
PRACTICE TIPS: DEATH PENALTY

By Lois Heaney, NJP Litigation Consulting, West



Lois Heaney has been a trial consultant with NJP Litigation Consulting (formerly known as National Jury Project) in Oakland since 1979. She has assisted counsel in thousands of civil and criminal cases, including Robert Blake, Snoop Dogg, Menendez Brothers, & Stephen Bingham, more than 50 state and federal capital cases, and civil cases including asbestos, civil & disability rights, personal injury, insurance coverage and all manner of business cases, throughout California and across the country. She assists counsel in case presentation & theme development, mock trials, survey research, venue studies, witness preparation & jury selection. She has helped prepare witnesses for trial and deposition testimony – including many non-English speakers, from the county jail to the board room, and all manner of places in between.

There is little doubt that public opinion about the death penalty is changing. In 2012, Proposition 34 (to end the death penalty in California) came very close to passing with 48% of voters in favor of and 52% against. It passed among Democrats and Independents and among liberal and moderate voters, younger voters, and voters of color. It passed in 12 counties (Alameda, Contra Costa, LA, Marin, Mendocino, Monterey, San Francisco, San Mateo, Santa Clara, Santa Cruz, Sonoma and Yolo). This is a far cry from the late 1980's when support for the death penalty was at an all-time high (well over 80%).

Proposition 34 passed among the very same people we so often see being excused for cause in capital trials, a disparity that skews the diversity and composition of juries.

To say the process of death qualification puts a thumb on the scales of justice and weighs it toward conviction and death is an understatement. Death qualification eliminates a broad swath of jurors from the pool; jurors who have come to believe that the death penalty is not without bias, not just, nor fair, brutal in its application, and irreversibly error prone.

Because capital trials tend to be long, the jury panels who hear them are already impacted by the process of time qualification. The biggest hardship disqualifier is economic - excluding the marginally employed and underemployed (often younger and poorer people), people whose employers don't pay for any or much jury service, etc... A lot of people are

out before the voir dire even begins.

Typically the time-qualified pool completes a voir dire questionnaire, attorneys and the judge review it, followed by a process by which jurors are excused by stipulation on the basis of their questionnaires, and the remaining jurors return for oral voir dire. In venues where the number of people opposed to the death penalty is substantial, stipulations may lead to large numbers of jurors most favorable to the defense being excused without any effort at rehabilitation, even so far as to get those jurors qualified through the guilt phase.

Although it may be time consuming and irritating to the judge, it is worth considering whether attempts at rehabilitation make sense for several reasons:

- You might actually succeed at rehabilitating a juror and force the prosecution to use a peremptory challenge;
- You can make a record that the juror is otherwise qualified to serve at the guilt phase, which some day, in some appellate court may matter;
- The death qualification process results in lopsided excusals which should be clearly established in the record;
- The death qualification process typically excludes a disproportionate number of people of color, frequently more women, and some religious groups; and
- The judge may err in granting cause challenge on a wavering juror, creating a potential issue for appeal.

Unless stipulations in your case work to get substantial numbers of automatic death penalty (ADP) jurors off who might otherwise survive a challenge for cause, the net result of the process may be more harmful than helpful — removing life-prone jurors and saving the prosecution peremptory challenges while doing little to eliminate death-prone jurors.

Whether jurors are excused by cause, challenge or stipulation I suggest, at a minimum, you keep track of excused jurors' race, ethnicity, gender, age, and, where possible, religion. Your questionnaire should provide this data, and a pattern may emerge that shows the correlation between death penalty attitudes and cognizable classes, supporting the contention that death qualification impacts the composition of the jury and limits diversity.

A particularly problematic question has come into use in many cases in Los Angeles and has frequently been used as the basis for cause challenges by the prosecution. The question was initiated by a district attorney in the Los Angeles office and has been popular with a number of judges. It has a variety of versions but a recent one was:

Which of the following best describes your attitude toward the death penalty?

*Category 1: I do **not** believe in the death penalty, and I would **never** vote for death for a defendant.*

*Category 2: I believe in the death penalty and I would **always** vote for death for a defendant convicted of first-degree murder and a special circumstance.*

*Category 3: I believe in the death penalty, but I know that I personally could **never** vote to put a defendant to death.*

*Category 4: If a defendant is convicted of first-degree murder and a special circumstance is found true, I would weigh the mitigating and aggravating evidence, and I would impose a sentence of **either** life without parole or death depending on the evidence.*

On paper it may look somewhat balanced; except for three very serious deficiencies.

(1) Category 2 – automatic vote for death in ALL first-degree murder cases with special circumstances is overbroad and invites death-prone jurors to opt out. Most death-prone jurors can think of murders where they would not vote for death; and the wording of Category 4 is so clearly the “correct” answer that most opt for that. Further, your case may be far more aggravated than that implied by Category 2, or it may meet a juror’s criteria for the kind of case in which the death penalty should always be applied, but due to the wording of Categories 2 and 4 these jurors pick the latter. Jurors who choose Category 2 are

frequently the smaller number of people with an unshakable “eye for an eye” belief or those who would like to be excused.

(2) Category 3 – those who support but could not vote for death – has no counter balancing option for those who could never really vote for life. The category captures some jurors’ ambivalence about the death penalty. Frequently these jurors can be rehabilitated in voir dire.

It is a second bite at the apple for the prosecution, and in our recent case, it identified five more jurors. These are not people who are opposed to the death penalty, in fact they support it, and they just do not want responsibility for that decision. The inclusion of Category 3 is a clear acknowledgment that there is ambivalence about the death penalty among even those who support it and assumes the responsibility of convincing those who support the death penalty but are ambivalent about making the decision themselves is too great a burden for the prosecution to bear. The defense is offered no such accommodation for those for whom a life verdict is a dim possibility.

(3) ADP jurors and those opposed to the death penalty are not two sides of the same coin. Most people who oppose the death penalty oppose it in all cases; they do not think there are grey areas or that you can execute someone – a little bit.

ADP proponents are rarely unilateral in their view. Some crimes and criminal histories are worse than others, and these jurors may be “substantially impaired” under a *Witt* or *Morgan* standard. People opposed to the death penalty don’t usually take comfort in

Category 4’s weighing process; while ADPers settle right into it.

I have been a proponent of opposing this question and remain so; at the least I suggest it not form the basis of your stipulation list. If our 2014 downtown LA venire is any measure, we saw the following:

Expressed strong opposition to DP in open-ended responses to questionnaire:	26
Also chose Category 1:	19
Chose Category 4:	7

Expressed strong support for DP in open-ended responses to questionnaire:	25
Also chose Category 2:	8
Chose Category 4:	17

In a 2006 downtown LA venire with a larger jury pool, the numbers where the wording was slightly different¹ and Categories 1 and 2 reversed, the result was as follows.

¹ Wording on 2006 questionnaire:

Many people’s views about the death penalty (after a defendant has been found guilty of first-degree murder with special circumstances) fall into one of four groups:

- (1) *Those who would automatically vote for death, without regard to aggravating and mitigating factors (e.g. “death always warrants death,” “an eye for an eye,” etc.);*
- (2) *Those who would automatically vote for life in prison without parole (LWOP), without regard to aggravating and mitigating factors (e.g. “the death penalty is always wrong,” “it is against my religious views or personal values,” etc.);*
- (3) *Those who agree with the death penalty law, but who know that they would never be able to personally vote for death, without regard to aggravating and mitigating factors (e.g. “it’s a good law, but somebody else has to make the decision,” etc.);*
- (4) *Those who have no fixed views, would consider all the evidence regarding penalty, would follow all instructions on the law, and would make a fair and balanced choice between death and life in prison without parole (LWOP).*

Please tell us which group you are part of (1,2,3 or 4) and explain your views.

Expressed strong opposition to DP in open-ended responses to questionnaire:	50
Also chose Category 2:	41
Chose Category 4 or no choice:	9
Chose Category 3 (favor DP but can't impose it):	20

Expressed strong support for DP in open-ended responses to questionnaire:	49
Also chose Category 1:	22
Chose Category 4 or no choice:	27

Under this scenario, cause and peremptory challenges for the prosecution are pretty easy and much tougher for the defense. Overall this kind of pattern has been evident in capital cases where this question was used; people who oppose the death penalty are far more consistent in their responses than those who strongly favor it. The result being that people who oppose the death penalty are excluded from juries for cause in greater numbers than are people who strongly support it.

As Craig Haney has so eloquently written, "Death qualification thus truncates the range of community moral values that can possibly be

taken into account in deciding a capital defendant's fate."

The process of death qualification is indeed a system designed and engineered to produce a death verdict by impaneling juries that do not reflect the values or the demographic diversity of the community. Values about the death penalty are clearly changing as the moral compass swings toward opposition, while the percentages of prospective jurors opposed to the death penalty and excused for cause increases. If the demographic trends persist as to who supports or opposes the death penalty, juries will be stripped of diversity of opinion and demography.

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