
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

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Bill No: AB 1541 **Hearing Date:** July 11, 2017
Author: Kalra
Version: June 29, 2017
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Examination of Prospective Jurors*

HISTORY

Source: California Public Defenders Association

Prior Legislation: None

Support: American Civil Liberties Union; California District Attorneys Association; NJP Consulting

Opposition: None known

Assembly Floor Vote: 62 - 12

PURPOSE

The purpose of this bill is to require a trial judge to permit counsel for each party to conduct a jury examination that is calculated to discover bias or prejudice with regard to the circumstances of a particular case or the parties before the court and to make related changes.

Existing law establishes that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state, as provided. (U.S. Const., 6th Amend.)

Existing law establishes the Trial Jury Selection and Management Act, which sets forth the rules and procedures for the selection of jurors, and the formation of trial juries for both civil and criminal cases in all trial courts of the state. (Code of Civil Procedure §190 *et seq*)

Existing law states that all persons are eligible and qualified to be prospective trial jurors, except the following:

- a) Persons who are not citizens of the United States.
- b) Persons who are less than 18 years of age.
- c) Persons who are not domiciliaries of the State of California, as defined.
- d) Persons who are not residents of the jurisdiction wherein they are summoned to serve.
- e) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.
- f) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing

in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

- g) Persons who are serving as grand or trial jurors in any court of this state.
- h) Persons who are the subject of conservatorship. (Code of Civil Procedure § 203 (a).)

Existing law provides that no person shall be excluded from eligibility for jury service in the State of California for any reason other than those reasons provided in 3) above. (Code of Civil Procedure §203 (b).)

Existing law requires a trial jury to consist of 12 persons, except that in civil actions and misdemeanor cases, the trial jury may consist of 12 or any number less than 12, upon which the parties may agree. (Code of Civil Procedure §220.)

Existing law provides that to select a fair and impartial jury in civil jury trials, the trial judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. (Code of Civil Procedure § 222.5.)

- a) Provides that during jury selection in civil trials, during any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel.
- b) The trial judge should allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process.
- c) The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed in any case. The trial judge shall not establish a blanket policy of a time limit for voir dire.
- d) The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning. For purposes of this section, an "improper question" is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law. A court shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel. If a questionnaire is utilized, the parties should be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences. To help facilitate the jury selection process, the judge in civil trials should provide the parties with both the alphabetical list and the list of prospective jurors in the order in which they will be called.

- e) In civil cases, the court may, upon stipulation by counsel for all the parties appearing in the action, permit counsel to examine the prospective jurors outside a judge's presence.

Existing law provides that in a criminal case, the court shall conduct an initial examination of prospective jurors and may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. (Code of Civil Procedure §223.)

- a) Allows the court, in the exercise of its discretion, to limit the oral and direct questioning of prospective jurors by counsel.
- b) Allows the court to specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel.
- c) Provides that voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
- d) Establishes that the trial court's exercise of its discretion—in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause—shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

Existing law establishes that a challenge is an objection made to the trial jurors that may be taken by any party to the action. (Code of Civil Procedure §225.)

Existing law provides that a challenge to a prospective juror is made by either a challenge for cause or a peremptory challenge. (Code of Civil Procedure §225.)

Existing law provides that a challenge for cause may be for one of the following reasons:

- a) General disqualification—that the juror is disqualified from serving in the action on trial.
- b) Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.
- c) Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party. (Code of Civil Procedure §225.)

Existing law provides that—commencing on January 1, 2017—if the offense charged is punishable with a maximum term of imprisonment of one year or less, the defendant is entitled to six and the state to six peremptory challenges. (Code of Civil Procedure §231 (b).)

Existing law requires the Judicial Council to conduct a study, and on or before January 1, 2020, to submit a report to the public safety committees of both houses of the Legislature on the reductions in peremptory challenges, including but not be limited to, an examination of the number of peremptory challenges used by the defendant and the state in misdemeanor jury trials, a representative sample of the types of cases that go to jury trial, and the resulting cost savings to the courts. (Code of Civil Procedure §231 (f).)

Existing law provides that parties are encouraged to submit a joint form questionnaire to be used with prospective jurors to help expedite the voir dire process. (Cal. Rules of Court, rule 3.1549.)

Existing law provides that for expedited jury trials, including jury voir dire, each side will be allowed five hours to present its case, including opening statements and closing arguments, unless the court, upon a finding of good cause, allows additional time. The amount of time allotted for each side includes the time that the side spends on cross-examination. The parties are encouraged to streamline the trial process by limiting the number of live witnesses. The goal is to complete an expedited jury trial within two trial days. (Cal. Rules of Court, rule 3.1550.)

Existing law requires the court to conduct a pre-voir dire conference, as provided. (Cal. Rules of Court, rule 4.200.)

Existing law allows the court to require counsel to submit in writing, and before the conference, all questions that counsel requests the court to ask of prospective jurors. This rule applies to questions to be asked either orally or by written questionnaire. The Juror Questionnaire for Criminal Cases (form MC-002) may be used. (Cal. Rules of Court, rule 4.201.)

Existing law provides that the examination of prospective jurors in a criminal case should include all questions necessary to insure the selection of a fair and impartial jury. (Cal. Stds. Jud. Admin., Standard 4.30 (a)(2).)

Existing law provides that the trial judge may want to use the Juror Questionnaire for Criminal Cases (form MC-002), an optional form and is not intended to constitute the complete examination of prospective jurors, to assist in the examination of prospective jurors and make the initial examination of prospective jurors more efficient; provides that if the court chooses to use form MC-002, its use and any supplemental questions must be discussed at the pre-voir dire conference required by rule 4.200; and advises that excusing jurors based on questionnaire answers alone is generally not advisable. (Cal. Stds. Jud. Admin., Standard 4.30 (b).)

Existing law establishes that no judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. (Cal. Const. Art. VI, Section 13.)

This bill deletes the existing Code of Civil Procedure Section 223.

This bill provides that to select a fair and impartial jury in a criminal trial, the trial judge shall conduct an initial examination of prospective jurors.

This bill provides that at the first practical opportunity before voir dire, the trial judge shall consider the form and subject matter of voir dire questions. And the party may submit questions to the trial judge.

This bill provides that upon completion of the trial judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors.

This bill provides that the scope of examination conducted by counsel shall be within reasonable limits prescribed by the trial judge.

This bill provides that during any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case or the parties before the court.

This bill provides that the fact that a topic has been included in the trial judge's examination shall not preclude appropriate follow up questioning in the same area by counsel.

This bill provides that the trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning.

This bill provides that the trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire. As voir dire proceeds, the trial judge shall permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitude inconsistent with suitability to serve as a fair and impartial juror in the particular case.

This bill defines an "improper question" as any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury.

This bill provides that in exercising his or her sound discretion, the trial judge shall consider all of the following:

- a) The amount of time requested by trial counsel.
- b) Any unique or complex legal or factual elements in the case.
- c) The length of the trial.
- d) The number of parties.
- e) The number of witnesses.

This bill provides that voir dire of any prospective jurors shall, where practicable, take place in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

This bill provides that the trial judge shall, in his or her sound discretion, consider reasonable written questionnaires when requested by counsel. If a questionnaire is utilized, the parties shall be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences.

This bill provides that to help facilitate the jury selection process, the court in a criminal trial shall provide the parties with the list of prospective jurors in the order in which they will be called.

This bill provides that the trial judge's exercise of discretion in the manner in which voir dire is conducted, including any limitation on the time that will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of exercise of challenges for cause, is not cause for conviction to be reversed unless the exercise of that discretion results in a miscarriage of justice.

COMMENTS

1. Need for This Bill

According to the author:

In any criminal trial where a person's liberty is at stake, it is critical for both sides to be able to ensure that each juror is fair and impartial. The recent reductions in peremptory challenges and the common limitations on proper attempts to examine jurors in the courtroom strengthens the need for AB 1541 in establishing guidance that courts must consider that ensures parties have sufficient information in juror selection and allow adequate time to question prospective jurors during voir dire for criminal trials.

Courtroom dynamics and possible lack of candor by jurors can make it difficult for the attorneys and judge to make this determination. In addition, the judge has the discretion to limit the examination of prospective jurors, and it is not uncommon for judges to limit the attorneys to a total of 15-30 minutes for their voir dire of the entire jury panel. AB 1541 clarifies the law and permits counsel to "liberal and probing examination" of prospective jurors to discover bias or prejudice and prohibits unreasonable or arbitrary time limits as a general court policy by the judge.

During the voir dire process, peremptory challenges are often used by attorneys on both sides to ensure fairness by allowing them to excuse jurors who they suspect, but cannot prove, are harboring biases. As part of the 2016-17 Public Safety Budget Trailer bill, SB 843, Chapter 33, Statutes of 2016, the number of peremptory challenges allowed to be used by both the prosecution and defense in criminal misdemeanor trials was reduced from ten to six. This significantly curtails the ability of counsel to remove jurors who may not be able to render a fair and impartial verdict.

Collectively, the policy set by reducing peremptory challenges and the limitations commonly imposed on attorneys in their attempts to properly examination a prospective juror create significant challenges for attorneys on both sides to select a fair and impartial jury.

The voir dire procedures in AB 1541 will help ensure a fair and impartial jury and therefore a fair trial.

Just last month, the United States Supreme Court decided *Pena-Rodriguez v. Colorado* (2017) 580 U.S. ____ [2017 WL 855760]. In the course of vacating the defendant's conviction because a juror's racial bias infected the jury deliberations and verdict, the high court observed that "[t]he advantages of careful voir dire" are designed to prevent racial bias. That observation applies with equal force to all kinds of bias. And just last year, the California Supreme Court reversed two death penalty cases more than 15 years after lengthy trials because the trial judges failed to conduct oral voir dire. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 36-41; *People v. Covarrubias* (2016) 1 Cal.5th 838, 866.) The failure of the trial courts in these cases to take the time to elicit the relevant opinions of the respective jurors has delayed justice for defendants and victims, and could have been avoided had the trial judges simply taken the time to allow the prosecutors and defense counsel a reasonable amount of time to voir dire the potential jurors on these important issues.

2. The Sixth Amendment

A hallmark of the American legal system is the right to a jury trial. "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor...or perhaps [the] overconditioned or biased response of a judge." (*Taylor v. Louisiana* (1975) 419 U.S. 522, 530.)

Specifically, the Sixth Amendment of the United States Constitution requires that a criminal defendant be afforded not just with a jury, but with an impartial one. As Chief Justice John Marshall has described, "[t]he great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind...The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those [preconceived] opinions which will resist those impressions." (*United States v. Burr* (1807) 25 F.Cas. 49, 50.)

3. Voir Dire and Peremptories

Juries are selected by a court process known as voir dire. During voir dire, prospective jurors are seated in the jury box and are asked—in front of other prospective jurors and the public—a series of questions to determine their competence and fitness to serve as jurors. During voir dire, parties (and their attorneys) will consider the facts and evidence involved in that particular case and compare and contrast that to the background and experience of a prospective juror. It is hoped that during voir dire—through various questions posed by the court and attorneys—that the prospective jurors will provide verbal and non-verbal cues that will reveal information about a prospective juror's life, background, and experiences, demonstrating whether a prospective juror is biased or suitable to serve. Not surprisingly, the best jury is one that consists of persons who have a wealth of experiences and varying perspectives of the world. A jury that includes a wide spectrum of the community helps to ensure that the jury's deliberation (and verdict) ultimately reflects that community.

A juror who is incompetent, incapacitated, or biased may be excused for cause. For example, a prospective juror who does not possess sufficient knowledge of the English language would likely be excused for cause. Additionally, a juror with a familial or employment relationship with one of the parties or witnesses is considered to have an implied bias, and could be excused

for cause. Furthermore, a juror who reveals during questioning that he or she has already pre-judged the matter may also be excused for cause on grounds of actual bias.

Generally, a juror who testifies that he or she can fairly apply the jury instructions will meet the legal standard of being unbiased. However, if such a juror is nevertheless suspected of being biased or not suitable to serve, a party or attorney can use a peremptory challenge to remove that juror.

In 2016, the Budget Act included a public safety trailer bill that included a reduction in the number of peremptory challenges in misdemeanor criminal cases from ten to six. In support of this reduction, the Judicial Council noted (in a bill similar to budget trailer language) that reducing peremptory challenges would reduce court costs and improve juror satisfaction. Similar language had been in a number of bills over the year with support from the Judges Association and opposition from the California District Attorneys Association and the California Public Defenders Association.

4. Adequate Time to Examine Jurors

This bill will require the judge to give the prosecution and defense in a criminal trial to be given time to examine jurors to determine if there is bias or prejudice with regards to the particular case. The bill further requires the trial judge to permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. The trial judge, in his or her sound discretion, should consider the use of reasonable written questionnaires for jury examination when requested by counsel. The bill would also require the court to provide the parties with the list of prospective jurors in the order in which they will be called to help facilitate the jury selection process.

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