for the first time. See *Westover v City of Los Angeles* (1942) 20 C2d 635, 639, 128 P2d 350 (preinstruction of jury on legal principles is proper when helpful to jury, especially in a complicated case).

✪ The Commission has recommended that judges should be encouraged, in their discretion, to preinstruct the jury on the substantive law of issues involved in the case. Commission Report, p 95.

D. [§2.16] INSTRUCTIONS ON DISCOVERED MATERIAL AND EXPERT WITNESSES

Many judges wait to instruct the jury on discovered material or expert testimony until this evidence is received because a cautionary or limiting instruction at that time makes clear to jurors the appropriate use of the evidence. See Evid C §355; *People v Housley* (1992) 6 CA4th 947, 957, 8 CR2d 431. The time for giving these instructions, however, is within your discretion. See *People v Dennis* (1998) 17 C4th 468, 533–534, 71 CR2d 680. Thus, if you believe the jury would be helped by being instructed earlier, you should do so.

IX. REMOVAL AND REPLACEMENT OF JUROR

A. [§2.17] INVESTIGATING JUROR MISCONDUCT

You must conduct an investigation when you become aware of information which, if proven true, would be good cause to doubt a juror's ability to perform his or her duties and would justify removal of the juror. *People v Cleveland* (2001) 25 C4th 466, 477, 480, 484, 106 CR2d 313. Once you are put on notice of possible misconduct, you must make whatever inquiry is reasonably necessary to determine whether the juror should be discharged and whether the impartiality of the other jurors has been affected. *People v Cleveland, supra.*

*CAUTION***:** In the context of evidentiary hearings, it is important to distinguish between cases involving misconduct discovered during trial from cases involving misconduct discovered after trial. In the former the focus is usually on whether to retain or discharge the juror or to declare a mistrial. In the latter, the focus is on whether there has been misconduct and if so, whether the presumption of prejudice is rebutted. The analytical determinations are different as is the burden of proof. In the context of evidentiary hearings, the need and ease of conducting a misconduct investigation hearing weigh in favor of doing so in most situations. But whether to conduct a hearing after trial as a part of a new trial motion involves a different set of circumstances and considerations. See discussion below.

The specific procedures to follow in investigating an allegation of misconduct are generally within your discretion. *People v Seaton* (2001) 26 C4th 598, 676, 110 CR2d 441. You should, however, interview all jurors who may appear from the evidence to have information about the conduct, as well as the allegedly offending juror. You should not simply take the word of the jurors who made the complaint. See *People v Barber* (2002) 102 CA4th 145, 151, 124 CR2d 917; *People v Castorena* (1996) 47 CA4th 1051, 1066, 55 CR2d 151. Although you should give counsel an opportunity to suggest questions for you to ask the jurors, you should not permit direct questioning of the jurors by counsel. *People v Cleveland*, 25 C4th at 485; *People v Karapetyan* (2003) 106 CA4th 609, 613 n1, 130 CR2d 849. You should examine the juror on the record in the presence of the attorneys, but out of the presence of the other jurors. See *People v Davis* (1995) 10 C4th 463, 534–535, 41 CR2d 826. You may conduct this inquiry in chambers. See *People v Johnson* (1993) 6 C4th 1, 17–21, 23 CR2d 593, overruled on another ground in 39 C4th at 879. You may exclude the defendant from the hearing if you feel the defendant's presence might alienate the juror or inhibit the misconduct investigation. *U.S. v Gagnon* (1985) 470 US 522, 526–527, 105 S Ct 1482, 84 L Ed 2d 486; *People v Johnson, supra*, 6 C4th at 17–21. The attorneys can waive their presence as well. 6 C4th at 20. And it is within your court's discretion as to whether to conduct an evidentiary hearing with actual juror testimony. *People v Tuggles* (2009) 179 CA4th 339, 380, 100 CR3d 820 (misconduct discovered after trial).

Not all allegations of misconduct require investigations. Some examples of those that do not are:

- Learning of inadvertent contact between a juror and a district attorney's investigator even when that juror knew of defendant's juvenile record. *People v Martinez* (2010) 47 C4th 911, 940–943, 105 CR3d 131.
- Hearing that a juror with prior experience had let a holdout juror know that it would not be easy for her to withdraw from the jury during deliberations. *People v Ybarra* (2008) 166 CA4th 1069, 1087, 83 CR3d 340.
- In a capital case, when the alleged misconduct was based on conflict of interest but it is clear to the court that any conflict of interest had no effect on the proceedings or any juror. See *People v Rundle* (2008) 43 C4th 76, 176–177, 74 CR3d 454, disapproved on another point in 45 C4th at 390.

TIP: You should interview the jurors who might have information and any other witnesses to the misconduct separately, outside of the presence of one another. Interview the offending juror las*t, after you h*ave received whatever information might be available from the other sources.

B. [§2.18] DISCHARGING A JUROR FOR MISCONDUCT DISCOVERED DURING TRIAL

You may discharge a juror when there is good cause shown to believe a juror cannot perform his or her duty as a juror. Pen C §1098; CCP §233. However, you can discharge a juror for misconduct only when the unwillingness or inability to perform is shown by a "demonstrable reality." *People v Cleveland* (2001) 25 C4th 466, 474, 484, 106 CR2d 313. For example, you may discharge a juror who expressed a fixed conclusion before the beginning of deliberations and refused to enter into the deliberations. *People v Wilson* (2008) 43 C4th 1, 26, 73 CR3d 620. Or you can discharge a juror who indicates an intent to change positions if it turned out that he or she was the lone holdout. 43 C4th at 27.

The demonstrable reality standard requires a showing that you relied on evidence that, in light of the entire record, supports the conclusion that misconduct was established. For example, a reviewing court will look both at the evidence itself and also the record of reasons you provide for the discharge. This standard is greater than the abuse of discretion standard and reflects a court's obligation to protect a defendant's right to due process and to a fair trial by an unbiased jury. See *People v Fuiava* (2012) 53 C4th 622, 712, 137 CR3d 147.

The demonstrable reality standard is not met when the evidence establishing a juror's unwillingness or inability to perform a juror's duties is ambiguous. *See People v Compton* (1971) 6 Cal3d 55, 59–60, 98 CR 217; *People v Bowers* (2001) 87 CA4th 722, 729, 104 CR2d 726.

C. [§2.19] CONCEALING FACTS ON VOIR DIRE

Intentionally concealing material information or giving false answers in response to voir dire questions is misconduct. *People v San Nicolas* (2004) 34 C4th 614, 644, 21 CR3d 612; *In re Hitchings* (1993) 6 C4th 97, 116, 24 CR2d 74; see *Enyart v City of Los Angeles* (1999) 76 CA4th 499, 509–511, 90 CR2d 502 (new trial was warranted based on five jurors' concealment on voir dire of bias against the defendants, the City of Los Angeles and LAPD). However, an inadvertent, unintentional or mistaken answer or omission of information is not misconduct. *In*

re Hamilton (1999) 20 C4th 273, 298–299, 84 CR2d 403. When information later surfaces that was not provided during voir dire because of true inadvertence or honest mistake, the test for discharging the juror is whether the juror is actually biased. *People v San Nicolas, supra,* 34 C4th at 646; *In re Hamilton, supra,* 20 C4th at 300. The juror's good faith when answering the voir dire questions is the most significant indicator of lack of bias, and you should look to the totality of the juror's voir dire responses in determining whether there was good faith. *In re Hamilton, supra*. However, if the voir dire questioning is specific and unambiguous enough to elicit information that is not disclosed, or as to which a false answer is given, a prima facie case of concealment or deception will usually be established. *People v Blackwell* (1987) 191 CA3d 925, 930, 236 CR 803.

Failure of a juror to disclose substantial familiarity with facts underlying the charges is prejudicial misconduct warranting a new trial. *Ovando v County of Los Angeles* (2008) 159 CA4th 42, 59−60, 71 CR3d 415.

> TIP: To avoid the problem in the above case and similar situations, some judges use the following at the beginning of voir dire:
>
> Each of you took a solemn oath to speak the truth about your ability to be fair and impartial. We are not mind readers. If you feel there is anything from your life experience, beliefs, or values that would prevent you from being fair and impartial, you should let us know during this jury selection process.

D. [§2.20] INATTENTIVENESS

You are not required to conduct a hearing involving a juror who counsel accuses of sleeping if you have not made the same observations of the juror. *People v Espinoza* (1992) 3 C4th 806, 821, 12 CR2d 682. However, when you have been put on notice that a juror may be dozing, you should engage in a "self-directed inquiry" by watching the juror. If you determine the juror is not dozing, then you need not conduct a hearing. You should, however, make a record of your observations. *People v Bradford* (1997) 15 C4th 1229, 1347, 65 CR2d 145. If there is convincing proof reflecting a demonstrable reality of the juror's inability to perform his or her duties because the juror was sleeping, you may discharge the juror. However, you should first conduct an inquiry of the juror to determine if the juror was actually dozing and missed testimony. *People v Johnson* (1993) 6 C4th 1, 21, 23 CR2d 593, overruled on another ground in 39 C4th at 879. For example, when a defendant called to the judge's attention that one of the jurors appeared to be sleeping during testimony, the judge asked the juror whether he had been paying attention to the proceedings. The juror proved that he was alert by describing his reaction to the testimony. Affirming the conviction, the Supreme Court held that the judge was not required to conduct a further inquiry. *People v Ochoa* (1998) 19 C4th 353, 418, 79 CR2d 408.

In another case, the appellate court held that a juror should not have been discharged for inattentiveness when, although the record showed he was inattentive at times during the deliberations and did not participate in the deliberations as fully as others, this conduct manifested his disagreement with the other jurors' evaluation of the evidence and did not show he was unable to function as a juror. *People v Bowers* (2001) 87 CA4th 722, 730–731, 104 CR2d 726. The court also held that a juror must not be discharged for sleeping unless there is convincing proof the juror slept during the trial. 87 CA4th at 731 (bare fact of sleeping at unknown time for unknown duration and without evidence of what, if anything, was occurring in

jury room at time is insufficient to support finding of misconduct or to conclude juror was unable to perform his duty). See *People v Bonilla* (2007) 41 C4th 313, 351–353, 60 CR3d 209 (discharge of juror not required when he reported to court that he had nodded off but under questioning stated that he had not missed anything).

E. [§2.21] Other Reasons for Discharge and Replacement

If before or after final submission of the case to the jury, a juror (1) dies, (2) becomes ill, (3) is found unable to perform the duties of a juror for other good cause, or (4) requests a discharge for good cause, you may discharge the juror and request the clerk to draw the name of an alternate as a replacement. CCP §§233–234; Pen C §1089. Good cause exists to discharge an impaneled juror if you find that the juror

- Cannot perform the duties of a juror. See *People v Williams* (1996) 46 CA4th 1767, 1780–1781, 54 CR2d 521 (judge properly dismissed juror during deliberations who was unable to comprehend simple concepts, forgot previous votes or discussions, and was not following the law).
- Has lost the ability to render a fair, impartial, and unbiased verdict. See *People v Feagin* (1995) 34 CA4th 1427, 1434–1437, 40 CR2d 918 (juror who had prejudged credibility of prosecution witnesses and who was unable to cast aside her personal bias in weighing the evidence was properly discharged). But see *People v Ramos* (2004) 34 C4th 494, 522–523, 21 CR3d 575 (juror's note to judge expressing juror's concern about defendant's spiritual well-being was not misconduct).
- Realizes he or she cannot fairly consider the case and asks to be removed. *People v Samuels* (2005) 36 C4th 96, 131–133, 30 CR3d 105 (judge properly discharged juror during penalty phase deliberations when juror requested to be removed from jury because she could not follow oath and instruction to consider imposing death penalty).
- Has become physically or emotionally unable to continue to serve as a juror due to illness or other circumstances, including the stress of being a juror. See *People v Cleveland* (2001) 25 C4th 466, 474, 106 CR2d 313; *People v Diaz* (2002) 95 CA4th 695, 703, 115 CR2d 799.
- Has a family emergency, *e.g.*, a death or serious illness in the juror's immediate family. See *People v Smith* (2005) 35 C4th 334, 348–349, 25 CR3d 554 (because juror had good cause to be absent from trial for indefinite period to care for elderly parent, judge properly replaced juror with alternate); *People v Bell* (1998) 61 CA4th 282, 289, 71 CR2d 415 (caring for sick or injured family member constitutes "good cause" for discharge); *People v Zamudio* (2008) 43 C4th 327, 349–350, 75 CR3d 289 (juror's father being ill and near death was "good cause" for discharge).
- Has a change of or loss of job that affects juror's ability to perform duties. *People v Delamora* (1996) 48 CA4th 1850, 1855–1856, 56 CR2d 382 (judge's authority to discharge juror for problems related to juror's employment).
- Repeatedly fails to appear at the court proceedings on time.
- Refuses to deliberate with the other jurors. *People v Cleveland, supra*, 25 C4th at 475, 485. See Jurors' Duty to Deliberate in §3.14.

- Has declaration of a fact, based on his or her own knowledge, that could be evidence in the case. Pen C §1120; 25 C4th at 476–477 (court's duty to conduct hearing to determine if good cause for discharge exists).

You should instruct the jury regarding a juror's discharge. See *People v Thomas* (1994) 26 CA4th 1328, 1333–1334, 32 CR2d 177. For example, you might say:

Juror _____ has been excused and replaced with an alternate juror. You must not speculate or consider for any purpose the reasons why this juror has been excused.

If a juror expresses concern to you about another juror's unexplained discharge, you may decide with the attorneys whether an explanation should be given. See *People v Davis, supra,* 10 C4th at 535.

An alternate must be selected by lot to replace a discharged juror, unless the attorneys have stipulated to another procedure. See CCP §234. If the replacement occurs during the deliberations, you must instruct the jury regarding its duty to disregard all past deliberations and to begin deliberating once again with the full participation of the new juror. *People v Proctor* (1992) 4 C4th 499, 536–538, 15 CR2d 340; *Mendoza v Club Car, Inc.* (2000) 81 CA4th 287, 298, 96 CR2d 605; see CACI 5014; CALCRIM 3575. If no alternate is available to replace a discharged juror and the parties will not stipulate to a verdict by the remaining jurors, you must declare a mistrial. See CCP §233.

X. [§2.22] RESPONDING TO JUROR COMPLAINTS

Each court should establish a reasonable mechanism for receiving and responding to juror complaints. Cal Rules of Ct, Standards of J Admin 10.51. You should make sure that you are aware of your court's mechanisms for responding to juror complaints so that you can respond immediately, if appropriate.

Chapter 3
JURY DELIBERATIONS

I. JUDGE'S DUTY TO INSTRUCT JURY

A. [§3.1] CRIMINAL CASES

In general. In a criminal case, you must instruct the jury on your own motion, even without request, on all general principles of law relevant to the issues raised by the evidence. *People v Blair* (2005) 36 C4th 686, 744, 31 CR3d 485; *People v Benavides* (2005) 35 C4th 69, 102, 24 CR3d 507. This general rule stems from the criminal defendant's constitutional right to have a jury determine every material issue presented by the evidence. *People v Flood* (1998) 18 C4th 470, 480, 76 CR2d 180. You must give instructions on each essential element of the charged offense. 18 C4th at 480–482. You must generally give a unanimity instruction if the evidence suggests more than one discrete criminal act and the prosecution has not elected to rely on a particular act. *People v Norman* (2007) 157 CA4th 460, 464, 467, 69 CR3d 359; see CALCRIM 3500.

Instructions on lesser included offenses. You must also give instructions on lesser included offenses if the evidence raises a question as to whether all elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. *People v Manriquez* (2005) 37 C4th 547, 587–588, 36 CR3d 340; *People v Blair, supra,* 36 C4th at 745; *People v Koontz* (2002) 27 C4th 1041, 1085, 119 CR2d 859. See, *e.g., People v Carter* (2005) 36 C4th 1114, 1183–1185, 32 CR3d 759 (judge properly refused to instruct jury on second degree murder as lesser included offense of first degree murder when there was no substantial evidence that would support jury's determination that killing constituted second degree, rather than first degree, murder); *People v Haley* (2004) 34 C4th 283, 312–313, 17 CR3d 877 (judge properly refused to instruct jury on involuntary manslaughter as lesser included offense of first degree felony murder when no rational jury could have found defendant guilty of involuntary manslaughter based on evidence presented); *People v Cole* (2004) 33 C4th 1158, 1214–1216, 17 CR3d 532 (judge properly refused to instruct jury on voluntary manslaughter as lesser included offense of first degree murder when evidence may have satisfied subjective element of heat of passion, but did not satisfy objective reasonable person requirement that requires provocation by the victim). You must so instruct the jury even when, as a matter of trial tactics, the defendant not only fails to request the instruction, but expressly objects to its being given. *People v Koontz, supra,* 27 C4th at 1085.

Pinpoint instructions. You are required to give pinpoint instructions only on request, and then only if the proposed instructions are not argumentative, do not merely duplicate other instructions, and are supported by substantial evidence. *People v Pollock* (2004) 32 C4th 1153, 1176, 13 CR3d 34. See *People v Adrian* (1982) 135 CA3d 335, 337, 185 CR 506 (such instructions may relate reasonable doubt standard for proof of guilt to particular elements of charged crime or may "pinpoint" crux of defendant's case, such as mistaken identification or alibi); *People v Flores* (2007) 157 CA4th 216, 220, 68 CR3d 472. You do not have a sua sponte duty to give such instructions. See *People v Henderson* (2003) 110 CA4th 737, 743–744, 2 CR3d 32.

Capital cases. In a capital case, you need not instruct the jury on whether any of the various statutory penalty factors is potentially aggravating or mitigating, because the aggravating or

mitigating nature of these factors should be self-evident to any reasonable person within the context of the particular case. *People v Pollock, supra*, 32 C4th at 1193. Likewise, you need not instruct the jury that the absence of a mitigating circumstance is not itself an aggravating circumstance. 32 C4th at 1193–1194.

Refusing instructions. You should refuse a party's request for instruction on a legal issue if there is no evidence to which the instruction properly may be related. *People v Watie* (2002) 100 CA4th 866, 883, 124 CR2d 259; *People v Robinson* (1999) 72 CA4th 421, 428, 84 CR2d 832. Instructing the jury on abstract legal principles that are not pertinent to the issues in the case is error. 72 CA4th at 428. In addition, you should give a requested instruction only if it is supported by substantial evidence. *People v Flood, supra*, 18 C4th at 480. See *People v Shelmire* (2005) 130 CA4th 1044, 1046, 1054, 30 CR3d 696 (defendant is entitled to instruction on a defense only if substantial evidence supports that defense). See also *People v Roldan* (2005) 35 C4th 646, 715, 27 CR3d 360, disapproved on another point in 45 C4th at 390 (judge properly refused requested instruction on intoxication defense when only minimal and insubstantial evidence supported defense; *People v Lee* (2005) 131 CA4th 1413, 1426–1427, 32 CR3d 745 (evidence is substantial if reasonable jury could find existence of particular facts underlying instruction). You may refuse to give an instruction that is surplusage and adds nothing to the other instructions. *People v San Nicolas* (2004) 34 C4th 614, 675, 21 CR3d 612.

You need not instruct the jury on the meaning of a word in a statute unless the legal meaning of the word is different from the commonly understood meaning. *People v Roberge* (2003) 29 C4th 979, 988, 129 CR2d 861; *People v Rodriguez* (2002) 28 C4th 543, 546–547, 122 CR2d 348; *People v Brady* (2005) 129 CA4th 1314, 1329, 29 CR3d 286 (no need to define term "disconnected," which has no technical meaning peculiar to the law).

CALCRIM. Effective January 1, 2006, the California Criminal Jury Instructions (CALCRIM), approved by the Judicial Council, are now the official jury instructions to use in all criminal cases in California. Cal Rules of Ct 2.1050(a), (b). Although the use of CALCRIM is not mandated to the exclusion of other valid instructions (*People v Thomas* (2007) 150 CA4th 461, 465–466, 58 CR3d 581), you are strongly encouraged to use these instructions. If the latest edition of CALCRIM contains an instruction that applies to a case and you determine that the jury should be instructed on the subject, the Judicial Council recommends that you give this instruction unless you find that a different instruction would more accurately state the law and be understood by the jurors. Cal Rules of Ct 2.1050(e). If CALCRIM does not contain an instruction on a subject on which you determine that the jury should be instructed, or if the instruction contained in CALCRIM cannot be modified to submit the issue properly, the instruction you give on that subject should be accurate, brief, understandable, impartial, and free from argument. Cal Rules of Ct 2.1050(e). Copies and updates of CALCRIM are available on the California Courts website. Cal Rules of Ct 2.1050(c).

The Judicial Council's guide for using CALCRIM states that CALCRIM and CALJIC instructions should *never* be used together because mixing the two sets of instructions may result in omissions or confusion that could severely compromise clarity and accuracy. See instructions at http://www.courtinfo.ca.gov/jury/criminaljuryinstructions/calcrim_juryins_guide.pdf

For a comprehensive list of the law for determining quickly and correctly what jury instructions you must give in a criminal case, see CJER's Mandatory Criminal Jury Instructions Handbook.

B. CIVIL CASES

1. [§3.2] Right to Jury Instructions

In a civil case, you may instruct on all matters of law you think the jury needs to know to render a verdict in the case. See CCP §608. Ordinarily, you do not have a duty to instruct the jury on a particular issue unless specifically requested to do so by the parties. *Willden v Washington Nat'l Ins. Co.* (1976) 18 C3d 631, 636, 135 CR 69.

Each party has a right to have the jury instructed on all theories of its case that are supported by the pleadings and the evidence, or by inferences that reasonably may be drawn from the evidence, as long as the instructions are proper. *Soule v General Motors Corp.* (1994) 8 C4th 548, 572, 34 CR2d 607. The parties have a right to have the jury instructed on their specific theories of the case rather than in abstract generalities. 8 C4th at 572–573. They are entitled to jury instructions that fairly and clearly state the essential legal principles applicable to the case. *Harris v Oaks Shopping Ctr.* (1999) 70 CA4th 206, 208, 82 CR2d 523. Jury instructions are sufficient if they give the jury a balanced statement of the necessary legal principles applicable to the theories of the case the parties presented. 70 CA4th at 208. However, you are not required to give instructions on a party's theory of the case unless that theory is supported by substantial evidence. *Morey v Vannucci* (1998) 64 CA4th 904, 915, 75 CR2d 573. See *Alexander v Nextel Communications, Inc.* (1997) 52 CA4th 1376, 1380, 61 CR2d 293 (error to give instruction on theory not supported by evidence presented).

The critical issue is not whether you find the evidence persuasive, but whether the evidence could support a finding in the proponent's favor. *Freeze v Lost Isle Partners* (2002) 96 CA4th 45, 52–53, 116 CR2d 520. You may, however, properly refuse to give an instruction proposed by a party when your own instruction is a correct statement of the law and adequately addresses the issues to be resolved by the jury. *McMahon v Albany Unified School Dist.* (2002) 104 CA4th 1275, 1290, 129 CR2d 184.

You may give a jury instruction in the language of an applicable statute, or based on state or federal regulations. *Conservatorship of Gregory* (2000) 80 CA4th 514, 520, 522–524, 95 CR2d 336; but see California Civil Jury Instructions (CACI) discussed below. When giving an instruction based on a statute, you should ordinarily use the statutory language to avoid omitting or erroneously describing a requirement specified in the statute. See *Chapman v Enos* (2004) 116 CA4th 920, 926–931, 10 CR3d 852 (in sexual harassment action against employer, judge erred in expanding definition of supervisor beyond statutory definition under FEHA); *Lundy v Ford Motor Co.* (2001) 87 CA4th 472, 478–480, 104 CR2d 545 (judge erred by omitting key term of statute). You need not instruct the jury on the meaning of a word in the statute unless the legal meaning of the word is different from the commonly understood meaning. *Akers v County of San Diego* (2002) 95 CA4th 1441, 1459, 116 CR2d 602 (in employment discrimination action, judge must instruct jury on meaning of "adverse" as used in statute defining "adverse employment action" because legal definition includes only adverse actions that substantially and materially affect terms and conditions of employee's job).

You may also give a jury instruction based on case law. See *Craddock v Kmart Corp.* (2001) 89 CA4th 1300, 107 CR2d 881 (special instruction approved in prior appellate case). See also *K.G. v County of Riverside* (2003) 106 CA4th 1374, 1379–1387, 131 CR2d 762 (judge should refuse to give party's instruction based on case law that contains inaccurate statements of law).

Primary assumption of the risk (*i.e.*, whether the defendant owed the plaintiff a duty of care) is not a proper subject for a jury instruction. Whether primary assumption of the risk negates a defendant's duty to protect the plaintiff from a particular risk is a legal determination to be made by the judge, not the jury. *Vine v Bear Valley Ski Co.* (2004) 118 CA4th 577, 592, 13 CR3d 370. In certain circumstances, however, primary and secondary assumption of the risk (*e.g.*, whether the defendant breached the duty not to increase the risks inherent in a hazardous sporting activity) are intertwined, and you must give an instruction to the jury so that it can properly determine whether the defendant did, in fact, increase the inherent risks. 118 CA4th at 592–593. If the jury determines that the defendant increased the inherent risk, it may then consider the plaintiff's claim based on secondary assumption of the risk as an aspect of the plaintiff's comparative fault. 118 CA4th at 593. Giving instructions on ordinary negligence and contributory negligence does not satisfy the judge's duty to instruct the jury on secondary assumption of the risk. 118 CA4th at 582–583, 594–598.

A judge does not satisfy the duty to instruct the jury by giving the jury a highlighted handbook covering the proceedings; a handbook is no substitute for concise, carefully drafted jury instructions. *Carrau v Marvin Lumber & Cedar Co.* (2001) 93 CA4th 281, 295–296, 112 CR2d 869.

For further discussion of giving instructions in civil cases, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—TRIAL, SECOND EDITION, chap 13 (Cal CJER 2010).

2. [§3.3] California Civil Jury Instructions (CACI)

Using the new instructions. The California Civil Jury Instructions (CACI), approved by the Judicial Council, effective January 1, 2004, are now the official jury instructions for use in California. The goal of these instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in "plain English," so that it is understandable to the average juror. Cal Rules of Ct 2.1050(a), (b).

You are strongly encouraged to use these instructions, although their use is not mandatory. If the latest edition of the CACI contains an instruction that applies to a case and you determine that the jury should be instructed on the subject, the Judicial Council recommends that you give this instruction unless you find that a different instruction would more accurately state the law and be understood by the jurors. Cal Rules of Ct 2.1050(e).

> TIP: Some judges believe that the new rules mean that you should make a finding on the record that an instruction substituted for a CACI instruction more accurately states the law and can be understood by the jurors to withstand any possible appeal based on the failure to use CACI.

If the latest edition of the CACI does *not* contain an instruction on a subject on which you determine that the jury should be instructed, or if the instruction contained in the CACI cannot be modified to submit the issue properly, the instruction you give on that subject should be accurate, brief, understandable, impartial, and free from argument. Cal Rules of Ct 2.1050(e).

Obtaining copies and updates of the new instructions. Copies and updates of the approved jury instructions are available on the California Courts website at http://www.courtinfo.ca.gov/jury/civiljuryinstructions/index.htm. Cal Rules of Ct 2.1050(c). The instructions are regularly updated and maintained by the Judicial Council through its advisory committees on jury instructions. Judges may submit suggestions for improving or modifying the instructions or creating new instructions for the advisory committee to consider. These suggestions should be

sent to the Administrative Office of the Courts, Office of the General Counsel. Cal Rules of Ct 2.1050(d).

Citing the new instructions. The instructions should be cited as "CACI _."

C. [§3.4] INSTRUCTION ON DELIBERATIONS

You may provide the following suggested procedures to the jury for its deliberations:

You are free to manage your jury deliberations in any way that seems most suitable to you. I would like to make a few suggestions that may help you to proceed more smoothly with your deliberations. You are free to accept or reject these suggestions.

When you return to the jury room to begin your deliberations, you might want to take a few minutes to get acquainted. You could each in turn introduce yourselves and indicate any topics or questions you want to discuss during the deliberations. I suggest, however, that you not give your opinion at this point about how you would vote.

By first getting to know each other, you will feel more comfortable sharing your ideas, and you will have a better basis for choosing your presiding juror. Give careful consideration to this choice. Look for a juror who is a good listener and observer, who can organize the evidence and discussion, and who will see that every juror is heard fairly.

You should then discuss the case with your fellow jurors to reach agreement if you can do so. I suggest that you discuss the evidence and the law to your satisfaction before you take a vote, organize your discussion by separately considering each charge or claim and by separately examining the evidence relating to each element of that charge or claim, and identify those issues for which there are differences of opinion and then discuss each in turn. But how you ultimately deliberate is up to you.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence and the law, discussed the case fully with the other jurors, and listened to the views of the other jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right. Each of you must make your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. Nothing I have said or done is intended to suggest what your verdict should be. That is entirely for you to decide.

II. [§3.5] JURY'S DUTY TO FOLLOW JUDGE'S INSTRUCTIONS—NULLIFICATION

Jurors take an oath to render a true verdict according to the evidence and the judge's instructions. See CCP §232(b); *People v Williams* (2001) 25 C4th 441, 448, 106 CR2d 295. You should emphasize this obligation by so instructing the jurors at various times during the trial. See *People v Como* (2002) 95 CA4th 1088, 1091, 115 CR2d 922 (judge properly instructed jurors

that "You must accept and follow the law as I state it to you, regardless of whether you agree with the law").

✪ The Commission has recommended that the Judicial Council oppose legislation that would permit or require trial judges to inform the jury of its power of nullification. Commission Report, p 92. This is in accordance with California case law, which provides that judges are prohibited from instructing jurors that they may disregard ("nullify") a law they consider unjust. See *People v Cline* (1998) 60 CA4th 1327, 1335, 71 CR2d 41. See also *People v Nichols* (1997) 54 CA4th 21, 23–25, 62 CR2d 433 (judge properly refuses to inform jury that defendant is charged under three-strikes law because to do so would in effect be "inviting" jury to exercise power of jury nullification).

The duty to follow a judge's instruction means that you may discharge a juror who refuses to follow your instructions. *People v Engelman* (2002) 28 C4th 436, 442, 121 CR2d 862; *People v Williams, supra,* 25 C4th at 448–449, 463. You must, however, exercise care in responding to an allegation from a deliberating jury that one of the jurors is refusing to follow the instructions. *People v Engelman, supra,* 28 C4th at 445. Even though such a refusal is misconduct, a judge's inquiry regarding the juror's motivations could compromise the secrecy of the jury's deliberations. 28 C4th at 445.

You may also grant a new trial if you find that one or more jurors agreed, explicitly or implicitly, to disregard your instructions (see *People v Perez* (1992) 4 CA4th 893, 908, 6 CR2d 141), even if the jurors' failure to follow the instructions does not suggest a bias toward either side (*People v Daniels* (1991) 52 C3d 815, 863–864, 277 CR 122). A juror's expressed intent not to follow the law, however, does not constitute grounds for a new trial if the juror subsequently agrees to follow the law after reinstruction by the judge or admonition by the other jurors. See *Romo v Ford Motor Co.* (2002) 99 CA4th 1115, 1129–1136, 122 CR2d 139, disapproved on another point in 33 C4th at 1250.

TIP: One suggested technique that some judges have found successful is to instruct the jurors of the importance of following the rules. It can be pointed out that if even one person elects to disregard rules, it impacts the rights of all the parties and no one is being given the opportunity to respond or to right the wrong. An analogy can be made to a person who decides they don't want to obey red and green lights. The system only works if everyone follows the rules. The damage and chaos caused by even one person running that red light because they don't want to obey the law can be substantial.

The courts recognize that, in some instances, a jury has the ability to disregard, or nullify, the law, *e.g.,* the jury may acquit a criminal defendant against the weight of the evidence, the jury may return inconsistent verdicts, and a judge may not direct a jury to enter a guilty verdict even if the evidence is conclusive. *People v Williams, supra,* 25 C4th at 449. But the jury's power to nullify the law is attributable to two unique features of criminal trials: (1) A jury in a criminal trial has the right to return a general verdict that does not specify how the jury applied the law to the facts, what law it applied, or what facts it found; and (2) the constitutional double jeopardy bar prevents an appellate court from disregarding the jury's verdict in the defendant's favor and ordering a new trial on the same charges. 25 C4th at 450.

This power to return a verdict of not guilty for impermissible reasons, however, does not lessen the obligation of each juror to obey the judge's instructions. 25 C4th at 450–451. Thus, even though the jury may disregard your instructions and, in some cases, there may be no

remedy, you must nevertheless instruct the jury on the law and the jury has a duty to follow these instructions. 25 C4th at 451, 463.

In a civil case, the jury's ability to disregard or nullify a law is sharply curtailed by the judge's authority under CCP §630 to direct the jury to enter a particular verdict. 25 C4th at 451 n6. See *Howard v Owens Corning* (1999) 72 CA4th 621, 629–630, 85 CR2d 386 (factors to consider on motion for directed verdict).

The jury's disregard of the judge's instructions must be distinguished from the jury's confusion about or misunderstanding of the instructions. The former is grounds for impeaching the jury's verdict, while the latter is not. See *Ford v Bennacka* (1990) 226 CA3d 330, 335–336, 276 CR 513.

III. [§3.6] MANNER OF DELIVERING INSTRUCTIONS TO JURY

When you prepare to deliver the instructions to the jury, you should

- Organize them in a logical, meaningful sequence, organize the headings so that they highlight the subject matter, and number them to avoid omissions. The order in which you read the instructions is within your discretion. See *Nungaray v Pleasant Valley Lima Bean Growers & Warehouse Ass'n* (1956) 142 CA2d 653, 661, 300 P2d 285. Some judges sequence them by their CACI or CALCRIM numbers, while others prefer to give them in the following order: (1) introductory instructions; (2) duties of the court; (3) duties of jurors; (4) evidence and witnesses; (5) issues and substantive law; (6) burden of proof; and (7) concluding instructions.
- Make a final check in chambers to ensure that the instructions are complete, correct, and properly organized. This will prevent distracting interruptions while you rearrange, correct, or search for instructions.
- If the jurors are given a written copy of the instructions, request the clerk to verify that the copy of the instructions they will be allowed to take into the jury room during deliberations is the same as the copy of the instructions that you will read.

TIP: If at all possible, you should provide each juror with a written copy of the instructions. Using a booklet format instead of individual pages reduces the number of pages required. The individual copy should be provided before the reading so that jurors may follow along. Judges who have done this have found that jurors have fewer legal questions during deliberations. Jurors in a pilot study who were provided written instructions said they were better able to understand their obligation and avoid speculation and distractions. They indicated that they referred back to the instructions frequently for clarification when they had questions.

When delivering the instructions, you should

- Remember how difficult they are for laypersons to understand.
- Ensure that your speech is slow, clear, and easy to hear and understand.
- Maintain as much eye contact with each juror as possible.
- Read all the instructions without interruption, except for rest periods or lunch breaks, unless the jurors' attention is wavering and a recess might be beneficial.

- If applicable, before reading the instructions, give them a copy to take into the jury room during deliberations so that they will not feel compelled to take notes during the reading. Let them read along.
- Be careful not to unduly emphasize certain instructions over others. Some vocal inflection, however, can be useful to maintain the jurors' attention and facilitate their understanding.
- Use transitional or introductory phrases as you reach a new section, *e.g.,* "Now we will talk about the elements of the plaintiff's cause of action," or "These instructions will help you evaluate the testimony of the witnesses."

IV. [§3.7] COMMENTING ON EVIDENCE

You may make any comment on the evidence, the testimony, or a witness's credibility that you consider necessary to aid the jurors in reaching a just verdict. Cal Const art VI, §10; Pen C §§1093(f), 1127; *People v Proctor* (1992) 4 C4th 499, 541–542, 15 CR2d 340; *People v Linwood* (2003) 105 CA4th 59, 74, 129 CR2d 73 (judge may comment to jury in attempt to clarify possible confusion as to evidence supporting each count); *People v Santana* (2000) 80 CA4th 1194, 1206–1207, 96 CR2d 158 (judge may not discredit a party or make disparaging remarks that create impression judge favors one party over the other). But if you do comment on testimony or a witness's credibility, you must also instruct the jurors that they are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses. See CCP §608 (civil cases); Pen C §1127 (criminal cases).

Any comment must be accurate, temperate, nonargumentative, and scrupulously fair. You may not, by your comments, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's factfinding power. You have broad latitude in making fair commentary, as long as your comments do not effectively control the verdict. See *People v Monterroso* (2004) 34 C4th 743, 780, 22 CR3d 1.

> TIP: You should carefully consider whether a comment will invade the province of the jury or otherwise unfairly prejudice a party. The danger of judicial comment is that a jury may rely too much on your opinion as to how a factual issue should be resolved. You may comment on the speculative nature of a witness's testimony when the testimony lacks factual foundation. See *People v Miller* (1999) 69 CA4th 190, 206, 81 CR2d 410. In any event, your comments should never discredit a party or make disparaging remarks that create the impression that you favor one party over the other. See *People v Santana, supra,* 80 CA4th at 1206–1207. Most judges do not comment on the evidence except in exceptional circumstances.

V. TREATMENT OF JURORS DURING DELIBERATIONS

A. [§3.8] JURY ROOM

The court must provide the jurors with a room for their use during deliberations. This room must be designed to minimize unwarranted intrusions by other persons. It must have suitable

furnishings, equipment, and supplies, and restroom accommodations for male and female jurors. CCP §216(a).

B. [§3.9] Secret Deliberations Under Deputy or Bailiff's Charge

An important element of trial by jury is the conduct of deliberations in secret. Secrecy affords the jurors the freedom to engage in frank discussions without fear of exposure to the parties, to other trial participants, and to the public. *People v Engelman* (2002) 28 C4th 436, 442, 121 CR2d 862. As a general rule, no one, including the judge, has a right to know how a jury, or any individual juror, has deliberated or how a decision was reached by the jury or any juror. 28 C4th at 443. Secrecy in deliberations may give way to reasonable inquiry by the judge, however, when the judge receives an allegation that a deliberating juror has committed misconduct. 28 C4th at 443. See §§3.24–3.25.

When the jurors retire for deliberations, you must place them under the deputy or bailiff's charge. The deputy or bailiff must ensure that the jurors are kept together and that they receive no communications until they have agreed on a verdict or are discharged by the judge. See CCP §613; Pen C §1128.

Anyone who listens to or observes a jury's deliberations is guilty of a misdemeanor. Pen C §167.

C. [§3.10] Schedule

The schedule for a deliberating jury is not prescribed by statute or court rule. Most judges require jurors to be present and to deliberate Monday through Friday during the court's normal business hours. Variations from this schedule should be permitted as circumstances warrant. Micromanaging their breaks and recesses can disrupt the discussion and could have an impact on verdicts. You may permit jurors to deliberate past normal business hours if the foreperson or presiding juror indicates that the jury is close to reaching a verdict.

Juries do not normally deliberate on weekends or holidays. See CCP §134. See also *People v Bolden* (2002) 29 C4th 515, 561–562, 127 CR2d 802 (suspension of jury deliberations from December 20 until January 2 for convenience of jurors during this traditional holiday period when jurors were likely to be particularly inconvenienced by court duties).

In a case in which the trial was conducted on a four-day-per-week schedule, with Fridays off, and in which the judge asked the jurors to begin deliberations on Friday morning following the conclusion of closing arguments on Thursday afternoon, the judge did not improperly rush the jury to a verdict by asking them to come in on their scheduled day off. The Supreme Court rejected the argument that the judge "was subtly implying that deliberations would not take very long." *People v Gurule* (2002) 28 C4th 557, 632, 123 CR2d 345. The Court noted that judges should refrain from placing specific time pressure on a deliberating jury and should never imply that the case warrants only desultory deliberations, but that the record in this case failed to support the defendant's claim that the judge pressured the jurors or implied that the judge believed the deliberations would be brief. 28 C4th at 633.

D. [§3.11] Meals

You have the authority to arrange for jurors' meals while the jurors are kept together during trial and deliberations. See CCP §217 (criminal cases); *Hart Bros. Co. v County of Los Angeles* (1938) 31 CA2d Supp 766, 770–771, 82 P2d 221 (civil cases). But most judges permit the jurors to separate at lunchtime both during trial and during deliberations after being given the usual admonition. See CCP §611. When jurors are not permitted to separate at lunchtime during

deliberations, the parties in civil cases may be required, by local rule (see, *e.g.*, Placer County Superior Court local rule 20.4(B), which requires the party demanding a trial to be responsible for all jury costs, including fees, mileage, and meals) to split the cost of the jurors' meals or the party paying the jury fees may be required to pay the full cost. Jurors should, of course, not be told who is paying for the meal. In civil cases, many judges are finding that an arranged lunch for all the jurors on the last day helps them bond and opens up communication that can assist in the deliberation process. Obviously, the attorneys have to agree and be willing to take on the cost. This is an area that the judge should be careful not to be perceived as coercing the attorneys, but it is generally to their benefit to have the deliberations work as smoothly as possible.

E. [§3.12] SMOKING

Smoking is prohibited in all court facilities, including the jury room. See Cal Rules of Ct 10.504. Jurors who need a smoking break must go outside the courthouse. Because such a break is a separation of the jury, the admonition under CCP §611 must be given, unless the parties have stipulated otherwise. A juror commits misconduct by leaving the jury room during deliberations for a smoking break without obtaining prior permission to do so. See *People v Dorsey* (1995) 34 CA4th 694, 701–703, 40 CR2d 384.

F. [§3.13] SPECIAL ASSISTANCE FOR JURORS WITH DISABILITIES

Requests for accommodations apply to jurors as well as parties, witnesses, and lawyers. Cal Rules of Ct 1.100(a). The same process of requesting accommodation is available to all individuals needing accommodation. Cal Rules of Ct 1.100(c).

By statute you are responsible for appointing a service provider when needed to facilitate the communication or participation of a juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired. In addition, the parties must (1) stipulate to the presence of the service provider in the jury room during deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider. CCP §224(a), (c). You must instruct the service provider and the jury that the service provider may not participate in the jury's deliberations in any manner except to facilitate communication between the disabled juror and the other jurors. For an instruction that might be given, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—TRIAL, SECOND EDITION, §14.11 (Cal CJER 2010).

VI. [§3.14] JURORS' DUTY TO DELIBERATE

The constitutional right to a jury trial includes the right to a verdict arrived at through the deliberations of all the jurors. *Griesel v Dart Indus., Inc.* (1979) 23 C3d 578, 584, 153 CR 213 (overruled on other grounds in 5 C4th at 695).

If you question whether all of the jurors are participating in deliberations, you may reinstruct the jurors regarding their duty to deliberate and may permit them to continue deliberations before making inquiries that could intrude on the sanctity of the deliberations. *People v Cleveland* (2001) 25 C4th 466, 480, 106 CR2d 313. If this reinstruction does not resolve the problem and you are on notice that there may be grounds to discharge a juror during deliberations, you must conduct whatever inquiry is reasonably necessary to determine whether these grounds exist. 25 C4th at 480, 484.

You may discharge any juror who refuses to deliberate. *People v Engelman* (2002) 28 C4th 436, 442, 121 CR2d 862; *People v Cleveland, supra*, 25 C4th at 475, 485; *Boeken v Philip Morris, Inc.* (2005) 127 CA4th 1640, 1686, 26 CR3d 638. 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 Cleveland, supra*, 25 C4th at 485. But you may discharge the juror only if the juror's unwillingness or inability to deliberate appears as a "demonstrable reality." *People v Cleveland, supra,* 25 C4th at 475, 484; *Boeken v Philip Morris, Inc., supra,* 127 CA4th at 1686.

Examples of a refusal to deliberate include expressing a fixed conclusion at the beginning of deliberations and refusing to consider other viewpoints, refusing to speak to the other jurors, and attempting to separate oneself physically from the other jurors. *People v Cleveland, supra,* 25 C4th at 485. See *Boeken v Philip Morris, Inc., supra,* 127 CA4th at 1686–1688 (after not being elected foreperson, juror separated herself physically from the other jurors, did not pay attention to the deliberations, and instead slept or read a novel or the Bible throughout the jury deliberations). However, neither a juror's reliance on faulty logic or analysis nor a juror's disagreement with the majority of the jury as to what the evidence shows or how the law should be applied constitutes a refusal to deliberate, and neither is a ground for discharge. *People v Engelman, supra,* 28 C4th at 446. See *People v Elam* (2001) 91 CA4th 298, 312–315, 110 CR2d 185 (insufficient command of English is ground for discharge, but disagreement with majority is not).

TIP: Before conducting a deliberation misconduct investigation, you should consider reinstructing the jury about their duty to deliberate. *People v Cleveland, supra*, 25 C4th at 480; see the second paragraphs of CACI 5009 and CALCRIM 3550; see *People v Burgener* (2003) 29 C4th 833, 879, 129 CR2d 747, for a stronger admonition that was upheld. If that does not work and you decide to conduct an investigation, you should limit the scope of your inquiry to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. *People v Cleveland, supra,* 25 C4th at 480. Your inquiry should focus on the conduct of the jurors rather than on the content of their deliberations. 25 C4th at 480. You should stop your inquiry if you become satisfied that the juror is participating in deliberations and is not committing misconduct. 25 C4th at 480. You should not permit the attorneys to question deliberating jurors, but you may allow them to suggest areas of inquiry or specific questions for you to ask the jurors. 25 C4th at 485; *People v Barber* (2002) 102 CA4th 145, 150, 124 CR2d 917. To assess whether a particular juror is refusing to deliberate, you should question not only the jurors who have made this claim, but should also question other jurors and the juror in question. 102 CA4th at 151–152 (questioning only the complaining jurors is insufficient inquiry).

A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate because the juror contends that further discussion will not change his or her views. *People v Cleveland, supra,* 25 C4th at 485; *People v Karapetyan* (2003) 106 CA4th 609, 621, 130 CR2d 849 (error to remove juror who had been deliberating fully and completely for more than five days and then indicated he was not going to change his view). Conversely, when the jurors have only been deliberating for a short time and, after conducting an inquiry into the matter, the judge concludes that one of the jurors has not participated in the deliberations from the outset, the judge may properly discharge the juror. *People v Diaz* (2002) 95 CA4th 695, 702–705, 115 CR2d 799.

You must exercise caution in determining whether a juror has refused to deliberate to preserve the privacy of jury deliberations. *People v Engelman, supra,* 28 C4th at 445; *People v Cleveland, supra,* 25 C4th at 475, 484. But you have a duty to make a reasonable inquiry, and this inquiry must be conducted with care so as to minimize pressure on legitimate minority jurors. 25 C4th at 476. See *People v Diaz, supra,* 95 CA4th at 703–705 (example of sufficient inquiry).

TIP: When a note comes from the jury containing a complaint about a juror, many judges meet with counsel and discuss a preliminary game plan before doing anything else. Involving the attorneys at the beginning may immunize you against Monday-morning quarterbacking on appeal. Many judges then begin their inquiry by meeting with the foreperson to ascertain the nature of the problem. The inquiry is conducted in court, on the record, with counsel and parties present, but outside the presence of the other jurors. After discussing the matter with counsel, you may revise your plan for addressing the problem. Conduct the proceedings in a manner that will avoid the creation of an adversarial environment or perhaps embroiling one or more jurors in a conflict with the juror who is refusing to deliberate. Initially, you may admonish the entire panel, in a neutral way, reminding the jurors of their role as judges, not advocates, and of the collaborative nature of the deliberations process. If the problem persists, you may again speak to the foreperson and then question the subject juror about his or her inability to deliberate, but should stop the juror from responding if he or she begins to describe the deliberations. You should begin your discussions with each juror by telling them you do not want to talk about the content of their deliberations, but rather about any juror conduct they feel might be inappropriate. When you have finished talking with each juror, admonish each of them individually not to discuss with the other jurors what was said during your conversation and not to let your discussion influence their decision in anyway. It is usually best to speak to the subject juror last, so that you have all of the available information. Also, you may hear enough from other jurors to indicate that the subject juror's deliberation conduct is permissible deliberation conduct. In such a situation, you should stop your inquiry and you need not risk alienating the subject juror. If you determine that the subject juror is not committing misconduct, then tell the jury to continue their deliberations and re-admonish them as to their duties.

A. [§3.15] CRIMINAL CASE CONSIDERATIONS

You should use CALCRIM 3550 to instruct the jurors regarding their deliberations, including the selection of a foreperson and the procedure for communicating with you if they have any questions once they have begun deliberating. It also instructs the jurors regarding their duty to discuss the evidence with each other, to keep an open mind, and to be impartial judges of the facts. It reiterates the admonition that they must not discuss the case with anyone other than the other jurors and only when all jurors are present in the jury room.

You may not discharge a juror during deliberations merely because the juror has doubts about the sufficiency of the prosecution's evidence. *People v Cleveland* (2001) 25 C4th 466, 483, 485, 106 CR2d 313; *People v Bowers* (2001) 87 CA4th 722, 731–736, 104 CR2d 726 (juror did not refuse to deliberate by holding to belief that prosecution witnesses lacked credibility). Nor may you discharge jurors who have listened to and considered others' views and expressed

their own opinions, even when they appear to have strong views before deliberations begin. See *In re Bolden* (2009) 46 C4th 216, 229, 92 CR3d 850.

B. [§3.16] CIVIL CASE CONSIDERATIONS

In a civil case, the jurors may take a straw vote at the outset of their deliberations and if the vote reveals that at least nine jurors are in agreement, the jury may decide to render a verdict based on that vote instead of deliberating further. *Vomaska v City of San Diego* (1997) 55 CA4th 905, 911–912, 64 CR2d 492. Although the preferred procedure is for the jury to discuss the case, a party's constitutional right to have its case decided by a jury does not include the right to compel the jurors to discuss issues that they have chosen to decide without discussion. 55 CA4th at 911. Code of Civil Procedure §613 provides that when a case is submitted to the jury, the jury may decide the case in court or retire for deliberation. This provision suggests that a jury may choose to decide the case immediately following the judge's instructions. *Mendoza v Club Car, Inc.* (2000) 81 CA4th 287, 309–310, 96 CR2d 605; *Vomaska v City of San Diego, supra,* 55 CA4th at 912.

VII. [§3.17] SELECTION OF JURY FOREPERSON OR PRESIDING JUROR

As part of the final instructions, you should instruct the jurors that, on retiring, they must select one of their members to act as foreperson to preside over their deliberations. In some courts, this person is designated the presiding juror.

> TIP: If your court does not already do this, consider providing copies of the American Judicature Society's pamphlet, *Behind Closed Doors: A Guide for Jury Deliberations.* Some judges have had success simply by reading appropriate sections to the jurors. On obtaining copies of this pamphlet, see http://www.ajs.org/cart/storefront.asp.

To ensure an impartial jury, the jurors, not the judge, must select the foreperson or presiding juror. It is reversible error (without proof of actual prejudice) for a judge to make the selection because the other jurors may defer to the opinion of the judge's nominee regardless of the other instructions given. *Dorshkind v Harry N. Koff Agency, Inc.* (1976) 64 CA3d 302, 308–309, 134 CR 344. Jurors are entitled to select a new foreperson or presiding juror during the course of their deliberations. *People v Perez* (1989) 212 CA3d 395, 402–403, 260 CR 474.

VIII. [§3.18] WHAT MAY BE TAKEN INTO JURY ROOM

Jurors may take the following into the jury room:

- *Documentary evidence.* All papers received in evidence, except depositions. If you determine that certain papers should remain with the person having possession of them, copies may be furnished to the jurors for their use in the jury room. See CCP §612 (civil cases); Pen C §1137 (criminal cases). The pleadings and other papers, unless received or read into evidence, may not be taken into the jury room. See *Powley v Swensen* (1905) 146 C 471, 481–483, 80 P 722.
- *Exhibits.* Exhibits admitted in evidence that you deem proper. See CCP §612 (civil cases). Some judges exclude exhibits that are inherently dangerous (*e.g.,* weapons), some are not permitted by court rule (*e.g.,* drugs), some cannot be readily understood without expert explanation (*e.g.,* X-rays), are inflammatory or have a prejudicial effect that outweighs their probative value (*e.g.,* a blowup of a gruesome photograph), or include

inadmissible matter that cannot be readily deleted. Large or bulky exhibits are also frequently excluded. If an attorney objects to a particular exhibit being sent into the jury room, you should conduct a hearing on the matter. A hearing should also be held if the jurors request to see an exhibit that is not included in the clerk's index of exhibits to be sent into the jury room. See *People v Horowitz* (1945) 70 CA2d 675, 703–704, 161 P2d 833. After final argument and before the jurors retire to deliberate, some judges seek the attorneys' stipulation that all exhibits may be sent into the jury room. If there are exhibits that are susceptible to experimentation, most judges give the jurors a cautionary instruction against their use.

- *Jurors' notes.* Jurors' notes of the testimony or other proceedings (see CCP §612 (civil cases); Pen C §1137 (criminal cases)), including diagrams they have made based on trial testimony (see *Wagner v Doulton* (1980) 112 CA3d 945, 950–951, 169 CR 550) and notes on the attorneys' arguments (*Ferner v Casalegno* (1956) 141 CA2d 467, 475–476, 297 P2d 91). But jurors may not bring notes made by other persons into the jury room. See CCP §612; *Conger v White* (1945) 69 CA2d 28, 41–42, 158 P2d 415 (improper for jurors to take into jury room large sheet of paper on which plaintiff's attorney had written his computation of damages and which he had used in argument).
- *Written jury instructions.* Before the jury retires for deliberations, you (1) must advise the jury that it may request a written copy of the jury instructions for use in deliberations, (2) may give the jury a written copy of the instructions, even if it has not requested one, and (3) must give the jury a copy on its request. CCP §612.5 (civil cases); Pen C §§1093(f), 1127, 1137 (criminal cases). The better practice is to automatically give the jury a written copy of the instructions. Most judges have found that providing a written copy of the instructions encourages more thoughtful deliberations. Multiple copies should be provided to avoid giving too much deliberative or persuasive power to the juror who might otherwise hold a single copy. Ideally, each juror should receive a copy, but as many as possible should be furnished. If written instructions are not provided, you must reread any instructions to the jurors on their request. See CCP §614; *People v Wingo* (1973) 34 CA3d 974, 984, 110 CR 448, disapproved on another point in 16 C3d at 211. Providing a tape-recorded copy of the instructions does not satisfy the requirement that a written copy be given to the jurors on their request. See *People v Cooley* (1993) 14 CA4th 1394, 1397–1399, 18 CR2d 346. The jurors must receive a copy of all instructions given, not merely selected ones, to prevent them from unduly emphasizing the copied ones. See, *e.g.*, *People v Wingo, supra*, 34 CA3d at 984. The jurors should also be given a "clean" copy of the instructions without notes, comments, etc. See *People v Bloyd* (1987) 43 C3d 333, 356, 233 CR 368. The copy should also omit titles, citations of authority (if any), and the identities of the parties requesting the instructions.
- *Verdict forms.* The jurors should be given the verdict forms approved by the judge and attorneys. See CCP §618.

IX. [§3.19] ANSWERING JURORS' QUESTIONS

You should instruct the jurors, as most judges do, that if during deliberations they have questions, disagree on any part of the testimony, or wish to be informed of any point of law arising in the case, they should advise you of this in writing. Jurors should give their written requests for information to the deputy or bailiff to be submitted to you.

You should have each question numbered sequentially with the date and time of the request on the note. The note is shown to counsel and preserved as part of the record, usually in a jury question folder, marked as an exhibit.

> TIP: Be aware that some enterprising jurors might want to use electronic self-help devices, such as wireless technology and smart phones to obtain statutes or other primary sources and to Google parties, rather than asking the court for instruction on a point of law. Therefore, you should advise jurors specifically against using technology for self-help in deliberations, *e.g.*, CACI 100 or CALCRIM 101: "Do not use dictionaries, the Internet, or other reference materials. . . ." An admonition of some kind addressing this concern should always be included in preliminary instructions by the court to the jury.

You may not respond to a juror's question without first advising the parties and their attorneys, at least insofar as the inquiry relates to disputed testimony or any applicable point of law. See CCP §614 (civil cases); Pen C §1138 (criminal cases); *People v Neufer* (1994) 30 CA4th 244, 251–253, 35 CR2d 386; *Cucamonga County Water Dist. v Southwest Water Co.* (1971) 22 CA3d 245, 265, 99 CR 557; *Putensen v Clay Adams, Inc.* (1970) 12 CA3d 1062, 1081, 91 CR 319. The attorneys are entitled to know on what theories and in what manner the jury is instructed. *Carlson, Collins, Gordon & Bold v Banducci* (1967) 257 CA2d 212, 230, 64 CR 915. Generally, you and the attorneys should meet and agree on the appropriate response, but you have the final say. You must not, however, engage in ex parte communications with the jury outside the presence of counsel during deliberations. *People v Bradford* (2007) 154 CA4th 1390, 1411–1415, 65 CR3d 548.

You should preserve and deliver to the clerk for inclusion in the record all formal or informal written communications received from the jury or individual jurors or sent by you to the jury or individual jurors. You should also ensure that the reporter records all formal or informal oral communications received from the jury or from the individual jurors or communicated by you to the jury or individual jurors. Cal Rules of Ct 2.1030. Finally, you should include in the record whether the attorneys agreed or disagreed with the responses.

When you meet with counsel to discuss a response to the jury note, you should try to reach an agreement as to the response and put the question and the agreed answer on the record. If an agreement can't be reached, put the question and response on the record with counsel's objection.

If the jury requests to revisit the crime scene after deliberations have begun, and you grant the request, you must afford the defendant and his or her counsel the right to be present and to observe what occurs during the revisit to ensure that the jury is not exposed to new or improper evidence and to be timely informed of any question that may be posed by a juror to the court during the revisit. See *People v Garcia* (2005) 36 C4th 777, 782, 802–803, 31 CR3d 541. Before permitting the jury to view the crime scene on the return visit, you should examine the setting with counsel for all parties to afford them the opportunity to bring to your attention any change in the scene that might affect the jury's consideration of the case. Should any unanticipated events occur during the visit that result in the jury's receipt of new evidence, you should be prepared to permit a reopening of the evidence to afford all parties the opportunity to respond to these events. 36 C4th at 804.

TIP: You should make a record of each attorney's objection or agreement to how questions are to be answered. In criminal cases, you might also consider getting a stipulation that the defendant need not be present for readbacks of testimony or answering juror questions.

Some judges, upon learning of questions posed by deliberating jurors, permit the attorneys to address the questions by providing additional argument. In that case, the plaintiff/prosecution would go first, addressing just the question, followed by the defense. No rebuttal is necessary in this situation because it is not argument in the formal sense, but only an opportunity for the attorneys to address jury questions.

X. [§3.20] READING BACK TESTIMONY

You must instruct the jurors that they may request a readback of testimony. See *People v Hillhouse* (2002) 27 C4th 469, 504–507, 117 CR2d 45 (not error to instruct jury that any requested testimony must be "material").

In general, you must grant the jurors' request to have portions of the testimony read back. See CCP §614 (civil cases); Pen C §1138 (criminal cases). If the jurors ask for improper matter, such as a witness's deposition or a transcript of a witness's testimony, you should not summarily deny the request, but must inform the jurors that while the deposition or transcript cannot be provided, they are entitled to have any specified portion of the witness's trial testimony or deposition testimony received in evidence read to them. See *Smith v Shankman* (1962) 208 CA2d 177, 184, 25 CR 195 (transcript); *James v Key Sys. Transit Lines* (1954) 125 CA2d 278, 282–284, 270 P2d 116 (deposition). You may require the reading of more testimony than the jury requests to give the jury a context for the testimony. *People v Hillhouse, supra,* 27 C4th at 506.

You should discuss any requests for readbacks with the attorneys. You should put on the record what will be read back. You need not be present while the testimony is read to the jury. CCP §614.5 (civil cases); Pen C §1138.5 (criminal cases). See *People v Rhoades* (2001) 93 CA4th 1122, 1126–1127, 113 CR2d 686 (when judge exercises control over testimony to be read back and is available to address jurors' questions arising during readback, there is no reason why judge should be present during readback). If asked, counsel usually stipulate that the readback may occur in the jury room without counsel or the court present. Note that alternates do not have to be present for readbacks. They are not part of the deliberating jury and have not taken part in the discussion that generated the reason for the readback.

Testimony may be read back to the jury over the express objection of the defense and out of the presence of the defendant and defense counsel without violating the defendant's constitutional rights to counsel and due process. See *People v McCoy* (2005) 133 CA4th 974, 981, 35 CR3d 366 (judge carefully admonished the jury before the readback and the defense made no showing that the attorney's or defendant's presence during the readback could have assisted the defense).

Although any juror may request a readback of testimony, a juror is not entitled to use the request to annoy the other jurors or to delay the proceedings. If you suspect a juror is requesting a readback for either of these purposes, you may properly instruct the juror "to cease that conduct and to commence cooperation." *People v Burgener* (2003) 29 C4th 833, 880, 129 CR2d 747.

TIP: Some judges use the following, not to discourage readbacks, but to reduce any casual calls for readbacks:

We will be starting another case while you are deliberating and it will be necessary to stop what we are doing to make our reporter available for a readback. Please do not casually ask for the readback of testimony when it is not necessary to your deliberations. But if any juror does need a readback, do not hesitate to ask for it by specifying on the jury request form what portions of the testimony you would like read back.

XI. [§3.21] REREADING INSTRUCTIONS

You must give the jury information it requests on "any point of law arising in the cause." CCP §614 (civil cases); Pen C §1138 (criminal cases). This duty includes rereading instructions (see *Asplund v Driskell* (1964) 225 CA2d 705, 712, 37 CR 652) or reopening argument, and, if necessary, giving additional instructions. See *Sesler v Ghumman* (1990) 219 CA3d 218, 227, 268 CR 70 (failure to give proper additional instructions may be reversible error when jury asks for specific guidance); *Estate of Mann* (1986) 184 CA3d 593, 614, 229 CR 225 (failure to give more specific instruction may be reversible error when jury asks for specific guidance; rereading of general instructions previously given was insufficient response). If the original instructions are full and complete, you have the discretion to determine what additional instructions are necessary. You may direct the jury to consider instructions that you previously gave if, after conferring with the attorneys, you determine that the previously given instructions would clarify the issues. See *People v Davis* (1995) 10 C4th 463, 523, 41 CR2d 826; *People v Montero* (2007) 155 CA4th 1170, 1179–1180, 66 CR3d 668. See also *People v Dunkle* (2005) 36 C4th 861, 895–896, 32 CR3d 23 (when deliberating jurors asked for "legal definition" of term used in instruction, and judge and counsel could not find judicial decision defining term or dictionary definition to which all parties could agree, judge properly instructed jurors "to rely upon the common understanding of the meaning of the word," and reinstructed them to consider instructions as a whole); but see *People v Ross* (2007) 155 CA4th 1033, 1047, 66 CR3d 438 (error to leave jury to suppose "mutual combat" had no particular legal requirement).

When a jury has been given copies of the instructions, a rereading is generally not necessary.

XII. [§3.22] JUROR'S ABSENCE DURING DELIBERATIONS

All jurors must be present during all of the deliberations. See *Griesel v Dart Indus., Inc.* (1979) 23 C3d 578, 584, 153 CR 213, overruled on other grounds in 5 C4th at 695. Deliberations may not begin until all jurors are present in the jury room and must end when any juror leaves. You should admonish the jurors to converse about the case only in the jury room and only after the entire jury has assembled there. If a brief absence of a juror is necessary, deliberations should be suspended until the juror returns. If a lengthy absence is necessary, the juror should be discharged and replaced with an alternate.

XIII. [§3.23] TREATMENT OF ALTERNATE JURORS

When deliberations begin, the issue arises of what to do with the alternate jurors. Some judges encourage the attorneys to stipulate that the alternates be released on telephone standby and subject to recall, particularly in cases in which lengthy deliberations are anticipated. Other judges require the alternates to remain in the courthouse, usually in the jury assembly room, so that they are readily available for any rereading of instructions or testimony or for the reading of the verdict.

The alternate jurors are subject to the same admonition as the regular jurors not to discuss the case with the other jurors or communicate with anyone about the trial. See CCP §611; Pen C §1089; *People v Adame* (1973) 36 CA3d 402, 405, 111 CR 462. The alternate jurors may not be present in the jury room during deliberations, unless the parties stipulate otherwise. If allowed to be present, you must instruct the alternates that they may not participate in the jury's deliberations in any manner "except by silent attention." See *People v Valles* (1979) 24 C3d 121, 127–128, 154 CR 543. Most judges do not allow the alternates in the jury room, even if the parties so stipulate, to avoid the possibility that their presence will influence or somehow affect the other jurors. See 24 C3d at 127 (reversible error if alternates' presence in jury room had any effect on other jurors or was otherwise prejudicial to appellant); *Vaughn v Noor* (1991) 233 CA3d 14, 22, 284 CR 222. Despite the California Supreme Court permitting the presence of nonparticipating alternates during deliberations, this practice created a problem in *Vaughn*, *supra*, because the judge failed to admonish the jury to begin deliberations anew when an alternate who had been present in the jury room was substituted for a seated juror. This case points out the importance of instructing the jurors to begin all deliberations anew if a substitution occurs.

✪ The Commission has recommended that trial judges be given the discretion in civil cases to permit the alternate jurors to observe, but not participate in, jury deliberations. Many jurors are so invested in the trial, that being ejected from the last part of the trial creates stress and animosity. One of the judges on the Commission has experimented for several years with permitting alternates in civil cases through stipulation to sit in the jury room during deliberations but not to participate. She reports that some alternates who have been permitted to observe deliberations have been very appreciative, but that for a few it was excruciating because of their inability to contribute. You should tell the alternates who are observing to let you know if it's too difficult so that you can excuse them to another location.

When an alternate juror replaces an original juror during deliberations, you must instruct the jury to disregard past deliberations and to begin deliberating anew. *People v Renteria* (2001) 93 CA4th 552, 557–561, 113 CR2d 287; *Mendoza v Club Car, Inc.* (2000) 81 CA4th 287, 298, 96 CR2d 605.

Alternate jurors may not be discharged until the regular jurors are discharged. See CCP §234; Pen C §1089.

TIP: If the alternates are not used, a court staff member should contact them at the conclusion of the trial to discharge them, let them know the trial result, and thank them for their service. You could consider asking the alternates if they would like to be present for the verdict. Many may not be interested in being present, but there are cases of alternates being extremely upset at what they perceived to be disrespect when a verdict was taken without any notice to them or any opportunity to be present.

XIV. JUROR MISCONDUCT

A. [§3.24] JUROR MISCONDUCT DURING DELIBERATIONS

Juror misconduct during the trial, including deliberations, may constitute grounds for discharging the juror. See §§2.19, 3.14. It may also constitute grounds for declaring a mistrial if the misconduct is discovered during trial, and a party's right to a fair trial has been prejudiced. The remedy of mistrial, however, is for those rare cases where the misconduct has caused such irreparable harm that only a new trial can secure a fair trial for the complaining party. *Rufo v Simpson* (2001) 86 CA4th 573, 613, 103 CR2d 492. Less drastic remedies such as an admonition to the jury or discharging the offending juror are preferable to requiring a new trial. Juror misconduct may also constitute grounds for declaring a mistrial or ordering a new trial if the misconduct is discovered after the jury reaches a verdict. See *People v Ault* (2004) 33 C4th 1250, 1255, 17 CR3d 302.

The following conduct by a juror constitutes misconduct:

- Disregarding the judge's admonition not to discuss the case with nonjurors. See CCP §611; Pen C §1122(a); See *People v Ault*, *supra,* 33 C4th at 1256, 1259–1260, 1270 n13 (juror discussed with nonjuror credibility of key witness and shared with other jurors information obtained in this conversation in an attempt to curtail further discussion of witness's credibility). *People v Ledesma* (2006) 39 C4th 641, 743, 47 CR3d 326 (juror properly discharged when he discussed case with wife during trial); *People v Cissna* (2010) 182 CA4th 1105, 1118–1119, 106 CR3d 54 (juror discussed the case daily with a friend).
- Failing to report any improper communications to the judge immediately, if properly instructed to do so. See CCP §1209(a)(10). But it is not misconduct if a juror discusses with a nonjuror the stress the juror is feeling in deciding the case but does not discuss the case or the deliberations. *People v Danks* (2004) 32 C4th 269, 304, 8 CR3d 767. Because jurors who are instructed not to speak to anyone about the case except another juror during deliberations may assume this instruction does not apply to confidential relationships, the Supreme Court has recommended that jurors be expressly instructed that they may not speak to anyone about the case, except another juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Jurors should also be instructed that if anyone, other than another juror during deliberations, tells a juror his or her view of the evidence in the case, the juror should immediately report that conversation to the judge. 32 C4th at 306 n11. See CACI 100 and CALCRIM 101, 3550.
- Discussing the case with another juror before deliberations begin. *Smith v Brown* (1929) 102 CA 477, 484, 283 P 132.

- Prejudging the case. *Romo v Ford Motor Co.* (2002) 99 CA4th 1115, 1135–1136, 122 CR2d 139, disapproved on another point in 33 C4th at 1250 (no misconduct when juror made statements at beginning of deliberations concerning her readiness to decide case without regard to law and evidence, but was subsequently persuaded by other jurors to consider law and evidence).
- Receiving and injecting information learned outside of the trial into the deliberations. *People v Nesler* (1997) 16 C4th 561, 577–590, 66 CR2d 454.
- Injecting an opinion based on specialized information obtained from outside sources. See *Whitlock v Foster Wheeler LLC* (2008) 160 CA4th 149, 161, 72 CR3d 369.
- Reading aloud from the Bible or circulating biblical passages during deliberations. *People v Williams* (2006) 40 C4th 287, 333, 52 CR3d 268; *People v Danks* (2004) 32 C4th 269, 308, 8 CR3d 767.
- Refusing to deliberate. *People v Cleveland* (2001) 25 C4th 466, 474, 485, 106 CR2d 313; see *People v Leonard* (2007) 40 C4th 1370, 1410, 58 CR3d 368 (juror committed misconduct by refusing to deliberate because he had determined defendant was guilty; misconduct was not prejudicial when defendant convicted because all jurors concurred in guilty verdict). See §3.14.
- Falling asleep during deliberations. *People v Ramirez* (2006) 39 C4th 398, 457–458, 46 CR3d 677.
- Consulting reference works or other sources outside the evidence in the case for additional information, *e.g.*, using a dictionary to enhance the juror's understanding of words used in the judge's instructions. See *People v Karis* (1988) 46 C3d 612, 642–645, 250 CR 659; *Glage v Hawes Firearms Co.* (1990) 226 CA3d 314, 323–326, 276 CR 430.
- Soliciting opinions on the facts at issue or the applicable law from nonjurors. See *People v Honeycutt* (1977) 20 C3d 150, 156–157, 141 CR 698 (juror solicited legal opinion from attorney-acquaintance); *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 106–107, 95 CR 516 (juror solicited opinion of his personal physician in medical malpractice case).

TIP: Cell phones may be a source of improper communication and should not be permitted in the jury deliberation room.

- Expressing an opinion to the other jurors based on the juror's personal expertise or specialized knowledge that goes beyond the evidence presented. See *McDonald v Southern Pac. Transp. Co.* (1999) 71 CA4th 256, 263–267, 83 CR2d 734. But see *People v Collins* (2010) 49 C4th 175, 237–256, 110 CR3d 384 (juror did not commit misconduct by using a computer to draw a diagram of the scene or by a demonstration in the jury room based only on evidence received. It was a "more critical examination of the evidence received." The jurors did not receive any extrinsic evidence). *People v Garcia* (2001) 89 CA4th 1321, 1338–1340, 107 CR2d 889 (juror did not commit misconduct by telling other jurors he had taken course in body language and had concluded that defendant's body language indicated he was lying; juror did not describe himself as an expert, and other jurors did not consider him as such); *People v Leonard* (2007) 40 C4th 1370, 1413, 58 CR3d 368 (statement by juror that he had plenty of experience with handguns in connection with discussion of accuracy of murder weapon was not misconduct). Although jurors may not express an opinion based on their personal

expertise that is different from or contrary to the law, as stated by the judge, or to the evidence, they may use their specialized knowledge in evaluating and interpreting the evidence. *People v Steele* (2002) 27 C4th 1230, 1266, 120 CR2d 432. See *People v San Nicolas* (2004) 34 C4th 614, 650, 21 CR3d 612 (explanation of blood evidence by juror who was nurse was consistent with trial testimony of pathologist and thus was not misconduct). See also *Bormann v Chevron USA, Inc.* (1997) 56 CA4th 260, 262–265, 65 CR2d 321 (juror did not commit misconduct by preparing written statement of her views of the evidence and reading this statement to other jurors). But a juror does not commit misconduct by injecting personal experiences that are a matter of common knowledge or experience into the deliberations. *In re Lucas* (2004) 33 C4th 682, 696, 16 CR3d 331 (injecting personal experience with drugs into deliberations was not misconduct).

- Visiting the scene where the incident that is the subject of the action occurred or any other premises or place involved in the case. See Pen C §1122(a); *People v Sutter* (1982) 134 CA3d 806, 817–821, 184 CR 829; *Anderson v PG&E* (1963) 218 CA2d 276, 280, 32 CR 328.
- Examining an exhibit not introduced in evidence. See *Tunmore v McLeish* (1919) 45 CA 266, 268, 187 P 443.
- Conducting experiments outside the deliberations using items not admitted in evidence. See *Bell v State of California* (1998) 63 CA4th 919, 932–933, 74 CR2d 541; *Lankster v Alpha Beta Co.* (1993) 15 CA4th 678, 682–684, 18 CR2d 923. But jurors may carry out experiments within the lines of offered evidence, if their experiments do not invade new fields. *People v Baldine* (2001) 94 CA4th 773, 778–779, 114 CR2d 570. They may also use an exhibit according to its nature and to aid them in weighing the evidence and reaching a conclusion on a controverted matter. 94 CA4th at 777–780 (jurors did not conduct improper experiment in turning on police scanner defendant testified was not working); see *People v Collins, supra,* 49 C4th at 237–256 (juror did not commit misconduct by using a computer to draw a diagram of the scene or by a demonstration in the jury room based only on evidence received. It was a "more critical examination of the evidence received." The jurors did not receive any extrinsic evidence.) But see *People v Collins, supra*, 49 C4th at 255, for an extensive list of cases in which computers were used to investigate, and misconduct was found.
- Being exposed to news media reports during the trial. See CCP §232(b); *People v Jenkins* (2000) 22 C4th 900, 1048, 95 CR2d 377; *In re Carpenter* (1995) 9 C4th 634, 656, 38 CR2d 665.
- Agreeing to a chance or quotient verdict. This is grounds for a new trial. See CCP §657(2); Pen C §1181(4). A verdict reached by tossing a coin, drawing lots, or any other form of gambling is a chance verdict. A verdict reached under an advance agreement to take a statistical average of the jurors' views, without any deliberation, is a quotient verdict. See *Chronakis v Windsor* (1993) 14 CA4th 1058, 1064–1066, 18 CR2d 106. Jurors do not reach a chance or quotient verdict, however, by agreeing that each juror will submit a dollar amount between a minimum and a maximum number and then they will calculate the average if they do not adopt this average as their verdict without further discussion or deliberation. *Lara v Nevitt* (2004) 123 CA4th 454, 462–463, 19 CR3d 865 (it is not improper for jurors to make an average of their individual estimates of damages as basis for discussion and to adopt average if they subsequently agree to it).

- Agreeing to a compromise verdict, *i.e.*, when some jurors believe that the evidence fails to establish liability, but agree to award the plaintiff a small recovery. *Lauren H. v Kannappan* (2002) 96 CA4th 834, 838–842, 117 CR2d 484.
- Agreeing to include improper items of compensation in the verdict. See *Trammell v McDonald Douglas Corp.* (1984) 163 CA3d 157, 172–173, 209 CR 427 (extensive discussion among jurors to inflate damage award to compensate for attorneys' fees and taxes). But see *Iwekaogwu v City of Los Angeles* (1999) 75 CA4th 803, 819–820, 89 CR2d 505 (new trial not warranted when one juror suggested that verdict should include punitive damages, which could not properly be included, but none of the other jurors agreed to include these damages); *Thompson v Friendly Hills Regional Med. Ctr.* (1999) 71 CA4th 544, 551, 84 CR2d 51 (new trial not warranted when jurors denied they considered attorneys' fees when awarding damages and amount awarded was same as that requested in plaintiff's closing argument to cover actual damages).
- Failing to follow the judge's instructions. See *People v Williams* (2001) 25 C4th 441, 448–449, 463, 106 CR2d 295 (juror refused to follow judge's instruction on law); *People v Thomas* (1994) 26 CA4th 1328, 1333, 32 CR2d 177 (juror took trial notes home with him during trial in violation of judge's instructions).
- Injecting law extraneous to the jury instructions into the deliberations, whether correct or not. See *People v Marshall* (1990) 50 C3d 907, 949–950, 269 CR 269.
- Sexually harassing another juror so as to interfere with that juror's participation in the deliberations. See *People v Fauber* (1992) 2 C4th 792, 838, 9 CR2d 24.

B. [§3.25] HEARING ON JUROR MISCONDUCT

Misconduct by or affecting the jurors during their deliberations may be brought to your attention informally or on a party's motion for a mistrial or a new trial. If the misconduct is brought to your attention informally, you should hold a hearing in chambers with the attorneys and the court reporter present (1) to question the persons responsible for, or who witnessed, the alleged misconduct, and (2) to determine the facts as to whether the jury was affected and whether any party has been prejudiced by the misconduct. See *People v Staten* (2000) 24 C4th 434, 466, 101 CR2d 213. You must conduct the questioning; you should not permit the attorneys to question the jurors, but you may allow them to suggest areas of inquiry or specific questions for you to ask. See *People v Cleveland* (2001) 25 C4th 466, 485, 106 CR2d 313. If a particular juror's misconduct does not appear to have affected the other jurors, you may properly question only the particular juror and not the others. See *People v Ramirez* (1990) 50 C3d 1158, 1175, 270 CR 286. See also *People v Seaton* (2001) 26 C4th 598, 675–676, 110 CR2d 441 (when defendant claimed juror made obscene gesture towards him, judge conducted sufficient inquiry by questioning juror, who denied making gesture, and admonishing her not to discuss matter with other jurors).

CAUTION: You should distinguish between misconduct that is brought to your attention during a trial and misconduct that is brought to your attention after a trial. See discussion at §3.26. Different approaches are required for these situations.

When possible juror misconduct is brought to your attention, you must make whatever inquiry is reasonably necessary to resolve the matter. *People v Prieto* (2003) 30 C4th 226, 133 CR2d 18. You may fulfill the duty of conducting a reasonable inquiry into allegations of juror

misconduct by holding an evidentiary hearing to determine the credibility of the allegations, or by determining the matter without a hearing if you conclude that a hearing is not necessary to resolve material, disputed issues of fact. *People v San Nicolas* (2004) 34 C4th 614, 649, 21 CR3d 612; *People v Steele* (2002) 27 C4th 1230, 1267, 120 CR2d 432.

Determining whether to discharge a juror because of misconduct during deliberations is a delicate matter, particularly when the alleged misconduct consists of statements made during deliberations. *People v Cleveland, supra,* 25 C4th 484. Although Evid C §1150 makes evidence of the jurors' mental processes inadmissible, it expressly permits the introduction of evidence of statements made in the jury room in the context of conducting an inquiry into the validity of the verdict. 25 C4th at 484.

This evidence must be admitted with caution, because statements have a greater tendency than nonverbal acts to implicate the jurors' reasoning processes. 25 C4th at 484. Statements made by jurors during deliberations are admissible under Evid C §1150 when the making of the statements constitutes misconduct. 25 C4th at 484. But when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes and consideration of the words as evidence of those processes is barred by Evid C §1150. 25 C4th at 484–485. For example, a statement of one juror describing her struggle and difficulty in reaching a verdict and another juror's statement in response describing how he came to reconcile his decision are inadmissible because they involve the decision-making processes of these jurors. *People v Lewis* (2001) 26 C4th 334, 389, 110 CR2d 272. Similarly, jurors' understanding of a special verdict question is inadmissible in that it is evidence of jurors' reasoning processes. *Bell v Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 CA4th 1108, 1125–1126, 105 CR3d 485.

Even though the provisions of Evid C §1150 apply only to a postverdict situation and not to an inquiry conducted during jury deliberations, a judge's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible to avoid intruding unnecessarily on the sanctity of the jury's deliberations. *People v Cleveland, supra,* 25 C4th at 485. The judge's inquiry should focus on the juror's conduct, not on the content of the deliberations. 25 C4th at 485. The inquiry should end once the judge is satisfied that the juror is participating in deliberations and has not expressed an intention to disregard the judge's instructions or otherwise committed misconduct, and that no other ground for discharge exists. 25 C4th at 485.

If you find misconduct before the verdict is rendered, you must consider its effect on the jury and whether any adverse effect can be remedied. Assuming misconduct, you must determine whether the misconduct is prejudicial. See *Sierra View Local Health Care Dist. v Sierra View Med. Plaza Assocs.* (2005) 126 CA4th 478, 484, 24 CR3d 210. Your options may include the following:

- You may remove a juror for serious and willful misconduct. See CCP §233; *People v Daniels* (1991) 52 C3d 815, 863–864, 277 CR 122.
- If you conclude that the jurors are not properly following your instructions during their deliberations, you may give the jurors further instructions on their duties. See *Maxwell v Powers* (1994) 22 CA4th 1596, 1602–1604, 28 CR2d 62.
- If the effect of the misconduct is prejudicial to a fair trial and cannot be remedied, you may declare a mistrial (or grant a motion for a new trial after a verdict has been rendered). See *People v Stewart* (2004) 33 C4th 425, 509–511, 15 CR3d 656 (juror's statement to defendant's former girlfriend who was witness at trial that juror thought

witness was "a very beautiful woman" was misconduct because it violated judge's admonitions to avoid contact with all other persons, including witnesses, associated with case, but it did not warrant granting new trial because it was "clearly of a trifling nature" and did not involve anything of substance concerning the merits of the case).

- You may cite the offending juror for contempt of court, *e.g.*, for disobeying your instruction not to communicate with a party or other person about the case. See CCP §1209(a)(10).

C. JUROR MISCONDUCT DISCOVERED AFTER TRIAL

1. [§3.26] New Trial Motions

A defendant in a criminal trial may seek a new trial based on juror misconduct. Pen C §1181(2)–(4). The motion need not be in writing. It may be made orally. *People v Braxton* (2004) 34 C4th 798, 807 n2, 22 CR3d 46. In a civil case the motion must be made in writing. CCP §659. Also, in a civil case, the moving party must submit affidavits or declarations asserting that the moving party and that party's counsel had no knowledge of the misconduct until after the verdict was returned. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103–106, 95 CR 516.

When a motion is made for a new trial based on juror misconduct, you must undertake a three-step inquiry: (1) Is the evidence admissible? (2) Does the admissible evidence establish misconduct? and (3) Is the misconduct prejudicial? *People v Garcia* (2001) 89 CA4th 1321, 1338, 107 CR2d 889; *People v Von Villas* (1992) 11 CA4th 175, 255, 15 CR2d 112.

2. [§3.27] Admissible Evidence

Under Evid C §1150(a), evidence of overt acts such as statements, conduct, conditions, and events is admissible. The effect of statements, conduct, and events on a juror's decision or on a juror's mental processes, and evidence of a juror's subjective reasoning process, however, is not admissible. *People v Danks* (2004) 32 C4th 269, 302, 8 CR3d 767; *People v Steele* (2002) 27 C4th 1230, 1261–1265, 120 CR2d 432; *Hanson v Ford Motor Co.* (1982) 32 C3d 388, 413–415, 185 CR 654; *Enyart v City of Los Angeles* (1999) 76 CA4th 499, 506, 90 CR2d 502. Thus, the improper influences that may be proved under Evid C §1150(a) to impeach a verdict are those open to sight, hearing, and the other senses that are subject to corroboration. *People v Hutchinson* (1969) 71 C2d 342, 350, 78 CR 196. Evidence of mental processes, however, is admissible to establish voir dire concealment of a preexisting bias, mental incompetence of the juror, or the juror's intent to disregard your instructions. *People v Hutchinson*, 71 C2d at 348.

Hearsay is not admissible to impeach a jury verdict. *People v Cox* (1991) 53 C3d 618, 698–699, 280 CR 692; *Burns v 20th Century Ins. Co.* (1992) 9 CA4th 1666, 1670, 12 CR2d 462. Consequently, statements made by jurors contained in an investigator's report or in declarations of an investigator or attorney are not admissible unless some hearsay exception applies.

In a criminal case, misconduct can be proved by affidavits, declarations, or by an evidentiary hearing. But an evidentiary hearing should not be used as a "fishing expedition" to search for possible misconduct or to take sworn testimony from jurors who refuse to provide a declaration. *People v Cox, supra*, 53 C3d at 697. Although you have discretion to hold a hearing in a criminal case, you are required to do so only when the defendant has come forward with declarations demonstrating a strong possibility that prejudicial misconduct has occurred, and you determine that the hearing is necessary to resolve material, disputed issues of fact. *People v Hedgecock* (1990) 51 C3d 395, 415, 418, 419, 272 CR 803.

An unsworn statement or declaration containing hearsay is normally inadmissible and insufficient to justify a hearing, but if a juror refuses to provide a sworn statement as the result of interference by the prosecution, the unsworn statement or hearsay may be sufficient to warrant a hearing at which the juror may be examined. *People v Hayes* (1999) 21 C4th 1211, 1256 n6, 91 CR2d 211.

In a civil case, misconduct can only be proved in connection with a new trial motion by affidavit or a declaration. CCP §§657(2), 658. Jurors cannot be required to testify in an evidentiary hearing on a new trial motion based on juror misconduct in a civil case. *Linhart v Nelson* (1976) 18 C3d 641, 645, 134 CR 813.

3. [§3.28] Misconduct

You must determine whether credible evidence substantiates the misconduct allegations. *People v Cox* (1991) 53 C3d 618, 697, 280 CR 692. In doing so, you must carefully examine the quality of the affidavits or declarations. *People v Von Villas* (1992) 11 CA4th 175, 258, 15 CR2d 112.

> TIP: Affidavits or declarations purportedly from jurors that are written in legalese should be viewed with caution.

4. [§3.29] Prejudice

Juror misconduct, if proven, raises a rebuttable presumption of prejudice. *People v Danks* (2004) 32 C4th 269, 302, 8 CR3d 767; *Hanson v Ford Motor Co*. (1982) 32 C3d 388, 416–417, 185 CR 654. The burden of rebutting the presumption is on the opposing party. But the opposing party need not present affirmative evidence showing there was no prejudice. The presumption may be rebutted by either an affirmative evidentiary showing or by an examination of the record. *In re Carpenter* (1995) 9 C4th 634, 657, 38 CR2d 665; *Hanson v Ford Motor Co., supra*, 32 C3d at 417.

The presumption of prejudice is rebutted if a review of the record, including the nature of the misconduct and the surrounding circumstances, indicates there is no substantial likelihood of juror bias or prejudice. *People v Williams* (2006) 40 C4th 287, 333–334, 52 CR3d 268; *People v Danks, supra*, 32 C4th at 303; *Hanson v Ford Motor Co., supra*, 32 C3d at 417; *Province v Center for Women's Health and Family Birth* (1993) 20 CA4th 1673, 1679, 25 CR2d 667, disapproved on other grounds in *Heller v Norcal Mut. Ins. Co*. (1994) 8 C4th 30, 41, 32 CR2d 200. Although the substantial likelihood test is different and less tolerant than the harmless error analysis, courts have cautioned that the likelihood of bias must be substantial. *People v Marshall* (1990) 50 C3d 907, 951, 269 CR 269; *People v Danks*, 32 C4th at 304–305.

In a criminal case, a new trial should be granted if there is a substantial likelihood only one juror is affected by or involved in prejudicial misconduct because even a single juror's improperly influenced vote deprives a criminal defendant of an unbiased unanimous verdict. *People v Marshall, supra*, 50 C3d at 951; *People v Pierce* (1979) 24 C3d 199, 207, 155 CR 657.

By contrast, in a civil case, a new trial must be granted if you find there is a substantial likelihood that enough jurors were impermissibly influenced by misconduct to have affected the verdict to the detriment of the moving party. Because unanimity is not required in a civil case, the number of tainted jurors needed to compel a new trial will vary. *Glage v Hawes Firearms Co.* (1990) 226 CA3d 314, 322–323 n5, 276 CR 430. If the verdict is nine-to-three and there is a substantial likelihood that any one of the majority jurors was biased by misconduct, then a new

trial should be granted in favor of the losing party. *Weathers v Kaiser Found. Hosp*s. (1971) 5 C3d 98, 110, 95 CR 516; *Province v Center for Women's Health and Family Birth, supra,* 20 CA4th at 1680.

5. [§3.30] Misconduct Involving the Receipt of Outside Information

One common type of misconduct that usually does not surface until after the verdict involves receiving information extraneous to the trial evidence. When the misconduct involves such outside information, substantial evidence of bias or prejudice may appear in two ways, and you must examine each.

First, was the information inherently prejudicial? When the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently likely to have influenced a juror, then the presumption is not rebutted. In applying the inherent prejudice test, you must review the trial record.

Second, was the juror actually biased? Even if the information was not inherently prejudicial, it may still be prejudicial if, from the nature of the misconduct and surrounding circumstances, you determine it is substantially likely the juror is actually biased. *People v Danks* (2004) 32 C4th 269, 303, 8 CR3d 767; *In re Carpenter* (1995) 9 C4th 634, 653–655, 38 CR2d 665.

In applying the actual bias test, you must review the entire record, including but not limited to the trial record. Actual bias is the existence of a state of mind that prevents the juror from acting with entire impartiality and without prejudice to the substantial rights of the moving party. *People v Nesler* (1997) 16 C4th 561, 581, 66 CR2d 454; CCP §225(b)(1)(C).

The following are some of the circumstances that courts look to in determining whether there is a substantial likelihood of bias:

- The nature and seriousness of the misconduct. *People v Carpenter*, 9 C4th at 654, 657; *Hanson v Ford Motor Co*. (1982) 32 C3d 388, 417, 185 CR 654.
- The nature of the extraneous information, including whether the information touched on a key issue in the case; whether the information lightened the burden of the party who had the burden of proof; whether the information was unambiguously phrased; and whether the information was cumulative of evidence received in the trial. *People v Nesler, supra,* 16 C4th at 586; *In re Stankewitz* (1985) 40 C3d 391, 402, 220 CR 382; *People v Hord* (1993) 15 CA4th 711, 727, 19 CR2d 55; *Sassounian v Roe* (9th Cir 2000) 230 F3d 1097, 1109. Also, whether you precluded introduction of the information under Evid C §352, but this is not necessarily dispositive. *People v Carpenter, supra,* 9 C4th at 655 n2.
- Whether the juror only told nonjurors about the outside information. If so, did the juror suggest an intent to consider the outside information in reaching a decision or express an opinion about the case based on that information. 9 C4th at 656–657.
- Whether the juror told the other jurors about the information. *People v Nesler, supra,* 16 C4th at 583.
- At what point the jury was exposed to the information and how long did the exposure happen before the verdict. *Sassounian v Roe, supra,* 230 F3d at 1109.
- Whether the jury considered or discussed the information, or refused to consider the information and admonished the offending juror not to use the information. *People v Danks, supra,* 32 C4th at 307 n12, 308; *People v Hill* (1992) 3 CA4th 16, 38, 4 CR2d 258, disapproved on other grounds in *People v Nesler, supra,* 16 C4th at 582 n5.

- The effect on the other jurors of the conduct of the juror who behaved inappropriately. See *Bandana Trading Co., Inc. v Quality Infusion Care, Inc.* (2008) 164 CA4th 1440, 1445–1447, 80 CR3d 495 (one juror clapped inappropriately and tried to rush the other jurors through deliberations).
- The effect on the other jurors of the extraneous information. See *People v Tuggles* (2009) 179 CA4th 339, 375–376, 100 CR3d 820 (juror made statements about variable effect of drug usage on the user).
- The juror's premisconduct votes. Evidence of a juror's premisconduct vote is not barred by Evid C §1150(a) for purposes of determining actual bias. *People v Danks, supra*, 32 C4th at 310 n14.
- The source of the information. *People v Hill, supra*, 3 CA4th at 35–37.
- The circumstances under which the information was obtained. *People v Carpenter, supra*, 9 C4th at 654.
- Whether the juror reported the receipt of the outside information to the court. 9 C4th at 654.
- Whether the court admonished the jury to disregard the information. 9 C4th at 654.
- The strength of the evidence establishing misconduct. *Hanson v Ford Motor Co., supra*, 32 C3d at 417; *People v Hill, supra*, 3 CA4th at 38–39.
- The strength of the trial evidence against the moving party. *People v Ramos* (2004) 34 C4th 494, 521, 21 CR3d 575; *People v Danks, supra*, 32 C4th at 305–308. However, if you determine a juror was actually biased, the strength of the trial evidence is irrelevant. *People v Carpenter, supra*, 9 C4th at 654.
- How specialized the information is. See *Whitlock v Foster Wheeler LLC* (2008) 160 CA4th 149, 161, 72 CR3d 369 (new trial appropriate when juror crossed the fine line between using own background in analyzing the evidence and injecting an opinion based on specialized information obtained from outside sources).

XV. JUDGE'S ACTIONS WHEN JURORS ARE UNABLE TO AGREE ON VERDICT

A. [§3.31] QUESTIONING JURORS

If, after substantial deliberations, the jurors are unable to agree on a verdict, you should order them to return to court, and should ask the foreperson or presiding juror, and then the other jurors, whether further deliberations might reasonably be expected to result in a verdict. You may ask the foreperson how many ballots have been taken and their numerical outcomes, but you may not ask which side has the greater number of votes. *People v Proctor* (1992) 4 C4th 499, 538–539, 15 CR2d 340. For example, you may properly ask the jury if it has taken a vote concerning a particular count and, if so, how the vote was divided numerically. *People v Dennis* (1998) 17 C4th 468, 539–540, 71 CR2d 680.

After a jury reports that it has reached an impasse in its deliberations, you may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. You should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict. Cal Rules of Ct 2.1036(a).

For this purpose, you might ask:

Does the [*foreperson/presiding juror*] believe that any further deliberation, instruction from the court, or reading of testimony by the court reporter could assist the jury in reaching a verdict?

[If yes, the jurors return for further deliberations; if no, ask the other jurors:]

Does any other member of the jury believe that any further deliberation, instruction, or reading of testimony would assist the jury in reaching a verdict?

[Or you may ask each juror individually if any assistance from the court by way of instruction or readback would assist in reaching a verdict]

[If yes, the jurors return for further deliberations; if no, ask the foreperson:]

How many ballots has the jury taken on the verdict?

[If only one or two, consider returning the jurors for further deliberations and balloting. Ask the foreperson:]

Without telling us how the jury voted, tell us the numbers voting on differing sides, issue by issue, listing the higher number first regardless of which side it was for, such as 8 to 4, 7 to 5, or 6 to 6.

If you determines that further action might assist the jury in reaching a verdict, you may (Cal Rules of Ct 2.1036(b)):

- Give additional instructions;
- Clarify previous instructions;
- Permit attorneys to make additional closing arguments; or
- Employ any combination of these measures.

CACI 5013 is a civil deadlocked jury instruction, and CALCRIM 3550 is a criminal deadlocked instruction.

You may suggest that the jurors try again to reach a verdict, unless it appears improbable that they can agree on a verdict. See *People v Proctor, supra,* 4 C4th at 538–539. You have the discretion to advise deadlocked jurors that they have not deliberated long enough and that they should resume deliberations in an effort to arrive at a verdict. *People v Gill* (1997) 60 CA4th 743, 747–749, 70 CR2d 369; see *People v Bell* (2007) 40 C4th 582, 617, 54 CR3d 453 (not error to have jury resume deliberations when had only deliberated 2 days and was deadlocked 11–1). Many judges find it useful to send the jurors home early and order them back the next day to continue deliberations on the theory that a good night's rest may resolve some problems. If jurors are unable to agree on the first issue of a special verdict, you may ask them to focus deliberations on the second issue if that issue might dispose of the entire action. *Santiago v Firestone Tire & Rubber Co.* (1990) 224 CA3d 1318, 1335, 274 CR 576.

TIP: You may try asking whether jurors can articulate the issues that they are struggling with and whether reopening argument might be helpful. The Jury Task Force recommends reopening argument when jurors articulate a specific area of confusion or need assistance. The foreperson can be addressed first and if no issues are articulated, the same inquiry may be made of each juror. Many judges have found this approach to be particularly helpful if the jurors' issues of concern deal with factual points. Judges who use this approach generally allow only two arguments, one from each party. See, *e.g.*, *People v Young* (2007) 156 CA4th 1165, 1170–1172, 67 CR3d 899. Rebuttal arguments are not required because the arguments are made as responses to specific questions from the jury.

B. [§3.32] GIVING "DYNAMITE" INSTRUCTION

You should never use a "dynamite" instruction, *i.e.*, an instruction intended to help break a deadlock, in a *criminal* case. *People v Gainer* (1977) 19 C3d 835, 852, 139 CR 861; see *People v Hinton* (2004) 121 CA4th 655, 659–662, 17 CR3d 437 (judge's "dynamite" instruction to deadlocked jury required reversal because judge instructed jurors holding minority position to question that position in light of majority's view, indicated case would be retried if jury could not agree, and emphasized costs of trial and necessity of expending further costs in retrial); but see *People v Valdez* (2012) 55 C4th 82, 160–164, 144_CR3d 865 (reference to majority and minority jurors as distinct groups was harmless when the instruction was balanced and encouraged both groups to reconsider their views; dicta in *Gainer* with respect to identifying majority and minority jurors as a reason to reverse was disapproved); *Early v Packer* (2002) 537 US 3, 123 S Ct 362, 154 L Ed 2d 263 (approving use of instruction urging jury to consider matter further with view to reaching agreement, as long as language used does not coerce particular verdict); *People v Whaley* (2007) 152 CA4th 968, 982–983, 62 CR3d 11 (approving supplemental instruction suggesting that jury try "reverse role playing"); *People v Moore* (2002) 96 CA4th 1105, 1121–1122, 17 CR2d 715 (approving noncoercive instruction given to deadlocked jury). But a predeliberation instruction with CALCRIM 3550 is not coercive. *People v Santiago* (2009) 178 CA4th 1471, 1474–1476, 101 CR3d 257.

In a *civil* case, which is subject to different considerations than a criminal case, you may consider using a dynamite instruction, but you must weigh the potentially coercive effect of each element of the instruction to ensure that jurors are not coerced into surrendering their convictions. *Inouye v Pacific Southwest Airlines* (1981) 126 CA3d 648, 651, 179 CR 13. A dynamite instruction might contain the following:

- The case will have to be retried if the jurors do not reach a verdict.
- Jurors should listen with proper deference to each other, and should question their own judgment if a majority of the jurors take a different view of the case.
- Jurors should not, however, surrender their own convictions of the truth and weight of the evidence; each juror must decide the case for himself or herself and not merely acquiesce to the conclusion of the other jurors.
- The verdict should represent the opinion of each juror. In reaching a verdict, a juror should not violate his or her individual judgment and conscience. 126 CA3d at 651–652.

Some judges would consider giving such an instruction in a lengthy trial when the jury is close to reaching a verdict. Other judges believe it is improper in any civil case to give even a

limited dynamite instruction, such as was upheld in *Inouye v Pacific Southwest Airlines,* because such an instruction is inherently coercive. Instead, they recommend taking some or all of the following steps when confronted with a deadlocked jury:

- Give jury instruction CACI 5013 (Deadlocked Jury Admonition).
- Ask the jurors what might assist them in reaching a verdict, such as a readback of testimony, or further instructions.
- Encourage the jurors to continue working together and listening to each other for a while longer.
- Explain that often jurors who think they are deadlocked discover that with further discussion they can reach agreement.
- Ask the jurors if they would prefer to recess for the day and return the following day.
- Reopen argument on specific points at issue.
- Assure the jurors that they will not be asked to deliberate indefinitely.

If the jurors are deadlocked eight-to-four, you may ask the parties whether they will stipulate to accepting a verdict based on a vote of eight-to-four instead of nine-to-three. See *Marich v MGM/UA Telecommunications, Inc.* (2003) 113 CA4th 415, 420, 430 n8, 7 CR3d 60.

C. [§3.33] Declaring Mistrial When Jury Is Deadlocked

If the jury appears hopelessly deadlocked, you must declare a mistrial. See CCP §616 (civil cases); Pen C §1140 (criminal cases). You may state for the record:

> **It appears to the court that this jury is hopelessly deadlocked. I now declare a mistrial and discharge the jury from any further service in this case.**

You may also ask:

> **[*Name of foreperson or presiding juror*], now that I have declared a mistrial, you may tell me in which direction the jury voted on the last ballot that was taken, for example, 8 to 4 in favor of the plaintiff or 7 to 5 in favor of the defendant.**

You should then discharge the jury, and set the case for retrial. See CCP §616 (civil cases); Pen C §1141 (criminal cases).

A deadlocked jury on a greater offense and agreement on the lesser offense does not act as an implied acquittal on the greater offense, and therefore, in this situation, you may discharge the jury and require the defendant to be retried. *People v Anderson* (2009) 47 C4th 92, 108–112, 97 CR3d 77.

Chapter 4
VERDICT AND DISCHARGE

I. RECEIVING VERDICT AND POLLING JURY

A. [§4.1] CIVIL CASES

The requirements for receiving and reading the verdict are set forth in CCP §618:

- When the jury foreperson or presiding juror informs the bailiff that a verdict has been reached, the bailiff must so inform the trial judge.
- The judge should ask the courtroom clerk to notify the attorneys that a verdict has been reached.
- When all the attorneys and parties are present, the jurors must be conducted into the courtroom and seated in the jury box.
- The judge should direct the foreperson or presiding juror to give all verdict forms to the bailiff or clerk for delivery to the judge.
- The judge should examine the verdict forms. If the verdict appears correct and complete and has been signed by the foreperson or presiding juror, the judge should give the verdict forms to the clerk, who must read them into the record. If there is no clerk, the judge must read the verdict.
- After the verdict is read, the judge (or the clerk) should ask the jurors if this is their verdict.
- If at least three-fourths of the jurors agree that this is their verdict and there is no request to poll the jury, the court should ask the attorneys if they would stipulate to the recording of the verdict as read. The verdict may be entered and the judge may discharge the jurors.
- If the verdict is incorrect or incomplete, or if more than one-fourth of the jurors disagree with it, the judge should confer with the attorneys at the sidebar to review the forms with them and to discuss (1) any questions to be asked the foreperson or presiding juror, (2) returning the verdict forms to the foreperson or presiding juror with instructions to clarify, complete, or revise them, or (3) sending the jury back to the jury room for further deliberations.

You may receive a jury verdict and discharge the jury on any day, including a judicial holiday. See CCP §134(a)(2). If the jurors reach an agreement during a recess or adjournment of

court for the day, you may direct them to bring in a sealed verdict at the opening of court. CCP §617.

When receiving the verdict, you may state:

In the matter of [*name of plaintiff*] **versus** [*name of defendant*]**, the record will reflect that the parties and their attorneys are present. All 12 jurors are present in the jury box.** [The alternate jurors are also present.] [Mr./Ms.] [*name of foreperson or presiding juror*]**, has the jury reached a verdict? Please hand the verdict forms to the** [bailiff/clerk]**.**

You should review the verdict forms to see if they are complete, filled out according to the instructions on the verdict form, free from internal inconsistencies, and signed and dated by the foreperson or presiding juror. If a problem is apparent, you should ask the attorneys to approach the bench, discuss the problem with them, tell the jurors what the problem is, and send them back to the jury room to correct the verdict.

If there is no problem, you should state: **The clerk will read the verdict**[s]. After the verdict is read, you should ask the jurors collectively: **Is this your verdict?**

After the verdict is read, either party may ask to have the jury polled. CCP §618. If neither party requests a poll, you may have the jury polled on your own motion, but you are not required to poll absent a party request. See CCP §618. You or the clerk polls the jury by asking each juror individually if the verdict, as read, is his or her verdict. CCP §618. If more than one-fourth of the jurors disagree with the verdict, you must send the jury back to the jury room for further deliberations. CCP §618. But when a juror is silent during polling, you may not count that juror toward the affirmative disagreement of more than one fourth of the jurors as required by CCP §618 in order to require further deliberations. *Keener v Jenn-Weld, Inc.* (2009) 46 C4th 247, 259, 92 CR3d 862.

After completion of the polling, or if polling is not requested, you should state: **The clerk will record and enter the verdict**[s].

If the verdict is defective, you must order it corrected, either by instructing the jurors in the courtroom of the corrections that must be made or by sending them back to the jury room with further instructions about their proper duties. See CCP §619. If you have any doubts about the sufficiency of the verdict, you should send the jury out, under proper instructions, to correct the verdict. See *Mendoza v Club Car, Inc.* (2000) 81 CA4th 287, 301–303, 96 CR2d 605 (judge properly ordered jurors to remedy inconsistency between two questions within special verdict). Inconsistent verdicts are against the law and are grounds for a new trial if not corrected. An inconsistent verdict may arise from an inconsistency among the answers within a special verdict. *City of San Diego v D.R. Horton San Diego Holding Co., Inc.* (2005) 126 CA4th 668, 682, 24 CR3d 338. Similarly, inconsistent general verdicts on separate causes of action constitute grounds for a new trial if not corrected. *Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1346, 100 CR2d 446.

You may reinstruct the jury in an objective, neutral, and noncoercive manner if the jury's simple misunderstanding of a verdict form, or a clerical error, can be corrected. *Mizel v City of Santa Monica* (2001) 93 CA4th 1059, 1072, 113 CR2d 649. You must carefully avoid directing the jury's decision, however, and must simply point out what appear to be unclear special verdict responses. 93 CA4th at 1070–1073.

For further discussion of receiving the verdict and polling the jury, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—TRIAL, SECOND EDITION, §§15.25–15.32 (Cal CJER 2010).

B. [§4.2] CRIMINAL CASES

After the jury has agreed on a verdict, it must be conducted into the courtroom by the bailiff. Pen C §1147. You must call the roll, which is a statement reflecting the presence of the defendant, both counsel, and all the jurors. See Pen C §§1147–1148. You then ask the foreperson or presiding juror whether the jury has arrived at a verdict. Pen C §1149. If the foreperson says "yes," you ask the foreperson to hand the verdict to the bailiff, who in turn hands it to you. See Pen C §1149. You should examine the verdict and ascertain whether it is signed and in proper form. See Pen C §§1151–1154. If the verdict is in proper form, you give the verdict to the clerk, who then reads it. If the verdict is not in proper form, you give it back to the foreperson for correction. See Pen C §1156.

> TIP: In any case involving a crime that is distinguished by degrees, you should check to be sure that the jury verdict form specifies the degree. Penal Code §1157 is strictly applied and if the verdict form does not specify the degree, then the defendant will be convicted of the lesser degree crime. Extrinsic evidence of the jury's intent to convict of the higher degree crime or even the total failure to charge the lesser degree crime will not save a conviction of the higher degree crime. See *People v McDonald* (1984) 37 C3d 351, 379, 208 CR 236, overruled to extent inconsistent with *People v Mendoza* (2000) 23 C4th 896, 910, 914, 98 CR2d 431 (Pen C §1157 does not apply when the defendant is convicted of a crime that is not distinguished into degrees pursuant to proper jury instructions); *People v Escobar* (1996) 48 CA4th 999, 1028, 55 CR2d 883. If lesser included verdict forms are used, you should also make certain that the greater charged crime has been completed and that the defendant has been found not guilty on the greater charge.

You then ask both counsel, or a defendant in pro per, if they wish to have the jury polled. If so, you may poll the jury or ask the clerk to poll the jury. Pen C §1163. If the verdict is unanimous, you direct the clerk to record the verdict. Pen C §§689, 1164. If not, you send the jurors back to the jury room for further deliberation. Pen C §1163. If during polling any juror answers that the verdict is not his or her verdict, you must order further deliberations. See *People v Wattier* (1996) 51 CA4th 948, 955, 59 CR2d 483. It does not constitute improper coercion of a verdict to take the following actions: (1) require the jurors to engage in further deliberations; (2) direct the juror who disavowed the verdict not to acquiesce to the majority but to make his or her own decision; and (3) instruct the jurors as a group that they must each consider the evidence for the purpose of reaching a verdict if they can do so, and they must each decide the case for themselves but only after discussing the evidence and instructions with the other jurors. 51 CA4th at 955–956. If a juror expresses doubt about the verdict after polling and recordation of the verdict under Pen C §§1163 and 1164, you may not reconvene the jury for further deliberations on the basis of this dissent. See *People v Bento* (1998) 65 CA4th 179, 191, 76 CR2d 412.

When an acquittal verdict appears to be inconsistent, under Pen C §1161 you may not invite the jury to reconsider; instead, you must poll the jurors to find whether the verdict reflects each juror's individual verdict and findings. *People v Guerra* (2009) 176 CA4th 933, 944, 98 CR3d 175. This is because a judge's invitation to the jury to reconsider its findings is akin to an order. 176 CA4th at 943.

If the defendant denied any prior convictions and was found guilty of the charged offense, the same jury must make a separate finding as to whether the defendant suffered these prior convictions, unless the jury has been waived on that issue. Pen C §1158. If more than one previous conviction is charged, a separate finding must be made as to each. Pen C §1158. Despite Pen C §1164, a court may reconvene a jury for a trial on defendant's priors if they had not yet left the jury box or been exposed to any outside influences. *People v Kimbell* (2008) 168 CA4th 904, 907–908, 85 CR3d 796.

II. [§4.3] DISCHARGING JURY

In discharging the jurors, you should

- Thank them for their service to the judicial system and the community.
- Refrain from commenting on the propriety of their verdict or findings or failure to reach a verdict. See Cal Rules of Ct, Standards of J Admin 2.30; Cal Rules of Ct, Code of Judicial Ethics, Canon 3B(10).
- Advise them that they may, but are not required to, speak with anyone, including the attorneys, about the case. Allowing a criminal jury to leave privately after deliberations and not talk to anybody was not a violation of due process. *People v Santos* (2007) 147 CA4th 965, 972–973, 55 CR3d 1.

When discharging the jurors, you may consider using the following spoken form to

- Thank them for their service on behalf of the court, the parties, and the attorneys.
- Note the importance of jury service.
- Admonish them regarding their right to discuss or not to discuss their deliberations or verdict with the parties and attorneys following their discharge. See CCP §206 (admonition required in criminal cases).

TIP: Some judges also advise jurors including the alternates for criminal cases how they may track the sentencing of the defendant by giving them a number or contact information.

Ladies and Gentlemen of the Jury:

[Thank you]

This completes your duties in this case. I want to express my appreciation and that of the parties for your services as jurors in this trial. You have been very attentive and conscientious. I thank you for your diligent work and dedication.

[Importance of jury service]

It is a great personal sacrifice to serve as a juror. You have taken time away from your jobs and usual interests to perform a very important civic function. By doing so, you are fulfilling an extremely important role in our system of justice. You are the ultimate decision makers in this system. You provide the knowledge and wisdom of the community in evaluating witnesses and resolving the difficult factual issues in the trial.

[Release from admonition]

Throughout this trial, I have admonished you not to discuss the facts and issues of this case with anyone. I am now releasing you from that order.

[Right to discuss or not to discuss case with attorneys]

You have an absolute right to discuss or not to discuss this case, including your deliberations or verdict, with anyone you choose. It is appropriate for the parties, their attorneys, or their representatives to ask you to discuss your deliberations or verdict with them. The discussion must take place at a reasonable time and place.

[Discharge]

Thank you, ladies and gentlemen of the jury. You are discharged.

A. [§4.4] Follow-Up to Jury Service

Many judges have found that sending a follow-up letter to jurors thanking them for their time and service leaves the jurors with a more positive impression of their jury experience. Also, many send questionnaires to jurors with the follow-up letters. These questionnaires (Appendix D) are helpful in gauging how well the staff operates with jurors. Also, in lengthy or complex cases, some judges send certificates to the jurors commending them for their service. Other judges have taken the time after a trial to speak directly to the jurors either in the court or in chambers. They have found that this helps provide a positive experience and sense of closure for jurors. That time can also be used to advise them of their right to privacy, and how to respond to inquiries if they occur. They can also be advised that they are free to talk about the case and can speak with and ask questions of the attorneys.

Jurors regularly seek reassurance that they have "done the right thing" and will often ask what the judge would have done. You should never answer this question. It can be easily deflected by suggesting that you did not have the benefit of hearing from 11 other jurors, that

many of them, having the benefit of other perspectives and observations, most likely changed positions, and therefore, you can't answer that question. Also, Ethics Opinion #52 from the California Judges Association warns of the risks if any discussion deals with the substance of the case. There should be no such discussions regarding the substance of the case. You can thank the jury for their service, but you may not suggest you agree or disagree with the verdict, and you may not reveal information that has been suppressed or was not received in trial.

See Appendix A for sample "thank-you" letters and Appendix D for sample juror questionnaires following jury service.

> TIP: In criminal cases involving the death sentence, life sentences, or other cases involving significant trauma, such as child molestation, you should check with your court to see if there is a standard juror debriefing procedure. If not, you should consider establishing one, and advocating for training for yourself, colleagues, and staff in how to recognize and deal with juror stress following these types of trials. For information that might be given to jurors on techniques for handling stress resulting from being a juror in an emotionally charged case, see Example 3 in Appendix C, Examples of Jury Information.

B. [§4.5] POSTTRIAL RESTRICTIONS ON ATTORNEYS' INTERVIEWS OF JURORS

After the jurors have been discharged, the attorneys should not ask questions of, or make comments to, jurors that are intended to harass or embarrass them or to influence their actions in future jury service. Cal Rules of Prof Cond 5-320(D). The attorneys are free to discuss the case with the jurors after the trial (with the jurors' permission), but must not criticize a juror for the verdict or reveal evidence not admitted at trial.

> TIP: You might want to advise the jurors that in a criminal case, if the prosecution or defense wants to interview a juror more than 24 hours after the verdict, the interviewer must inform the juror of the identity of the case, the party in the case that the interviewer represents, the juror's right not to discuss the deliberations or verdict, and the juror's right to review any declaration filed with the court. CCP §206(c).

Because CCP §206 gives jurors an absolute right to discuss or not to discuss the deliberations or verdict with anyone, a judge may not issue an order prohibiting discharged jurors from discussing the case if they choose to do so. See *Contra Costa Newspapers, Inc. v Superior Court* (1998) 61 CA4th 862, 867–868, 72 CR2d 69.

C. [§4.6] RELEASING JURORS' PERSONAL IDENTIFYING INFORMATION

On the recording of the verdict in a criminal case, the court's record of personal juror identifying information of the trial jurors, consisting of their names, addresses, and telephone numbers, must be sealed until further order of the court. CCP §237(a)(2). The defendant or defense counsel may petition the court for access to this information to enable the defendant to communicate with the jurors for the purpose of developing a motion for new trial or any other lawful purpose. CCP §206(g). Any other person may also petition the court for access to these records on a showing of good cause. CCP §237(b). You may deny the request on finding that a compelling interest requires that this information be kept confidential or that its use be limited in whole or in part. CCP §237(a)(1). A "compelling interest" includes protecting jurors from threats or danger of physical harm. CCP §237(b). You may require the person to whom disclosure is

made (or his or her agents or employees) to agree not to divulge jurors' identities or identifying information to others, and may otherwise limit disclosure in any manner deemed appropriate. CCP §237(d).

Under CCP §237, the judge need not disclose juror contact information to defense counsel, and nothing in this statute or the federal constitution dilutes the judge's prerogative to protect jurors from unwanted contact from the parties or counsel. *People v Tuggles* (2009) 179 CA4th 339, 380–382, 385, 100 CR3d 820.

APPENDIX A: EXAMPLES OF THANK YOU LETTERS TO JURORS

Example 1

Date

Re: People v _____

Superior Court No. BA_____

Dear [*Name of Juror*],

Thank you for your recent service as a juror in my court.

Those of us in the justice system are well aware that jury duty invariably involves personal sacrifices along with frustration with what appears to be an unwieldy system. Your commitment in accepting this important responsibility ensures that our system of justice continues to work and work well. Jury service is one of the few acts in which we can each fully participate as Americans that keeps our justice system unique in most of the world. For this commitment, I want to personally thank you. Your time, energy, integrity, and patience were critical components in this case and in the entire American justice system.

To allow us to try to improve the daily operation of my court, I have taken the liberty of enclosing two juror questionnaires. One involves the working of the court and the second deals specifically with some innovations that we are introducing to our jurors. Your comments and reactions are very valuable to my staff and me. Please take a few moments to answer the questions along with any other comments you would like to make, and forward them to me in the enclosed stamped envelope.

I sincerely hope that your experience was interesting and worthwhile. I certainly enjoyed having you in my courtroom. Your participation as a responsible citizen is to be commended.

Very truly yours,

Judge of the Superior Court

Example 2 (criminal trial)

Date

Name of Juror
Address

Dear [*Name of Juror*],

Now that you have concluded your jury service, the Court will conditionally seal your personal juror identifying information so that your address and telephone number remain confidential except as allowed by the Court. You also have the right to discuss or not discuss the deliberation or verdict with anyone. Counsel may ask to discuss this case with you at a reasonable place and time if you consent to do so. If the interview takes place more than 24 hours after the end of the trial, the interviewer must tell you the name of the case, who he or she represents, your right not to discuss the case, and your right to review any declaration filed with the court. Any contact without your consent or that violates those requirements should be reported immediately to my Court Staff at [*telephone number*].

Thank you for your conscientious efforts in serving as a trial juror. The court and the people of [*Name of County*] County are grateful for your contribution to our system of justice.

If you have any suggestions for improving our process, please let us know.

Very truly yours,

Judge of the Superior Court

Example 3

Date

Name of Juror
Address

Dear [*Name of Juror*],

Although I expressed to you in open court my personal gratitude and appreciation for the time, effort, and energy that you recently expended as a juror, I wish to reiterate not only my own appreciation, but also the gratitude of our community, by presenting you with a Certificate of Appreciation. The entire community benefits from the jury system because jurors participate in governing their fellow citizens.

I am aware that your jury service caused some disruption of your life and most likely some financial sacrifice. I hope, however, that your experience was sufficiently positive that you will look forward to serving on a jury sometime in the future. It would be a personal pleasure to work with you again.

Very truly yours,

Judge of the Superior Court

APPENDIX B: EXAMPLE OF THANK YOU LETTER TO JUROR'S EMPLOYER

Date

Name of Employer
Address
City, California

Dear [*Name of Employer*],

I would like to extend my personal thanks and the thanks of the justice system for supporting the participation of [*Juror's Name*] in the case of [*Case Name*].

Those of us here in trial courts every day know full well the cost to employers of permitting employees to participate in our system. In recent years there has been much criticism of the quality of justice by the media, but that quality is dictated directly by the quality of the jury and the jurors who make up that group. By supporting the participation of your employees, you are ensuring that when we call on the courts to resolve a legal decision, whether in a criminal case or a civil case, that call is answered by a decision rendered by members of our own communities.

This is without question an extremely expensive system and a great proportion of the cost is imposed on you. I can assure you that those of us in the Superior Court are sensitive to that burden. In the case of [*Case Name*], the attorneys, witnesses, and staff worked extremely hard before turning the mantle over to the jurors. Theirs was truly not an easy job.

I want to thank you for permitting [*Juror's Name*] to participate in this process. I can assure you that this is never as simple as it may appear in the news or as described by the media. We are all very grateful for the part you played in seeing that the system worked.

Very truly yours,

Judge of the Superior Court

APPENDIX C: EXAMPLES OF JURY INFORMATION

Example 1

JUDGE'S WELCOME TO JURORS IN ASSEMBLY ROOM

Good morning, ladies and gentlemen. I am Judge _____, sitting here in Department __.

I want to welcome you this morning. As judges, we each have calendars and, of course, are preparing for trials, but we take turns to share this privilege to speak with you briefly before you start your jury experience. I am looking forward to seeing some of you in my courtroom.

How many of you are here for the first time?

For you first timers, I want to especially recognize you and welcome you to a new experience that I know you will find valuable as a unique view into the workings of our powerful democracy. You will find that next to you might be judges, presidents of companies, gardeners, housekeepers, students, professors, travel agents, lawyers, and every other kind of background you might imagine. Nowhere other than in our courts would we see such a variety of representatives from our many communities.

Participation as a juror is the most critical and significant hands-on experience that you will ever engage in within our democracy. Thomas Jefferson himself referred to the right to sit as a juror as more important than the right to vote. As voters, you may be one of hundreds, thousands, or even millions. As a juror, a visiting judge in our system, you are one of twelve who will determine what justice means and what it looks like. You are the critical piece between the government and individuals, between the wealthy and the poor, between the connected and the unconnected. You are the last place where merit triumphs. This is the one place in our system where everyone is equal before that law. You make that happen; no one else. One writer recently described jury service as being the only public service that has the power to elevate an ordinary citizen, requiring the highest level of human nature—the part that is thoughtful, intelligent, empathetic, and fair. Jury service lets us step out of our everyday lives to listen to the facts; to refuse to judge by appearance, charm, or influence; to understand the rules; and to apply them fairly. YOU are our justice system.

For those who ignore a jury summons, in a very real sense they are throwing out democracy and are disrespecting the blood of our forefathers. Most of the world does not have what we have and what we too easily take for granted. As jurors, you are truly the first responders to our justice system, as soldiers are our first responders to our defense system, and as law enforcement are our first responders to crime.

What you see here will be just a small part of all that goes on to have trials ready to present to you for your decisions. Some of the many facets of the system that are constantly being juggled may cause some unavoidable delays. If any of this impacts on you, I want you to know that we value your time and presence and are doing all we can to ensure that nothing interferes with your ability to do the job we place so carefully in your hands. As we recognize that each of you have many competing demands on your time and your attention, we are all committed to doing our best to use your time wisely and to make sure that your service as a juror is something you can

be truly proud of. You are our visiting judges, and we honor you for your participation in the greatest justice system ever devised.

Please feel free to ask questions if you have them and to give us feedback to allow us to improve what we do. We welcome all suggestions, compliments, and criticisms.

And we thank you for being here.

Example 2

JURY INFORMATION

We extend our sincere thanks and appreciation for your service in this trial. Our justice system depends completely on the time and attention provided by our jurors in ensuring that justice is done and that our system provides a fair and impartial forum for all parties.

The following information is provided to give you some guidelines as to the proceedings you will be involved with and to answer questions you may have.

Department _____ will start each morning at 8:30 a.m., unless Judge [*Judge's Name*] advises you otherwise. We will stop for lunch at 12:00 noon. The afternoon sessions will begin at 1:30 p.m. promptly and end at 4:00 p.m., again, unless you are advised otherwise. You will be notified of any deviations in this schedule in advance.

The afternoon break will generally take place at about 2:50 p.m. Each break is limited to ten minutes. If you need additional time for any reason, please advise the judge through me, your bailiff.

In case of an emergency or unavoidable tardiness, please call the court at _____ to advise us of your status. You may wish to write this number down for your use through the course of the trial.

We do our best to start at the appointed times but there are, on occasions, unavoidable delays. Your patience is requested at these times. We may not be able to explain to you the causes of our delays, as almost invariably they concern procedural matters not involving you as judges. Please be assured that we are doing everything in our power to avoid causing you to wait. Your promptness is very important and is very much appreciated. To avoid being the cause of such delays, we ask that you arrive at court a few minutes before the starting time.

If there are unavoidable delays during the trial day, such as a longer noon break, you may want to take advantage of downtown Los Angeles. It has a lot to offer. Maps and guides have been posted in the jury room to give you some ideas, and you are certainly encouraged to take advantage of this opportunity.

When everyone is assembled at the beginning of the day and after each recess, please buzz the clerk ONCE to let the court know you are ready. Once you are in the jury room, please **remain inside** until you are notified to come into the courtroom. Two buzzes from the courtroom will be your signal to come into the jury box in the courtroom.

At the indicated time that you are directed to come to court, go directly to the jury room. Do not wait outside the courtroom. If there are other matters being conducted, please do not cut across the courtroom or walk through the area directly in front of the judge's bench. Walk along the back of the courtroom and through the jury box to avoid any unnecessary disruptions. You are asked to come in together, as much as possible, to prevent jurors "dribbling" through the courtroom. Your presence in the courtroom, other than when the trial is in session, may require that we stop other proceedings being conducted. Your cooperation along this line is very much appreciated.

All questions, whether they relate to procedures or to problems you may be experiencing, should be directed to me, your bailiff. I will be your liaison with the court and counsel during the trial. Do not approach the attorneys, parties, or the judge for any reason. Such an approach may be misconstrued and may result in a mistrial. If you are approached by anyone concerning this case, such as a spectator, a witness, a relative, or media person, please advise them you are prohibited from talking to them, and please advise me of any such incidents.

In order to comply with the Code of Civil Procedure, which applies to all cases, you will be addressed by your seat number throughout the course of the trial. Please sign any communications by using this seat number, or if you otherwise need to identify yourself in court, again, please use your seat number.

Although the jury deliberating room is your room during the course of this trial, we are not able to keep the room open during the lunch recesses without advance arrangements. As the court bailiff, I am responsible for your care and well-being during the trial, and will not be available during the noon recesses due to other duties and obligations, again, without advance scheduling. Due to budget cuts, we are unable to provide lunches to the jury. However, there are many reasonably priced facilities located close to the courthouse. Many offer discounts to customers on jury duty.

You are not to talk with anyone about this case or any subject related to this case until the trial is over and you have been discharged by the judge. This includes family members and coworkers. Until the case is turned over to you for deliberations, you are not even to discuss matters connected with this trial with your fellow jurors. Do not approach the attorneys or any parties in this case with any questions or comments, again, for the reasons noted above.

Please remember that you are not advocates for either side but are impartial judges of the facts. It would therefore be a violation of your oaths as jurors for you to conduct any independent investigation, such as driving by the scene of the crime, or consulting reference works or persons for additional information. Even referring to the dictionary to answer a question you might have relating to the trial raises the possibility of a mistrial.

Judge [*Judge's Name*] will also instruct you that it would be a violation of your oaths as judges to base any decision on matters <u>not</u> in evidence or to speculate about facts not presented to you. You further <u>must</u> accept the law as stated to you by Judge [*Judge's Name*], whether or not you agree with the law, and in reaching a decision, you are not permitted in any way to consider penalty or punishment.

If you become aware of any instances of a juror violating the oath to follow the law, Judge [*Judge's Name*] requests that you advise [him/her] of your concern, as any such violation jeopardizes the rights of each side to a fair trial.

Please keep your valuables with you as much as possible. You are welcome, of course, to keep hats, coats, books, or umbrellas, etc. in the jury room. However, things have been found to be missing and we unfortunately cannot guarantee the safety of your personal property.

You will be provided with notebooks and pencils to take notes during the trial. You may not take these notebooks home during the trial, however, but are instructed to leave them under your seat cushion in the jury box as you leave each day. You may, of course, take them with you into the jury room when you begin deliberating.

Please wear your jury badge in an easily visible location on your person at all times when you are in or near the courthouse so that you are identifiable as a juror.

Please give the trial your full attention while in session. Naturally, there can be no talking, eating, smoking, chewing gum, dozing, or sleeping while the trial is being conducted. If the attorneys and judge are discussing matters at the side bar, feel free to speak quietly of matters unrelated to the trial or stand at your seat and stretch.

Smoking is not permitted in the jury room and the Board of Supervisors has designated the entire Criminal Courts Building as a nonsmoking facility.

You may bring food and beverages into the jury room, although alcoholic beverages are not permitted. Please keep the jury room orderly and clean in consideration of the other jurors and other juries.

Please do not bring or use a cellular phone in the jury room during your service on this trial. As noted above, if you need additional time to complete calls for business or other purposes, please advise the judge through me.

You will be requested to provide your current address and a phone number to Judge [*Judge's Name*]. This information is kept strictly confidential and is available only to the judge through the trial to allow us to contact you should there be any problems. It will be destroyed after the trial is concluded.

Only when the evidence is concluded, the instructions have been read in open court, and the attorneys have had a chance to present their arguments to you, is the trial completed. Once this stage is reached, the jury shall, for the first time, begin discussing the case. Such discussions may only be conducted when all 12 jurors are present, in the jury room. At this stage, for the first time, the alternate jurors will be separated. They will be given instructions as to where to remain.

Jury Buzzer instructions are as follows:

> Please buzz the court <u>once</u> when you are reassembled.
>
> Buzz the court <u>twice</u> if you have a question.
>
> Buzz the court <u>three times</u> if you have a verdict.

It may not always be possible for me to respond instantly when you buzz twice with a question or concern because of other matters being conducted. If the court buzzes you back once, that will indicate to you that we acknowledge your signal and will be there as soon as possible.

All questions posed by the jury to the court during deliberations must be in writing and signed by the designated foreperson (by seat number), then given to the bailiff. You can notify me that you have a question by buzzing twice, as noted above.

If the jury room is locked during deliberations, a kick-out panel is located in the door to the jury room and can be removed easily in the event of an emergency.

The jury may not leave at the end of the day until all exhibits have been returned and accounted for. It is suggested that the exhibits be gathered and returned to the clerk a few minutes before the close of the day to prevent any delays in your leaving.

In the event a readback is requested, all alternates will be reassembled to participate in hearing the testimony requested. When such a request is made, the testimony read back will exclude objections and any matters that may have been stricken. In order to read back testimony, it will be necessary to contact all attorneys or parties, and the court reporter will need to locate the area of readback requested. If the court is otherwise engaged in new proceedings, which is generally the case, it will take a little time to conclude preparations in order to present that testimony to you. In light of these mechanics, if readback is necessary for your deliberations, you are requested to be as specific as possible in the area of readback you desire, and to please be patient as we prepare the response.

Alternates, during deliberations, are requested to keep the bailiff updated as to their whereabouts. They are also prohibited from discussing the case with each other or anyone else until they are either called to substitute for a juror or until the judge dismisses them at the end of the trial.

If at any time during the trial, there is a disruption in the courtroom, please LEAVE THE COURTROOM IMMEDIATELY, GO DIRECTLY TO THE JURY ROOM, and wait for further instructions. Do NOT remain in the courtroom and do not try to offer any assistance.

SUGGESTED PROCEDURES FOR DELIBERATIONS

The following comments are suggestions to aid in your deliberations in the jury room. None of them is mandatory and you are not required to follow them. You are invited to give us any suggestions you have that might assist future juries.

Before selecting a foreperson, get to know each other and take time to get acquainted. This will help in your selection and everyone will feel able to speak more freely when you start your work. Each of you may want to take a few minutes to introduce yourself, and indicate what you prefer to be called.

At all times, jurors should feel free to be heard, to give feedback, and to ask questions. This will prevent boredom and let the speaker know that he or she is being heard. It also energizes you as a group and may help with concentration on the questions you are there to decide.

In looking for a foreperson, a random selection may not be the best way to proceed. You should look for a foreperson who is a good listener, who can organize the evidence and tasks, who can be certain that everyone is heard, and who can help jurors understand why different people may have different opinions. You may want to select someone who has some managerial or supervisory experience, or who has some organizational skills.

You may wish to discuss the case before taking any vote to avoid making people feel committed or defensive. At all times, remind each other that you are impartial judges and not advocates for any side.

Remember that there are no experts in the jury room.

Each of you must reach your own decision, but please discuss your reasoning with the other jurors.

If things get heated, this may be a good time to have a break. You may take as many breaks as you wish. If new proceedings are being conducted, feel free to buzz the bailiff, and come through the courtroom quickly and as one group, to minimize disruption. If you are making progress and wish to keep working without a break, feel free to do so.

Some suggestions for the foreperson:

- Make a list of things the jury has to decide. Make summaries as you proceed.
- Be certain that everyone has a chance to be heard and that nobody monopolizes the time. Discuss all concerns and questions.
- Be sure that everyone is respectful of each other.
- If there is a disagreement among the jurors, don't let one side automatically assume its viewpoint is correct. Use the disagreement as an opportunity to reexamine assumptions and conclusions.
- Remind the jurors of the court's instructions if anyone starts to base a decision on inadmissible evidence, wants to testify as an expert, or wants to bring in legal advice or information from sources outside the courtroom. These actions are violations of your oaths as judges.
- You may wish to make a chart with two lists. On one side, list the evidence and reasoning supporting one position, and on the second, evidence and arguments supporting the other position. This may be useful, not to see which side has a longer list, but to help you make a reasoned decision based on the evidence and the court's instructions regarding the law.

PLEASE ACCEPT OUR SINCERE THANKS FOR YOUR JURY SERVICE. IF YOU HAVE ANY COMMENTS, CRITICISMS, OR SUGGESTIONS RELATING TO YOUR SERVICE, PLEASE DO NOT HESITATE TO DIRECT THEM TO JUDGE [*JUDGE'S NAME*] THROUGH THE BAILIFF.

DEPUTY [*Name of Deputy*]
THE BAILIFF, DEPARTMENT XXX

Example 3: Emotionally Charged Cases

JUROR STRESS

Jury service can be stressful, particularly in an emotionally charged case. Stress reactions are normal responses in normal people to stressful situations or to exposure to traumatic events, such as those experienced during some cases while serving as a juror. Typically, these feelings don't last long and for some may not appear for weeks or even months after the exposure. As individuals, we respond in our own unique ways and recover at our own pace. The healing process is always unique.

Reactions to stressful situations vary but can include one or more of the following:

Physical
Sweating
Heart racing
Fatigue, weakness
Headaches, body aches
Shortness of breath
Nausea, vomiting
Changes in appetite
Sleep problems
Sexual inhibitions

Thinking
Poor concentration
Forgetfulness
Mental confusion
Difficulty with decision making

Emotional
Anxiety/fear
Sadness/depression
Guilt
Irritability, anger
Crying
Insecurity
Flashbacks
Nightmares
Difficulty slowing down
Feelings of being unappreciated
Feeling that no one understands
Insecurity, depressed self-esteem

Behavioral
Hyperactivity/restlessness
Withdrawal/fear of being alone
Increased use of alcohol/drugs
Robotlike behavior

All of the above behaviors are normal although they may seem unusual and some are very different from others. Again, we are all individuals and respond in our own way, differently and uniquely. If the reactions to stress and feelings of anxiety or depression or physical ailments continue, professional consultation is advisable.

SUGGESTIONS TO HELP YOU GET THROUGH A DIFFICULT TIME

1. Be willing to talk about what happened and express your thoughts. Talking about your experience and your reactions to them are critical to healing.

2. Share your feelings. Don't hold them in or ignore them. This will help you get through this experience and heal more rapidly.

3. Be gentle with yourself. There are always things you could have done differently. "20/20 hindsight" is a temporary way the mind reflects back.

4. Be patient with yourself and expect changes with the passage of time.

5. Draw on supports that you know nurture you. This may include friends, reading, recreation, religion, prayer, meditation, music, and exercise.

6. Take care of yourself physically: good diet; adequate sleep, rest, and exercise; daily walks—these will all help considerably.

7. Any decisions about major life changes should not be made for six months to a year from exposure to traumatic events. Your feelings and attitudes may change over time.

8. Avoid caffeine, sugar, and junk food. They increase the body's stress responses.

9. Try not to numb your feelings with overuse of alcohol or drugs. The relief is temporary and the problems that arise may be great.

10. Give yourself permission to be alone, but don't totally withdraw from social interaction.

11. Stopping from time to time to take four or five deep, cleansing breaths is relaxing and rejuvenating.

12. Triggers, such as press coverage, television, radio, or other reminders of the justice system may bring back intense feelings. This is normal and will ease with time.

13. It may be helpful to share phone numbers with the other jurors and use one another for mutual support. No one else had the same experience that all of you shared. Lasting friendships are often built on mutual experiences.

APPENDIX D: EXAMPLES OF JURY SERVICE QUESTIONNAIRES

Example 1

JURY SERVICE EXIT QUESTIONNAIRE

Thank you for your invaluable service as a juror. Your suggestions on how we can improve jury service for future jurors will be both helpful and greatly appreciated. Please take a few minutes to briefly discuss your experience as a juror and add any comments and/or suggestions you would like to make. Your signature on this form is not necessary, and all information will be held strictly confidential. Once completed, please give this form to the bailiff or clerk. In advance, thank you for your cooperation.

Juror number (*optional*):_____
Date(s) of service:_____

Name of judge presiding:_____
Name or number of court:_____

1. Were you able to understand the instructions provided in your jury summons? Yes___ No___. If not, please explain what was not clear:
   _____
   _____

2. Is there additional information you believe should be included in the jury summons, but wasn't? Yes___ No___. If yes, please explain:_____
   _____

3. Did you have contact with the court office before reporting for jury service? Yes___ No___. If yes, was that contact satisfactory? Yes___ No___. If not, please explain:_____
   _____

4. Were you selected to serve on a jury? Yes___ No___. If yes, do you believe that you and the other jurors were able to faithfully fulfill your obligations as jurors according to the standards outlined in the jury handbook you were given? Yes___ No___. If not, why not?_____
   _____

5. Was jury service what you expected it to be? Yes___ No___. If not, why not?_____
   _____

6. Do you have any suggestions on how jury service could be improved for others?_____
   _____

7. Do you wish to comment on the court facility (physical comfort, safety, etc.)?_____
   _____

8. Were you treated with courtesy and respect by court personnel? Yes___ No___.
   Comments:_____
   _____

9. Do you have any suggestions or would you like to make any comments about the clerks, bailiffs, court reporter, or judge?
   _____
   _____

10. Are there any other comments you would care to note?
    _____
    _____

_____

Signature (*optional*)

Example 2

JURY SERVICE QUESTIONNAIRE
Department [*number*]

[*Case name*] [*Case number*] [*Date*]

1. What are your impressions of the court personnel and the attorneys?

Judge:_____
_____

Prosecutor or plaintiff's counsel: _____
_____

Defense counsel: _____
_____

Bailiff:_____

Court clerk:_____

Court reporter:_____

2. What did you like about your service in this trial? _____
   _____
3. Was there anything you disliked about your service in this case? _____
   _____
4. What is your opinion of our court system?_____
   _____
5. What was your experience with the assembly room and the summons process?
   _____
   _____
6. Do you have any suggestions on improvements to our system or anything that you might have liked to see during your service on this trial or in future trials?
   _____
   _____
7. Do you have any suggestions on how we might make your service more comfortable or enjoyable?_____
   _____

8. Were the preliminary instructions about the elements of the case provided to you at the beginning of the trial helpful? _____ Any comments?_____
   _____
   _____

9. Did you find the opening statement given before jury selection helpful? _____ Any comments?_____
   _____

10. What was your opinion of our juror notebooks? _____
    _____
    Should we have included anything else?_____
    _____
    _____

11. What did you think of being able to ask questions? _____ Did you ask any? _____ Was this helpful?_____
    _____

12. Was it helpful to have individual copies of the final jury instructions?_____ Any comments? _____
    _____

13. What was your feeling about being addressed by your juror identification number in court?_____
    _____

14. Any additional comments?_____
    _____

Name [*optional*]:_____

We are grateful for your responses. They are of invaluable assistance to us as we continue to try to improve our efforts in making your experience as a juror a positive one.

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