

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Criminal Law Advisory Committee
Hon. Steven Z. Perren, Chair
Joshua Weinstein, Committee Counsel, 415-865-7688,
joshua.weinstein@jud.ca.gov

DATE: October 3, 2007

SUBJECT: Criminal Law: Jury Voir Dire (amend Cal. Rules of Court, rule
4.201) (Action Required)

Issue Statement

The procedure regarding when to allow and when to inform prospective jurors of the possibility of sequestered voir dire is not well known. Jurors and a Judicial Council member have asked staff to consider how best to increase awareness of this option.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2008, amend rule 4.201 of the California Rules of Court by adding an advisory committee comment to emphasize the procedure to be followed to determine whether sequestered voir dire is appropriate and when courts might wish to inform prospective jurors of this option.

The text of the amended rule is attached at page 4.

Rationale for Recommendation

The Code of Civil Procedure creates a preference for nonsequestered voir dire.¹ (Code of Civ. Proc., § 223.) Judges, however, have the discretion to allow sequestered voir dire on issues that may be sensitive to the prospective juror or when the court deems it otherwise appropriate. (*People v. Roldan* (2005) 35 Cal.4th 646, 691.) Because of concerns raised by Judicial Council member Assembly Member Dave Jones and jurors, the Criminal Law Advisory Committee

¹ Legislation regarding both civil and criminal juries is codified in the Code of Civil Procedure.

investigated methods to increase judicial awareness of when to allow sequestered voir dire and when to inform prospective jurors of this option. In addition to improved judicial education on the procedure, the committee is suggesting the proposed advisory committee comment to highlight and describe the procedure in a succinct manner.

The proposed comment states the law regarding the preference for nonsequestered voir dire; points out the situations where sequestered voir dire might be appropriate, suggesting that “a judge should always inform the jury of the possibility of sequestered voir dire” if voir dire is likely to elicit sensitive answers; and notes that prospective jurors must be advised of their right to request a hearing in chambers on sensitive questions rather than answering them on a written questionnaire.

Alternative Actions Considered

The Criminal Law Advisory Committee considered two other alternatives. The first was amending rule 4.201 rather than highlighting the procedure in an advisory committee comment. Second, the committee considered increasing awareness solely through judicial education rather than amending the rule. The committee concluded that it would not be appropriate to recommend amending the rule because the rule's purpose is to raise awareness, rather than to state a court procedure.

Solely addressing the concern through judicial education was similarly rejected. While education provides judges with information, it is temporal and does not reach every judicial officer. The committee concluded that a permanent statement in an advisory committee comment—along with improved judicial education—would ensure the best exposure.

Comments From Interested Parties

The proposal was circulated for public comment for a nine-week period in spring 2007. Four comments were received, of which three agreed with the proposal. The remaining comment was from Assembly Member Jones who agreed with the proposal if it was amended.

In his comment, Assembly Member Jones notes that he initially brought to staff's attention the desirability for this clarifying advisory committee comment. While he supports the proposal, he offered nonsubstantive language changes to make the comment clearer and more direct. Slight changes suggested by the Criminal Law Advisory Committee were proposed to Assembly Member Jones. Assembly Member Jones agreed with those slight changes and they have been incorporated in the proposal. The exact language of Assembly Member Jones' suggested revision can be found in the comment chart.

A chart summarizing the comments is attached at pages 5–9.

Implementation Requirements and Costs

The only implementation costs would be the usual costs associated with the development of a new rule.

Attachments

Rule 4.201 of the California Rules of Court would be amended, effective January 1, 2008, to read:

1 **Rule 4.201. Voir dire in criminal cases**

2
3 To select a fair and impartial jury, the judge must conduct an initial examination
4 of the prospective jurors orally, or by written questionnaire, or by both methods.
5 The *Juror Questionnaire for Criminal Cases* (form MC-002) may be used. After
6 completion of the initial examination, the court must permit counsel to conduct
7 supplemental questioning as provided in Code of Civil Procedure section 223.

8
9 **Advisory Committee Comment**

10
11 Although Code of Civil Procedure section 223 creates a preference for nonsequestered voir dire
12 (*People v. Roldan* (2005) 35 Cal.4th 646, 691), a judge may conduct sequestered voir dire on questions
13 concerning media reports of the case and on any other issue deemed advisable. (See, e.g., Cal. Stds. Jud.
14 Admin., std. 8.5(a)(3).) To determine whether such issues are present, a judge may consider factors
15 including the charges, the nature of the evidence that is anticipated to be presented, and any other relevant
16 factors. To that end, a judge should always inform jurors of the possibility of sequestered voir dire if the
17 voir dire is likely to elicit answers that the juror may believe are sensitive in nature. It should also be noted
18 that when written questionnaires are used, jurors must be advised of the right to request a hearing in
19 chambers on sensitive questions rather than answering them on the questionnaire. (*Copley Press Inc. v.*
20 *Superior Court* (1991) 228 Cal.App.3d 77, 87.)

SP07-21
Criminal Law: Jury Voir Dire
(amend Cal. Rules of Court, rule 4.201)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Hon. Dave Jones Member of the Assembly Assembly Judiciary Committee	AM	N	By way of quick background, I believe the proposal originated from a concern I raised last year to Judicial Council staff about an aspect of the jury <i>voir dire</i> process brought to my attention by one of my constituents. Specifically, this constituent informed me that our current jury selection system can, in her painful experience, be unnecessarily difficult for individuals who have experienced substantial personal trauma due to their exposure to some aspect of a violent crime. In my constituent's case, she reportedly endured the terrible experience of losing a loved-one through a murder and was subsequently asked to serve on a jury involving another alleged murder. While attempting to perform her civic duty, she was reportedly subjected to further trauma during the <i>voir dire</i> process in that case because she felt compelled to relive this horrible experience in front of a room full of strangers. This occurred because the presiding judge reportedly failed to inform her of the possibility of sharing this personal tragedy in chambers rather than in public. As a result, my constituent said she felt highly victimized again.	Agree with slight editing for clarification.

SP07-21
Criminal Law: Jury Voir Dire
(amend Cal. Rules of Court, rule 4.201)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>Since receiving this information, my staff has been working closely with Judicial Council staff over the past year to try to prevent similar trying circumstances from arising when someone is asked to serve on a jury. I am informed this effort at clarifying the Advisory Committee Comment is specifically designed to address this important concern.</p> <p>Upon reviewing the proposed Advisory Committee Comment, I first want to express my sincere appreciation for the Committee's initial attempt to address these types of difficult <i>voir dire</i> situations. I recognize there are important legal principles that must be carefully balanced here, as well as case law to which we must adhere. However, I believe the current language fails the test of ensuring that a prospective juror who might have such highly sensitive information (as my constituent clearly did) is properly informed by the court that they may at a minimum request to share such painful information in private with the court if the court determines the nature of the information deserves such protection from disclosure in</p>	

SP07-21
Criminal Law: Jury Voir Dire
(amend Cal. Rules of Court, rule 4.201)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>open court.</p> <p>As reflected in my suggested revisions below, I believe, in its current form, the draft comment to the rule is insufficiently clear and direct. It needs to state clearly that all judicial officers should—at least orally—offer prospective jurors the chance to address the court privately so the court can determine if the nature of the information is such that it should properly be conveyed to the court in chambers rather than in open court. In order to better achieve this goal, I therefore suggest the following modification to the current draft language to the Advisory Comment to the rule:</p> <p style="text-align: center;"><u>Advisory Committee Comment</u></p> <p>Although Code of Civil Procedure section 223 creates a preference for nonsequestered voir dire, a judge may conduct sequestered voir dire on issues that are sensitive to prospective jurors, on questions concerning media reports of the case and on any other issue deemed advisable. (<i>People v. Roldan</i> (2005) 35 Cal.4th 646, 691.) To determine</p>	

SP07-21
Criminal Law: Jury Voir Dire
(amend Cal. Rules of Court, rule 4.201)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>whether such issues are present, a judge may consider factors including the charges, nature of the evidence that is anticipated to be presented, and any other relevant factors. To that end, <u>a judge should always</u> it may be appropriate to inform jurors of the possibility of sequestered voir dire if the juror believes his or her answers are sensitive in nature <u>and could cause substantial embarrassment or pain if made in public</u>. It should <u>also</u> be noted, however, that when written questionnaires are used, jurors must be advised of the right to request a hearing in chambers on sensitive questions rather than answering them on the questionnaire. (<i>Copley Press Inc. v. Superior Court</i> (1991) 228 Cal.App.3d 77, 87.)</p> <p>I believe this language (or similarly direct and clear language) in the Advisory Committee Comment to the rule is needed to try to ensure judicial officers will always properly seek to provide prospective jurors the protection they deserve from embarrassment and potential trauma, in circumstances the court deems warranted. I further believe, after the Judiciary</p>	

SP07-21
Criminal Law: Jury Voir Dire
(amend Cal. Rules of Court, rule 4.201)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				Committee Counsel's review of the pertinent case law, that this or a similarly direct approach would strike the proper balance your committee is seeking by informing all prospective jurors in criminal trials of this protective option, while retaining the judge's appropriate discretion to decide such requests on a case-by-case, fact-specific basis.	
2.	Joseph L. Chairez President Orange County Bar Association Irvine	A	Y	No specific comments.	No response required.
3.	Superior Court of California, County of Los Angeles	A	Y	No specific comments.	No response required.
4.	Michael M. Roddy Executive Officer Superior Court of California, County of San Diego	A	Y	No specific comments.	No response required.