

8 GCA CRIMINAL PROCEDURE
CH. 85 TRIAL BY JURY: CHALLENGE: ALTERNATES

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§ 85.10. Waiver of Jury Trial Must be With Consent of Government and Approval of Court.

Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

NOTE: Section 85.10 is identical to former Rule 23(a). See also Fed. R. Crim. P. 23(a). See generally 8 Moore, Federal Practice ¶¶23.01-23.03(1974). As to those cases in which the defendant has a right to a jury trial, see § 680.1(b) of the Code of Civil Procedure. See also U.S. Const. Amend. VI, incorporated by Subdivision (u) of § 1421b of the Organic Act. As to the formation of the jury panel and general qualifications for jury duty, see Code of Civil Procedure §§ 680.2-680.6, 680.9.

§ 85.15. Six (6) Member Juries; When Twelve (12) May be Requested.

Juries shall be of six. However, in a prosecution by indictment or information, the defendant shall be entitled to a jury of twelve upon his written request filed with the court prior to the date of trial. In any case where a jury of twelve is demanded, at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than twelve but not less than six.

NOTE: Section 85.10 replaces former Rule 23(b). In non-felony cases, the section required a jury of six; in felony cases, the section permits a jury of that size. The change is based on a recommendation by the National Advisory Commission on Criminal Justice Standards and Goals in Courts § 4.14, at 101 (1973). The purpose of a reduction in size is, of course, economy. It is believed that a group of six (or more) satisfies the policy that the group be "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a

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representative cross-section of the community." *Williams v. Florida*, 399 U.S. 78, 100 (1970)(6-member jury approved).

§ 85.20. Voir Dire.

The court may permit the defendant or his attorney and the prosecuting attorney to examine the prospective jurors to select a fair and impartial jury or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the prosecuting attorney to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

NOTE: Section 85.20 is substantively the same as former Rule 24(a). See also Fed. R. Crim. P. 24(a). Compare Cal. Pen. Code § 1078. See generally 8 Moore, Federal Practice ¶24.03(1974); B. Witkin, California Criminal Procedure Trial §§ 406, 408-415(1963, Supp. 1973).

§ 85.25. Peremptory Challenge Defined.

A *peremptory challenge* is an objection to a juror for which no reason need be given, but upon which the court must exclude such juror. It can be taken by either party and may be oral.

NOTE: Section 85.25 is new; it is substantively the same as § 1069 of the California Penal Code. As to the number of peremptory challenges and whether they must be taken jointly or separately by co-defendants, see § 85.30. As to challenges for cause, see § 85.35. This Chapter deals only with challenges to an individual juror. As to challenges to an entire jury panel, see Code of Civil Procedure § 680.7. Compare Cal. Pen. Code §§ 1055-1065.

§ 85.30. Peremptory Challenges; Number Available.

In a prosecution by indictment or information if the offense charged is punishable by a life sentence, each side is entitled to twenty peremptory challenges, otherwise the government is entitled to six peremptory challenges and the defendant or defendants jointly to ten peremptory challenges. In a prosecution by complaint, each side is entitled to three peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

NOTE: § 85.30 continues the substance of former Rule 24(b). See also Fed. R. Crim. P. 24(b) (same). Compare Cal. Pen. Code §§ 1070, 1070.5. See generally 8 Moore, Federal Practice ¶24.04 (1974).

§ 85.35. Challenge for Cause: Reasons; Who May Take.

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(a) A challenge for cause is an objection to a prospective juror based on any of the following grounds:

(1) The prospective juror does not have the qualifications for jury service required by § 680.5 of the Code of Civil Procedure.

(2) The prospective juror is related by blood or marriage within the second degree to the defendant, the person alleged to be injured by the offense charged or on whose complaint the prosecution was commenced, or a prospective witness or any attorney representing a party in the action, or the prospective juror bears some other relationship to any such person of such nature that it is likely to preclude him from being a fair and impartial juror.

(3) The prospective juror has served on any jury which heard evidence concerning the offense charged.

(4) The prospective juror has a state of mind that will preclude him from being a fair and impartial juror.

(b) A challenge for cause may be taken by any party. If the court finds that grounds exist that support a challenge for cause against a prospective juror, he shall discharge such juror.

NOTE: Section 85.35 is new; it is based on §§ 1071 through 1074 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Trial §§ 398-404 (1963, Supp. 1973).

§ 85.40. Order of Challenge; Full Panel Before Peremptory Challenges; When Panel Sworn.

(a) The court may direct the order in which challenges are to be taken both as to parties and as to type of challenge.

(b) Each party shall be entitled to have the panel full before exercising any peremptory challenge. The number of peremptory challenges remaining with a party shall not be diminished by any passing of a peremptory challenge.

(c) After all parties on both sides pass consecutively, the jury shall be sworn.

NOTE: Section 85.40 is new. Subsection (a) makes clear that the court may order either the defendant or the prosecuting attorney to take his challenges first and may further order that challenges for cause (and for particular types of cause) be taken before peremptory challenges. Compare Cal. Pen. Code §§ 1086-1088. See generally B. Witkin, California Criminal Procedure Trial §§ 416-417, 422 (1963, Supp. 1973). Subsection (b) makes clear that a party is entitled to have a full panel of prospective

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jurors seated before being required to exercise a peremptory challenge and further that passing a peremptory challenge does not affect the number of available challenges. See Cal. Pen. Code § 1088 (same).

§ 85.45. Alternate Jurors.

The court may direct that no more than six (6) jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges; shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one (1) peremptory challenge in addition to those otherwise allowed by law if one (1) or two (2) alternate jurors are to be impanelled, two (2) peremptory challenges if three (3) or four (4) alternate jurors are to be impanelled, and three (3) peremptory challenges if five (5) or six (6) alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

NOTE: Section 85.45 is identical to former Rule 24(c). See also Fed. R. Crim. P. 24(c) (same). Compare Cal. Pen. Code § 1089. See generally 8 Moore, Federal Practice ¶24.05 (1974); B. Witkin, California Criminal Procedure Trial §§ 424-426 (1963).
