Attorney-Directed Voir Dire Comes to Massachusetts: The Republic Is Safe

Dennis J. Curran
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ATTORNEY-DIRECTED VOIR DIRE COMES TO MASSACHUSETTS: THE REPUBLIC IS SAFE

By Honorable Dennis J. Curran

with

Attorney Vincent N. DePalo

Morgan Peterson (Tufts ’15)

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TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 3
II. THE SUPERIORITY OF ATTORNEY-DIRECTED OVER JUDGE- CONDUCTED VOIR DIRE ........................................................................................................ 5
   Figure 1 ....................................................................................................................... 9
   Figure 2 ....................................................................................................................... 10
   Figure 3 ....................................................................................................................... 13
III. THE CHALLENGE ...................................................................................................... 14
   Figure 4 ....................................................................................................................... 15

DISCLAIMER. This article reflects the work only of the authors and other credited sources. It represents neither the official position nor policy of the Superior Court, any other Justice of that Court, nor the Massachusetts trial court.

2 The author has been a Justice of the Superior Court for over a decade and has presided over 440 civil and criminal trials. In 2015, Justice Curran received the Massachusetts Bar Association’s (“MBA”) Chief Justice Edward F. Hennessey Award for “having demonstrated extraordinary leadership and dedication to improving the administration of justice” and upholding the highest traditions for public service. Mike Vigneux, Judge Curran a Steadfast Advocate of Attorney-Directed Voir Dire, MASS. BAR ASS’N (Feb. 2015), http://www.massbar.org/publications/lawyers-journal/2015/february/judge-curran-a-steadfast-advocate-of-attorney-directed-voir-dire. In 2016, the Massachusetts Academy of Trial Attorneys (“MATA”) presented him with its President’s Award for “his deep commitment and belief in the civil justice system, his many contributions to society and his continued dedication to the law.” And the Award Goes to... , MASS. LAWS. WEEKLY (June 16, 2016), http://masslawyersweekly.com/2016/06/16/and-the-award-goes-to/.

3 Attorney Vincent N. DePalo is an associate with Governo Law Firm LLC in Boston, Massachusetts.
IV. THE JUDICIAL REACTION TO THE PENDING BILL .................................................. 19
V. THE JUDICIAL RESPONSE TO THE NEW LAW .................................................. 20

Figure 5 ............................................................................................................... 22
VI. THE NEW LAW: HOW IT PRESENTLY WORKS UNDER SUPERIOR COURT STANDING ORDER 1-15 .................................................................................. 24
VII. THE NEW LAW: HOW IT WILL LIKELY WORK UNDER PROPOSED SUPERIOR COURT RULE 6 .......................................................................................... 27
   a. Timing ........................................................................................................ 27
   b. Questions that Must Be Generally Approved ........................................... 28
   c. Questions that Should Generally Be Approved ........................................ 28
   d. Questions that Should Generally Not Be Approved ............................... 28
   e. Questions that May Be Approved, But Only After Explanation To, and Approval by the Judge ................................................................. 28
VIII. THE PANEL VOIR DIRE EXPERIMENT .......................................................... 29
IX. MY DECADE-LONG PREFERRED PROCEDURE ............................................. 31
X. CONCLUSION ................................................................................................ 33

Appendix A ...................................................................................................... 35
   Judges Introduction ..................................................................................... 35
Appendix B ...................................................................................................... 58
Appendix C ...................................................................................................... 60
Appendix D ...................................................................................................... 61
Appendix E ...................................................................................................... 73
Appendix F ...................................................................................................... 74
Appendix G ...................................................................................................... 81

The integrity of our courts and our jury system—that is no ideal to me, it is a living and working reality. Gentlemen, a court is no better than each man of you sitting before me in this jury. The court is only as sound as its jury, and a jury is only as sound as the men [and women] who make it up.


Gregory Peck, in his starring role as Atticus Finch, gifted us with one of the most memorable and moving closing arguments in the history of film-making.4

4 See AFI’s 100 Years... 100 Heroes & Villains, AM. FILM INST., http://www.afi.com/100Years/handv.aspx (last visited Jan. 1, 2017) (recognizing “50 top movie heroes and 50 top movie villains of all time”). In 2003, Gregory Peck’s portrayal of Atticus Finch was named the greatest film hero of the past 100 years by the American Film Institute. Id. Author Harper Lee once wrote of Peck: “here was a fine actor who had made great films—what
Arguing before a hostile jury, Finch gave one of the most riveting closing arguments ever. But for that jury, like many, the die had already been cast. Finch, like those of two and three generations of attorneys who have preceded us, never had the benefit of meaningfully participating in the jury selection process. Justice was not done in the world of Atticus Finch.

Over time, our system of justice has been refined and improved immensely, and with it, the jury selection process, and in particular voir dire, which translated from French, means “to speak the truth.”

Our Massachusetts Declaration of Rights guarantees “the parties have a right to a trial by jury; and this method of procedure shall be held sacred . . . ” So too does our United States Constitution in its Sixth and Seventh Amendments, the former of which guarantees that the “criminal[ly] accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ” and the latter guarantees a jury trial for certain civil matters.

However, the promise of a fair trial is but a cruel hoax if the jury is composed of individuals who will, in no instance, honor their sworn oath. We refer, of course, to the juror with a conscious or even subconscious bias, the juror with a hidden agenda, the “stealth juror,” and those citizens whose life experience on a particular subject may be so profound as to alter an honest perception of events evidenced at trial.

I. INTRODUCTION

The single purpose of this article is to assist the Massachusetts trial bar in its efforts to learn how to properly use the new jury voir dire law to benefit themselves and their clients. It is not intended to be a dry recitation of the law that would, after a glancing look at the cover, likely wind up on the dusty bookshelf of a practicing lawyer, never to be handled again. Instead, the authors fervently hope it will serve as a living document to be

more could a writer ask for? . . . The years told me his secret. When he played Atticus Finch, he had played himself, and time has told all of us something more: when he played himself, he touched the world.”  Christina Knight, Six Degrees of Harper Lee, PBS (June 10, 2015), http://www.pbs.org/wnet/americansmasters/harper-lee-hey-boo-six-degrees-of-harper-lee/3918.


6 MASS. CONST., pt. 1, art. 15 (emphasis added) (proclaiming Massachusetts’ residents’ right to trial by jury in controversies and suits).

7 U.S. CONST. amend. VI (emphasis added) (deeming right to trial by jury for crimes and procedural rights).

8 See U.S. CONST. amend. VII (declaring right to trial by jury for civil trials); MAGNA CARTA ch. 39 (emphasis supplied) (proclaiming “no free man shall be taken, imprisoned, disseised . . . , nor will we go against him or send against him, except by lawful judgment of his peers or by the law of the land.”).
used repeatedly—and hopefully, with time, improved and refined—during an attorney’s professional career.

Many attorneys confide that they are unfamiliar with how to conduct attorney-directed voir dire and are reluctant to employ it for fear of embarrassment or worse, alienating a prospective juror. The purpose of this article is to provide a level of comfort with this new process. To this end, the authors have drafted, along with other credited sources, over 200 sample voir dire questions for use in a variety of civil cases: car accidents, pedestrian accidents, bicycle accidents, premises liability, slip and falls, workplace accidents, medical negligence, alcohol-related accidents, wrongful death, and contract disputes.¹⁹

This article first addresses the proven superiority of attorney-directed over judge-conducted voir dire, telling the story of the behind-the-scenes battle over Massachusetts legislation to reform the voir dire procedure, reporting judicial reaction to the newly-enacted law, laying out the procedure for attorneys to use the new law, and discussing an experimental Superior Court program to employ a “panel” as opposed to individualized voir dire. Finally, and perhaps most importantly, section IX entitled “My Decade-Long, Preferred Procedure” spells out a simple, time-tested, expeditious, and existing individualized voir dire process that fully permits attorney questioning, safeguards the privacy of the citizen-juror, and meaningfully engages the judge in the entire process to ensure propriety: all in an effort to select the most impartial jurors.

The battle to attain attorney-directed voir dire in Massachusetts has been hard-fought; indeed, bitter. It ill serves those who came before us,”¹⁰

⁹ See infra Appendix A (laying out sample voir dire questions).

¹⁰ MATA and the MBA richly deserve recognition for their leadership efforts on this important issue: The MBA’s Chief Legal Counsel and Chief Operating Officer Martin W. Healy, as well as MATA’s Attorney James T. Morris of Quinn & Morris, P.C., and MATA’s former President Timothy C. Kelleher, III of Jones Kelleher LLP, each deserve special recognition for their unrelenting work on this issue. MATA President Annette Gonthier-Kiely, former President-elect Michael R. Rezendes, and its past Presidents Andrew M. Abraham; Charles W. Barrett, Jr.; David R. Bliofsky; J. Michael Conley; Robert V. Costello; Walter A. Costello, Jr.; Warren Fitzgerald; Michael K. Gillis; Charlotte E. Glinka; Frederic N. Halstrom; Patrick T. Jones; Marsha V. Kazarian; Paul F. Leavis; Mary Jane McKenna; James F. Meehan; Chris A. Milne; Michael E. Mone, Sr.; Kathleen M. O’Donnell; Alan S. Pierce; Camille F. Sarrouf, Sr.; Steven H. Schafer; Douglas K. Sheff; Neil Sugarman; Paul R. Sugarman; and Anthony Tarricone of this vital organization also deserve credit for their two-decade long perseverance on this issue. Moreover, this legislation would not have prevailed without the support of MBA President Jeffrey N. Catalano (2016-2017), and former Presidents Robert W. Haruais (2015-2016); Marsha V. Kazarosian (2014-2015); Douglas K. Sheff (2013-2014); Robert L. Holloway, Jr. (2012-2013); Richard P. Campbell (2011-2012); Denise Squillante (2010-2011); Valerie A. Yanashus (2009-2010); Edward W. McIntyre (2008-2009); David W. White, Jr. (2007-2008); (now Honorable) Mark D. Mason (2006-2007) (current Massachusetts Superior Court Justice), Warren F. Fitzgerald (2005-2006); Kathleen M. O’Donnell (2004-2005); Richard C. Van Nostrand (2003-2004); Joseph P.J. Vrabel (2002-
II. THE SUPERIORITY OF ATTORNEY-DIRECTED OVER JUDGE-CONDUCTED VOIR DIRE

For over forty-one years, it has been empirically known that potential jurors often distort their answers during voir dire.\(^{11}\) Such evidence triggers two questions: Why and how often?

First, we offer anecdotal judicial experience, admittedly not scientific, but which surely has some value. Having presided over several hundreds of both civil and criminal trials and offered attorneys the opportunity in nearly every case to engage in attorney-directed voir dire, I can state the following with utter certainty: Jurors generally provide judges with socially desirable answers, but are far more likely to tell attorneys the truth.

Strong scientific evidence exists to prove that point, to be discussed later. But starting with informal and repeated experience, I have, on countless occasions, asked the venire the sharply limited statutory questions and then supplemented those questions liberally with questions requested by the attorneys. Hands were raised; the court officer would accompany the prospective juror to sidebar where I would ask follow-up questions on the issue about which they had responded affirmatively. I asked; they answered. I probed further; they responded with more information. I would, in some instances, employ a gentle and respectful further inquiry; and the juror would

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maintain his or her position of impartiality. The result: I would often find that juror indifferent. Self-satisfied with my inquiry, I would sit back in my chair, smugly congratulating myself in having vetted a wonderfully impartial and available juror. And then, it began. An attorney would ask—sometimes in following up on a question I had raised, sometimes on another line of inquiry—but, in any event, a simple and completely appropriate question. Whatever judicial confidence I had was quickly stripped away. With but a single innocent question or two, the juror’s impartiality was suddenly shattered. Passion flared; a story was blurted out about a close friend or immediate family member who had had a disturbing experience akin to the case at hand, and the juror was off and running with each sentence and declaration exposing more partiality, leaving me feeling embarrassed, deflated and indeed, truth be told, judicially impotent. My dream of judicial superiority to elicit the truth evaporated immediately, demonstrably, and publicly. Such an incident has occurred on so many occasions that I retreated to the research literature on voir dire to find comfort, and indeed, consolation.

The answer was right in front of me.

Respected legal scholars who have studied the issue of juror candor have concluded that jurors, viewing the judge as an authority figure, prioritize pleasing him or her over being honest in their responses.12

Jury voir dire is a self-disclosure process; it works only when honesty is the goal. That is the true test of the effectiveness of any system seeking fair and impartial jurors. To the extent that we, as judges, fail to provide a forum or atmosphere designed to elicit that honesty and the truth, we have failed in our simple, but fundamental mission as trial judges: to provide a fair trial.

A system that relies on accurate self-disclosure must be examined scientifically to determine where the self-satisfied judge who solely conducts voir dire has gone awry. Three important principles emerge from the research.

First, individuals (whether they are jurors or lay people) disclose more to: (1) those from whom they receive disclosure in return (this is called the “reciprocity effect”); (2) those whom they like more; and (3) those they perceive as sharing equal status (this is called “status similarity”).14

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12 See sourced cited supra note 11.
13 See David Suggs & Bruce D. Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L.J. 245 (1980) (arguing then-current voir dire practices are not conducive to promoting juror self-disclosure).
As to the first principle, attorneys who inquire in an either cold, aloof, or disdainful (i.e., a holier-than-thou) manner will elicit little-to-nothing from a prospective juror. Both a decade of judicial experience and science confirms this almost self-evident truth. A warmer, friendly (but not obsequious) manner carries the day: The reciprocity effect undoubtedly leads to more candid and expanded juror responses.

Similarly, a juror must like an attorney to be more forthcoming with him or her. As may be obvious, a juror will disclose more to a person he or she likes than to one whom he or she dislikes. While this may be an obvious human trait, it is especially important in getting to the truth in the jury selection process.

Finally, authority and status are strong factors that influence disclosure. An individual called upon to disclose to a person in a more powerful position tends to be less honest because he or she perceives, rightly or wrongly, considerable risk in doing so. As was wisely observed by Goodstein and Reinecker: “[W]e self-disclose to those who have already demonstrated that they will not punish our self-disclosure and to those who have no capacity for punishing such behavior.”

A judge must maintain a certain distance, decorum, and formality in performing his or her duties during juror examination; an attorney is not so limited. An attorney can conduct himself less formally, and in a friendly and engaging manner when asking questions of a potential juror. However, to the extent an attorney seeks to ingratiate himself or herself by injecting personal commentary, (e.g., “I went to the same high school” or “I’m from the same town”) it falls upon the judge to terminate such behavior. Moreover, jurors are not dim; they well realize why attorneys are trying to


19 To the contrary, an informal review I conducted of 66 jury trials in the Middlesex Superior Court demonstrates how well-educated our jurors are. See Figures 1-3 (stating education level and
ingratiate themselves; they distrust them *ab initio*; they have been socially conditioned not to expect much in the way of attorney candor; thus, attorneys should be cautious in trying to win over the juror as “their new best friend.” Jurors resent feigned familiarity.

occupations of jurors), *infra*, Appendix B (discussing juror education level). Appendix B states in relevant part:

> The results are striking. Among 850 jurors, their education levels ranged as follows:
> 81.4% have attended some college or held an associate’s degree;
> 67.1% held bachelor’s degrees;
> 20.6% also held master’s degrees;
> 2.2% held M.B.A. degrees;
> 6.6% held M.D.’s, J.D.’s or Ph.D.’s.

More than 81% of Middlesex County jurors who have sat in Superior Court Civil Session “F” have either attended college, have a college degree, or higher. Granted, these results are from one county only and surely, the results may vary from county-to-county, but I suspect, admittedly without evidence, that several other counties in the Commonwealth may show either the same or similar level of educational and professional attainment.

*See infra* Appendix B.
<table>
<thead>
<tr>
<th>Educational Level</th>
<th>Total Number of Jurors</th>
<th>Percentage of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ph.D.</td>
<td>32</td>
<td>3.8%</td>
</tr>
<tr>
<td>M.D.</td>
<td>7</td>
<td>0.8%</td>
</tr>
<tr>
<td>J.D.</td>
<td>17</td>
<td>2%</td>
</tr>
<tr>
<td>M.B.A</td>
<td>19</td>
<td>2.2%</td>
</tr>
<tr>
<td>Masters</td>
<td>175</td>
<td>20.6%</td>
</tr>
<tr>
<td>Bachelors</td>
<td>320</td>
<td>37.6%</td>
</tr>
<tr>
<td>Associates</td>
<td>32</td>
<td>3.8%</td>
</tr>
<tr>
<td>Some College</td>
<td>90</td>
<td>10.6%</td>
</tr>
<tr>
<td>G.E.D</td>
<td>3</td>
<td>0.35%</td>
</tr>
<tr>
<td>High School</td>
<td>152</td>
<td>17.9%</td>
</tr>
<tr>
<td>Some High School or Less</td>
<td>3</td>
<td>0.35%</td>
</tr>
<tr>
<td>Total</td>
<td>850</td>
<td>100%</td>
</tr>
</tbody>
</table>

**Figure 1.** Jury trial notes, including juror questionnaires, of Associate Justice Dennis J. Curran. Middlesex Superior Court Civil Session F.
## NOTABLE JUROR OCCUPATIONS

<table>
<thead>
<tr>
<th>#</th>
<th>Docket #</th>
<th>Notable Occupations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>04-0290x</td>
<td>Radiology software controller, engineer, educational consultant, medical device manufacturing technician</td>
</tr>
<tr>
<td>2</td>
<td>05-0447x</td>
<td>Sr. V.P. Investment manager, college psychology professor, software engineer, Sr. V.P. for a business, special education teacher</td>
</tr>
<tr>
<td>3</td>
<td>06-0364x</td>
<td>Software engineer, research program manager, analyst for biotech company, mental health facility manager, software engineer</td>
</tr>
<tr>
<td>4</td>
<td>06-0414x</td>
<td>Two teachers, two attorneys, business unit COO, advertising COO</td>
</tr>
<tr>
<td>5</td>
<td>07-0177x</td>
<td>Psychologist, teacher, physician</td>
</tr>
<tr>
<td>6</td>
<td>07-0470x</td>
<td>Biomedical research scientist, current college student, education publishing editor, bank manager, teacher, engineer</td>
</tr>
<tr>
<td>7</td>
<td>07-0495x</td>
<td>Scientist, biotech accountant</td>
</tr>
<tr>
<td>8</td>
<td>08-0061x</td>
<td>Consulting firm assoc. dir., principle, college professor, educational consultant, marketing manager, architect,</td>
</tr>
<tr>
<td>9</td>
<td>08-0108x</td>
<td>Director of healthcare system, school speech pathologist, attorney, senior AmeriCorps member, aerospace/defense engineer</td>
</tr>
<tr>
<td>10</td>
<td>08-0308x</td>
<td>Auditor, library analyst, IT technician for US Army</td>
</tr>
<tr>
<td>11</td>
<td>08-0124x</td>
<td>Banker, engineer, genetics researcher</td>
</tr>
<tr>
<td>12</td>
<td>08-0167x</td>
<td>Global account manager, professional services engineer</td>
</tr>
<tr>
<td>13</td>
<td>08-0282x</td>
<td>Occupational therapist, attorney, teacher, one current college student</td>
</tr>
<tr>
<td>14</td>
<td>08-0372x</td>
<td>Transit system architect, electrical engineer, editor</td>
</tr>
<tr>
<td>15</td>
<td>08-0409x</td>
<td>Architect, investment firm in-house counsel, electrical engineer</td>
</tr>
<tr>
<td>16</td>
<td>08-0425x</td>
<td>CFO of a large hospital's department of medicine, teacher</td>
</tr>
<tr>
<td>17</td>
<td>08-0491x</td>
<td>Pediatric neuropsychologist, IT consultant, network engineer</td>
</tr>
<tr>
<td>18</td>
<td>09-0013x</td>
<td>Advertising agency graphic artist, software engineer, journalist, fire protection engineer, mental health counselor</td>
</tr>
<tr>
<td>19</td>
<td>09-0130x</td>
<td>Intel lab manager, teacher, music composer/producer</td>
</tr>
<tr>
<td>20</td>
<td>09-0164x</td>
<td>Insurance broker, dental school office director</td>
</tr>
<tr>
<td>No.</td>
<td>Code</td>
<td>Description</td>
</tr>
<tr>
<td>-----</td>
<td>-----------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>21</td>
<td>09-0317x</td>
<td>COO Biomedical and pharmaceutical tools company, special education teacher, director of business development at medical device company, architect</td>
</tr>
<tr>
<td>22</td>
<td>09-0508x</td>
<td>Software engineer, business developer</td>
</tr>
<tr>
<td>23</td>
<td>10-0089x</td>
<td>Adoption social worker, research and development scientist</td>
</tr>
<tr>
<td>24</td>
<td>10-0081x</td>
<td>Retired FBI Agent, practicing attorney</td>
</tr>
<tr>
<td>25</td>
<td>10-0259x</td>
<td>Software programmer, director/in-house counsel for dental product corporation</td>
</tr>
<tr>
<td>26</td>
<td>10-0338x</td>
<td>Attorney, teacher, engineer</td>
</tr>
<tr>
<td>27</td>
<td>11-0059x</td>
<td>Software engineer, two teachers, semiconductor engineer, accountant</td>
</tr>
<tr>
<td>28</td>
<td>11-0068x</td>
<td>3 current college students, teacher, software engineer</td>
</tr>
<tr>
<td>29</td>
<td>11-0081x</td>
<td>Analyst for health insurance company, electrical engineer, software engineer, teacher, senior software scientist</td>
</tr>
<tr>
<td>30</td>
<td>11-0143x</td>
<td>Microbiologist, special education teacher, engineer, substance abuse psychologist</td>
</tr>
<tr>
<td>31</td>
<td>11-0209x</td>
<td>Consulting firm president</td>
</tr>
<tr>
<td>32</td>
<td>11-0211x</td>
<td>7 current college students</td>
</tr>
<tr>
<td>33</td>
<td>11-0216x</td>
<td>Intelligence technology researcher, Air Force contracting officer, special education teacher</td>
</tr>
<tr>
<td>34</td>
<td>11-0278x</td>
<td>Pharmaceutical sales rep</td>
</tr>
<tr>
<td>35</td>
<td>11-0314x</td>
<td>Conflict resolution professor, public relations manager, software engineer</td>
</tr>
<tr>
<td>36</td>
<td>11-0409x</td>
<td>Civil engineer, CIO of insurance company, political science professor, dentist</td>
</tr>
<tr>
<td>37</td>
<td>11-0454x</td>
<td>Account executive for major newspaper, senior insurance consultant</td>
</tr>
<tr>
<td>38</td>
<td>12-0000x</td>
<td>Attorney, teacher, dermatologist, observatory director</td>
</tr>
<tr>
<td>39</td>
<td>12-0019x</td>
<td>Scientist, attorney, dentist</td>
</tr>
<tr>
<td>40</td>
<td>12-0046x</td>
<td>President of consulting firm, teacher</td>
</tr>
<tr>
<td>41</td>
<td>12-0114x</td>
<td>Three current college students, college professor, government auditor, teacher, owner/CEO of financial services company, director of marketing/sales for a large social sports club</td>
</tr>
<tr>
<td>42</td>
<td>12-0166x</td>
<td>Financial analyst for a major university</td>
</tr>
<tr>
<td>43</td>
<td>12-0175x</td>
<td>Psychotherapist, software engineer, school counselor, drug research and development consultant</td>
</tr>
<tr>
<td>No.</td>
<td>Code</td>
<td>Occupation and Experience</td>
</tr>
<tr>
<td>------</td>
<td>--------</td>
<td>------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>44</td>
<td>12-0177x</td>
<td>Software developer, software engineer, teacher</td>
</tr>
<tr>
<td>45</td>
<td>12-0222x</td>
<td>Mental health counselor, software engineer, DMH social worker</td>
</tr>
<tr>
<td>46</td>
<td>12-0256x</td>
<td>Public health policy analyst, psychologist, engineer</td>
</tr>
<tr>
<td>47</td>
<td>12-0292x</td>
<td>Software engineer, social worker, engineer, research scientist at a major university, accountant, two current college students</td>
</tr>
<tr>
<td>48</td>
<td>12-0320x</td>
<td>Software developer, director of state government education and finance agency, teacher</td>
</tr>
<tr>
<td>49</td>
<td>12-0341x</td>
<td>Computer systems manager, attorney</td>
</tr>
<tr>
<td>50</td>
<td>12-0343x</td>
<td>Real estate appraiser, two teachers</td>
</tr>
<tr>
<td>51</td>
<td>12-0352x</td>
<td>Software architect, software engineer, social worker, teacher, two current college students, medical school professor</td>
</tr>
<tr>
<td>52</td>
<td>12-0395x</td>
<td>Defense contractor engineer, software engineer, attorney, editor of major magazine</td>
</tr>
<tr>
<td>53</td>
<td>12-0446x</td>
<td>Two current college students, environmental scientist</td>
</tr>
<tr>
<td>54</td>
<td>13-0019x</td>
<td>Engineer consultant, hi-tech consultant, teacher, architect, financial executive</td>
</tr>
<tr>
<td>55</td>
<td>13-0027x</td>
<td>Nonprofit director, software engineer, physician</td>
</tr>
<tr>
<td>56</td>
<td>13-0056x</td>
<td>Engineer, investment portfolio manager, accountant</td>
</tr>
<tr>
<td>57</td>
<td>13-0058x</td>
<td>VP and chief scientist at a defense security corp., academic researcher at a major university, architect, teacher</td>
</tr>
<tr>
<td>58</td>
<td>13-0152x</td>
<td>Engineer, economist, teacher, college dean, minister</td>
</tr>
<tr>
<td>59</td>
<td>13-0348x</td>
<td>Scientist, biotechnology professor, clinical psychologist, university lecturer, software engineer</td>
</tr>
<tr>
<td>60</td>
<td>13-0390x</td>
<td>Attorney</td>
</tr>
<tr>
<td>61</td>
<td>13-0393x</td>
<td>Civil engineer, executive director of research at prestigious university, two teachers</td>
</tr>
<tr>
<td>62</td>
<td>13-0413x</td>
<td>Engineer, information systems attorney</td>
</tr>
<tr>
<td>63</td>
<td>13-0455x</td>
<td>Speech-language pathologist, Philanthropic organization executive director, attorney</td>
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<tr>
<td>64</td>
<td>13-0487x</td>
<td>Electrical engineer, mechanical engineer, engineer, software consultant</td>
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<tr>
<td>65</td>
<td>13-0518x</td>
<td>Mechanical engineer, college professor, engineer</td>
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<tr>
<td>66</td>
<td>14-0517x</td>
<td>Teacher, archivist, school psychologist, senior revenue analyst, accountant.</td>
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Figure 2. Jury trial notes, including juror questionnaires, of Associate Justice Dennis J. Curran. Middlesex Superior Court Civil Session F.
The point does bear repeating, however. The respectful and courteous attorney who asks case-appropriate questions is in a far better position than a judge who deludes himself or herself into believing that simply wearing a black robe automatically elicits honesty; it does not.

To further drive home the point, remember that judges operate from an elevated position in the courtroom and look down from their lofty position onto jurors and all others. They are addressed formally—unlike an attorney. Thus, an attorney occupies a different level of status than the judge, one to which the juror will respond, generally, with more informality and familiarity.  

Generally, a juror questioned by a judge is anxious and maintains a heightened sense of vigilance, which hardly lends itself to a high level of

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20 There is one caveat to this observation. In the hierarchical structure of a courtroom, trial attorneys who seek to decimate or humiliate a witness on the stand forget one cardinal rule: Of all people in the courtroom, it is the witness with whom the juror identifies most readily—not the attorney, court officer, or clerk, and certainly not the judge. This lesson is easily forgotten in the heat of a litigation battle, much to the eventual, and almost inevitable, regret of the trial lawyer.
candor and reflection. Instead, privately-held attitudes and beliefs remain undisclosed and are often undetected.

In sum, juror candor does not exist in a vacuum and a judge hardly teases it out most effectively. An attorney, acting professionally and respectfully toward the citizen-juror (who, we must remember, did not volunteer to come to the trial courtroom that day), acting independently and yet appropriately, maximizes the probability of juror candor, and in doing so, empowers us in our common goal—that the jury “speak the truth.”

An article entitled Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor provides deep and strong analytical support for the principles articulated above. Indeed, the summary to that research study is striking:

> [E]mpirical support has been found for [the] observation that jurors often distort their replies to questions during the voir dire.... [I]nconsistency in attitude reports cut across all age, income and occupational groups. Even three ministers... significantly altered their attitude reports.... Of course, jurors may not be deliberately distorting their answers, but instead, respond unconsciously to pressures toward social conformity. Whatever the underlying mechanisms, it is apparent that jurors are not as candid as we presumed.

III. THE CHALLENGE

For over two decades, a behind-the-scenes battle raged between the Massachusetts trial bar on the one side, and the Massachusetts judiciary on the other, as to whether to permit attorney-directed voir dire to enter into Massachusetts trial courtrooms. That battle is now over. The trial bar has prevailed. Massachusetts has now joined the ranks of forty-seven other

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21 See Jones, supra note 11, at 131.
22 Id. at 145.
states in the nation in welcoming attorney-directed *voir dire* with the enactment of Chapter 254 of the Acts of 2014 into law on August 6, 2014.\(^{23}\)

A SURVEY OF THE LAW ON *VOIR DIRE* IN THE 50 STATES

<table>
<thead>
<tr>
<th>STATES THAT PERMIT ATTORNEY-CONDUCTED Voir Dire</th>
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<tr>
<td>Alabama</td>
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<td>Kansas</td>
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<tr>
<th>STATES THAT DO NOT PERMIT ATTORNEY-CONDUCTED</th>
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<td>Delaware</td>
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<tr>
<td>Massachusetts</td>
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<tr>
<td>Nebraska</td>
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*Figure 4.* As of February 1, 2015. A state is categorized as permitting attorney-conducted *voir dire* if the relevant statute, rule, or case law states that attorneys shall, must, may, or have the right to conduct *voir dire*. As of February 1, 2015, Massachusetts did not permit attorney *voir dire*.\(^{24}\)

Through the years, the battle occasionally erupted in full public view. Twenty years ago, a widely respected Superior Court Judge, in the brilliant and progressive booklet entitled *Massachusetts Jury Trial Benchbook*\(^{24}\) encapsulated the traditional judicial view stating:

\(^{23}\) Contrary to widespread erroneous reports in Massachusetts legal periodicals, Massachusetts is not the fortieth state to permit attorney-conducted jury *voir dire*; it is the forty-eighth. See Figure 4 (outlining states that do and do not allow attorney-direct *voir dire*); infra Appendices C and D (discussing *voir dire* laws by state).

\(^{24}\) Peter Lauriat & Toni L. Pomeroy, MA S SACHUSETTS JURY TRIAL BENCHBOOK (1st ed. 1996).
“[d]espite occasional efforts by some attorneys to introduce attorney-directed voir dire, the movement has shown little momentum in the Commonwealth. The usual and better technique is for the judge alone to ask questions, taking suggestions from counsel when appropriate.”

This position was repeated in *Sylva v. Anthony*,26 a case in which an injured victim, Mr. Joseph Sylva, sued his physician for his failure to properly diagnose his brain tissue during surgery.27 The then-Superior Court judge issued a Memorandum of Law in which he denied the plaintiff’s motion to allow attorney-conducted voir dire.28

The intransigence of this position emerged just two years later when the following view was again expressed:

Despite occasional efforts by some attorneys to request attorney-directed voir dire, to date the movement has shown only modest momentum in the Commonwealth. The usual and better technique is for the judge alone to ask the questions, taking suggestions from counsel when appropriate. However, legislation is usually filed each year to mandate some form of lawyer voir dire system, and although not yet successful, it continues to be favored in some quarters.29

Under this judicial perspective, one law student summarized the then-present Massachusetts jury selection process in an article pessimistically entitled, *As Good As It Gets: Why Massachusetts Should Not Adopt An Attorney-Conducted Voir Dire Process for Civil Trials.*30 The article starts by nobly observing “a person’s right to a trial by an impartial jury is deeply embedded within the fabric of the American judicial system,” a theme underscored throughout the piece. Despite its title, the article proceeded to criticize the then-existing Massachusetts voir dire system as a “rigid system as compared with other systems,” denounced the jury questionnaire31 as “simplistic” and “limited to basic information,” consisting of “six essential questions regarding prospective jurors’ knowledge of the

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25 Id. at 68.
27 See id. at *1 (introducing facts of case).
28 See id.
29 LAURIAT & HARTWELL, supra note 24, at 84.
31 See infra Appendix E.
case, the parties, and the attorneys.\textsuperscript{32} castigated “the standardized questioning required by statute [as] rarely, if ever, elicit[ing] a meaningful response from prospective jurors,” and condemned the Massachusetts system as “often work[ing] to the disadvantage of the parties.”\textsuperscript{33} By contrast, the author lauded the New York system “where the attorneys conduct the entire examination of prospective jurors[,]” but cautioned that even that process was not without its disadvantages.\textsuperscript{34} Finally, the author took pains to criticize then-pending legislative efforts to reform the \textit{voir dire} process to permit meaningful attorney participation.\textsuperscript{35}

During these two decades of judicial derision, prominent members of the trial bar were filing legislative bills, almost annually, to restructure a broken jury selection system, with several of the bills sponsored and supported by the respected Chair of the House Judiciary Committee, Hon. Eugene L. O’Flaherty (D-Chelsea) (now Corporation Counsel for the City of Boston), Acting Chair Hon. Christopher M. Markey (D-Dartmouth) and Hon. Garrett J. Bradley (D-Hingham). The judiciary opposed each such bill, with the following results:

- An Act Relative to the Examination of Jurors. 
  Died in a Study Order.\textsuperscript{36}

- An Act Relative to the Examination of Jurors.
  Died in a Study Order.\textsuperscript{37}

\textsuperscript{32} Moloney, \textit{supra} note 30, at 1054 (citing \textsc{Mass. R. Civ. P. 47(a)}) (outlining questions trial judges must ask during \textit{voir dire} examination). In each case, the judge must ask:

1. whether any juror or any member of his family is related to any party or attorney therein; 2. whether any has any interest therein; 3. whether any has expressed any opinion on the case; 4. whether any has formed any opinion on the case; 5. whether any is sensible of any bias or prejudice therein; and 6. whether any knows of any reason why he cannot stand or does not stand indifferent in the case.


\textsuperscript{33} Moloney, \textit{supra} note 30, at 1064.

\textsuperscript{34} \textit{Id.} at 1059.

\textsuperscript{35} See \textit{id.} at 1062-66 (contrasting New York and Massachusetts \textit{voir dire} systems).


• An Act Relative to the Examination of Jurors. Died. 38

• An Act Relative to the Examination of Jurors. Died when referred to House Ways and Means Committee. 39

• An Act Relative to the Examination of Jurors. Died. 40

• An Act Relative to the Examination of Jurors. Died. 41

• An Act Relative to the Examination of Jurors. Died in a Study Order. 42

• An Act Relative to the Examination of Jurors. Died in a Study Order. 43

• An Act Relative to Court Proceedings. Died in a Study Order. 44

• An Act Relative to Court Proceedings. Died in a Study Order. 45

• An Act Relative to Certain Judicial Procedures. Reported favorably as amended by the

Joint Committee on Judiciary. New draft substituted.  

- An Act Relative to Certain Judicial Procedures. 

IV. THE JUDICIAL REACTION TO THE PENDING BILL

Certain judicial leadership immediately and vehemently reacted to the bill that had been enacted in the Massachusetts House of Representatives and was looming for approval before the State Senate.

The judiciary claimed that the proposed legislation “would cost the Commonwealth, the business community, and Massachusetts citizens . . . millions of dollars each year . . .”; estimated that “an additional 154,000 summonses” would be required resulting in “54,000 additional citizens [being brought in] to the courthouses each year”; and alleged the “[t]otal additional costs to the Commonwealth in postage, printing, handling and juror payroll” would exceed $1.2 million per year. In a memorandum distributed to both branches of the legislature, it further claimed that the “total costs to the business community for a person to report to jury duty” in “administrative costs, wages, costs to the juror, productivity, and lost opportunity . . . would be from $43.2 to $54 million.

None of this came to pass. The legislature rightly found these figures incredible. Instead of increasing the Jury Commissioner’s budget for Fiscal Year 2015, it reduced it by $206,035 to $2,740,023, further reducing it by $278 for Fiscal Year 2016, and indeed, again reduced it for Fiscal Year 2017 to $2,774,337.

49 Id.
50 Id.
51 Id.
V. THE JUDICIAL RESPONSE TO THE NEW LAW

The *voir dire* law, Chapter 254 of the Acts of 2014, had an enactment date of 150 days from the date of the Governor’s signature, meaning that it took effect on February 2, 2015.\textsuperscript{52} The judiciary begrudgingly accepted the new law.\textsuperscript{53}

The Chief Justice of the Supreme Judicial Court, seizing upon the final (fourth) paragraph of the newly-drawn statute which states, “[t]he court may promulgate rules to implement this section . . .” appointed a committee of eighteen individuals to control its implementation.\textsuperscript{54} A subcommittee drafted a standing order for the superior court and declared, *sua sponte*, that in enacting the new *voir dire* law, “the Legislature recognized and preserved the discretion of the trial judge to lead and supervise the process of jury *voir dire*.”\textsuperscript{55} It further declared that the Standing Order “fully preserve[d] the discretionary authority of the trial judge with respect to the examination and section of jurors in each case, and provides a standard procedure that will apply in each case . . . unless otherwise ordered by the trial judge.”\textsuperscript{56} The well-respected National Center for State Courts, an independent, non-profit organization dedicated to research and the analysis of comparative data to improve administration of justice in the state courts, took issue with the committee and advised that the Order should be amended “to make it clear that the outlined procedures are advisory rather than . . . mandatory absent a judicial order expressly modifying those procedures.”\textsuperscript{57}

Post-enactment, the judiciary set out to “interpret” the new law. Section 4 of Chapter 254 of the Acts of 2014 consisted of all of twenty-eight words.\textsuperscript{58} The courts then enacted a rule, as authorized under that section, in the form of a standing order.\textsuperscript{59} That order was composed of 2,166 words

\textsuperscript{52} The *voir dire* law would never have been enacted without the critical support of the Massachusetts Speaker of the House or Representatives, Robert A. DeLeo (19th Suffolk District).


\textsuperscript{55} Infra Appendix F, at 74.

\textsuperscript{56} Id. at pp. 1-2.

\textsuperscript{57} Nat’l Ctr. State Cts., supra note 53, at 10.


\textsuperscript{59} See infra Appendix F.
which sought to clarify the jury selection procedure, they then topped it off with an additional 1,790 words to establish a panel *voir dire* pilot project. In short, a total of 3,984 words in judicially-created rules (spawned from just twenty-eight statutory words) were employed to control this new legislation.\(^6\)

\(^6\) See infra Figure 5.
The New Voir Dire Law and its Judicial Offspring:
A Comparison of Words

- Original Statute: G.L. c. 234, § 28(4)
- MA Superior Court Standing Order No. 1-15
- Panel Voir Dire Pilot Project
- Proposed Superior Court Rule 6 & Appendix A (Panel Voir Dire Protocol)

Figure 5.
Superior Court Standing Order 1-15 sets forth two ways in which attorneys may participate in *voir dire*: Attorneys may examine jurors individually, or as a group using a panel method, which will be detailed later.  

The Center for Jury Studies at the National Center for State Courts ("NCSC") studied the implementation of the law and its acceptance by the judges. It concluded that despite initial resistance, "the transition to [attorney participation in *voir dire*] has been smoother than expected," that although empanelment takes longer, the judges viewed the new law, "as hav[ing] improved the process of jury selection." After a year’s experience with the new law, trial judges finally conceded that those jurors who were ultimately impaneled "are more likely to be impartial."  

The NCSC’s major recommendations were that:  
- Judges, lawyers, and court officers be better trained to conduct *voir dire* when attorneys participate;  
- Resources be developed to make the process more efficient; and finally, that  
- Attorney-directed *voir dire* be considered for expansion into other Massachusetts trial courts.  

The NCSC concluded: "[g]iven the general consensus among Superior Court judges that [attorney participation] has improved the *voir dire* process, that attorneys have not abused the process, and that jurors do not appear to be offended by attorney questions, there is every reason to extend [it] to other trial courts."  

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See infra Appendix F.  
62 See NAT’L CTR. STATE CTS., supra note 53. The nationally-renowned Paula Hannaford-Agor directed the project, which conducted research regarding how to best implement the new law. See id.  
63 NAT’L CTR. STATE CTS., supra note 53, at 9-13 (providing recommendations for implementing 2014 Mass. Acts ch. 254); see also supra Illustration 5 (showing proposed Superior Court Rule 6 contains 3,544 words).  
64 Id.  
VI. THE NEW LAW: HOW IT PRESENTLY WORKS UNDER SUPERIOR COURT STANDING ORDER 1-15

Massachusetts attorney Peter Elikann wrote the following:

The Procedure

• An attorney or self-represented party must file a motion requesting permission to conduct juror interviews. Civil or criminal motion practice must be followed respectively. Civil cases must follow Superior Court Rule 9A requiring that the motion along with the response be filed the earlier of either the final pretrial conference date or 14 days prior to trial. In criminal cases, the motion must be served on the other party one week before filing and the response must be given two business days before the final pretrial conference or, if no final pretrial, then five days prior to trial.

• The motion should identify the general question areas that the moving party plans to ask the jurors. It is understood that reasonably related follow-up questions should be permitted. A response or opposition by the other party to these lines of inquiry may be filed. A judge has the discretion to request that specifically written questions be filed for pre-approval.

• In determining whether to approve or disapprove topics, judges are to be guided by the principle that: (a) jurors should not be exposed, through the voir dire process, to extraneous matter that could undermine their impartiality; (b) voir dire should move at a reasonable rate that bears some relation to the seriousness of the matter and anticipated length of the trial and consideration for other sessions that might need access to the same jury

66 See Peter T. Elikann, Get Ready for the New Voir Dire Law, MASS BAR ASS’N, (Jan. 2015), http://www.massbar.org/publications/lawyers-journal/2015/january/get-ready-for-the-new-voir-dire-law. The credit for this succinct and most helpful overview of the procedures to be followed under Chapter 254 were set forth in this article. Id. Attorney Elikann is a criminal defense attorney who is the immediate past Chair of the MBA’s Criminal Justice Section Council, a member of the MBA’s Executive Management Board, and an author of books on legal policy. Id.
Questions that should generally be approved

- Questions and reasonable follow-up questions about a prospective juror’s background and experience if relevant to the case should be explored as to how that might affect the juror. Sensitive personal information should be outside the earshot of the other jurors.
- Questions about potential biases about the parties, the claims or issues.
- Questions about the juror’s inclination or ability to follow the judge’s instructions about the applicable law.

Questions that should generally be disapproved

- Questions that duplicate the questions on any juror questionnaire. However, incomplete answers on a questionnaire or answers that need further elaboration are permitted.
- Questions regarding a variety of personal information including political and religious views and information on past charitable giving, hobbies, recreation, reading and viewing habits, etc., unless they pertain to issues that may arise at trial or may affect the juror’s impartiality.
- Questions about a juror’s previous service on a jury.
- Questions that are tantamount to instructing prospective jurors on the law.
- Questions that are an attempt to persuade the juror, encourage the juror to prejudge the case or commit to a result or do anything other than remain impartial.
- Questions that require a juror to guess about facts or law.
- Questions that might embarrass or offend the juror or invade privacy.

Prior to voir dire, the judge shall:

- Give a brief description of the case and related information.
Give a rudimentary description of legal principles relevant to the case.

Explain the empanelment process and, upon request, might permit the attorneys or self-represented party to also make a brief statement explaining the process. The jurors should be informed that, if a question is invasive of their privacy, they may request to decline to answer or have the questioner take steps to better ensure their privacy.

Ask all questions required by law to the prospective jurors possibly as a group. Yet at least some of the questions must be asked individually outside the earshot of other prospective jurors.

Excuse jurors if it is determined that service would be a hardship or they could not be impartial.

**Questioning**

Once the judge determines that a juror is impartial, the party with the burden of proof goes first.

The judge may require certain questions be asked outside the presence of fellow prospective jurors.

Parties may assert challenges for cause and, if the juror is not excused, a peremptory challenge may be exercised at that time beginning with the side that has the burden of proof or, in civil cases, the judge may order both parties alternate challenges. Or the juror may be seated subject to a later challenge after the voir dire.

Upon request, jurors may be questioned as a group in what is known as “panel voir dire.” In that case, no questions may be asked that appear to seek personal information. Jurors are to be addressed by their juror numbers only. After that, challenges for cause may be exercised. All challenges must be heard outside the earshot of the other jurors. Any time a juror is challenged, the judge may permit the opposing party to ask further questions.

Any party may object to a question by the other party merely by stating “Objection” without further explanation. The judge may rule on the objection.
in front of the jurors or the judge may hear argument and rule outside the jury’s hearing.

- The judge may set a reasonable time limit on questioning of prospective jurors.
- There will be instituted by the court a pilot project where volunteer judges will conduct “panel voir dire” according to procedure to be determined and compile data on it.\textsuperscript{67}

VII. THE NEW LAW: HOW IT WILL LIKELY WORK UNDER PROPOSED SUPERIOR COURT RULE \textsuperscript{68}

A. Timing.

- In both civil and criminal cases, the parties may discuss, at the final pretrial conference, \textit{inter alia}, the following:
  - the method and content of the judge’s voir dire;
  - the method and content of the attorney or party’s participation;
  - judicial approval or disapproval of proposed questions and subject matters;
  - time limits on voir dire;
  - the method and content of attorney/party participation;
  - judicial approval or disapproval of proposed questions and subject matters; and
  - the content or method of a supplemental juror questionnaire.

Before the final trial conference, the parties shall request, in writing the proposed subjects, questions of supplemental questionnaires, any preliminary instructions to the juror panels.

\textsuperscript{67} Id.

\textsuperscript{68} On December 2, 2016, the Superior Court approved an amendment to its Rules to substitute a new Rule 6 for Standing Order 1-15. \textit{See} Appendix G (stating text of proposed Superior Court Rule 6 and proposed Panel Voir Dire Protocol). This proposal is undergoing public comment at the time of the printing of this Journal, but likely will survive almost entirely intact. \textit{Id}. The Comment period expires on February 15, 2017, after which the Supreme Judicial Court will be asked to adopt the new Rule. \textit{Id}. Counsel is advised to determine the status of this Rule before relying on the above summary.
B. Questions that must be approved.

- Questions that ask for elaboration or explanation concerning the judge’s questions or the juror questionnaire.

C. Questions that should generally be approved.

- Questions that seek factual information about a prospective juror’s background experience pertinent to the case;
- Questions that may reveal preconceptions or biases relating to the identity of the parties or the nature of the case;
- Questions that inquire into the prospective juror’s willingness and ability to apply pertinent legal principles; and
- Questions meant to elicit information on subjects identified as preferred subjects of inquiry.

D. Questions that should not generally be approved.

- Questions relating to how the juror would decide this case, including hypotheticals that are close/specific to the facts of the case;
- Questions that seek to commit the juror to a result, including questions about what evidence would cause the juror to find for the attorney’s client or party;
- Questions having no relevancy other than to argue an attorney’s/party’s case or indoctrinate any juror;
- Questions about the outcome in prior cases where the person has served as a juror, including the prior vote of the juror or the verdict of the entire jury; and
- Questions in the presence of other jurors referring to what is written on a juror’s confidential juror questionnaire.

E. Questions that may be approved, but only after explanation to, and approval by, the Judge.

The following areas of inquiry are sharply limited, and may be asked only after an attorney or party satisfactorily explains to the judge how the inquiry is relevant to the issues, the juror’s impartiality, or may assist with peremptory challenges:
Questions relating to the juror’s political views, voting patterns or party preferences; and
Questions regarding the juror’s religious beliefs or affiliation.

VIII. THE PANEL VOIR DIRE EXPERIMENT

The Superior Court Panel Voir Dire Pilot Project created a “procedural overview” based on Standing Order 1-15 to painstakingly explain to trial attorneys how to conduct panel voir dire. The overview is comprised of fifty-two PowerPoint diagrams which depict, in excruciating detail, the flow of jurors through the courtroom in an elaborate detail, in which might best be described as a Rube Goldberg contraption.69

After the jury box is full of an initial jury panel, the judge explains that questioning will begin of the entire panel and that individuals may alert the court if they prefer to answer a question privately. The clerk reads juror numbers and corresponding seat assignments into the record. Panel questioning commences, while the venire remains in the courtroom. The plaintiff asks questions first. If multiple parties are on the same side in the trial, the parties may agree on an order for questioning, or the judge can determine the order. Attorneys may direct questions to the entire panel or to individual jurors. The clerk records any affirmative responses. Attorneys have the opportunity to follow up with individual jurors after their affirmative responses. During the questioning, the attorneys make “tactical decisions” about the potential jurors. If the answers alert the judge to a potential bias, he can recall the juror to sidebar. If a juror asks to be questioned privately, the judge can call him to sidebar or defer to the questioning party. The judge can deal with any challenge during the sidebar conversation, or can defer this discussion until later in the process. In cases with time limits, time at sidebar is not charged to the parties.

Parties may object to questions during the panel questioning if the other party goes beyond the scope of voir dire. The judge can hear arguments on the objections at sidebar, and this time is generally not charged against a party, although this decision is within the judge’s discretion. After the attorneys finish their questions, the judge hears additional for-cause challenges and rules on them at sidebar. Parties may request follow up time

after the other side finishes questioning, which the judge may allow, deny, or decide to complete the questioning himself.

Next, the party with the burden exercises its preemptory challenges, followed by the other party. In civil cases, the judge may alternate sides with successive panels. The judge tells those remaining in the jury box that they will be jurors, but jury selection continues until they empanel a full jury. These jurors are directed to another location. Subsequent panels, as needed, are called in, questioned, and challenged by the same procedure described above.

A few members of the trial bar, enamored of the panel approach employed in other jurisdictions, mistakenly refer to it as the “gold standard” of jury selection, a catchy, superficial phrase that lacks foundation: for it is fool’s gold. This method’s detractors contend that it requires much effort and yields little result because it introduces the likelihood that a prospective juror will blurt out a strongly-held and wholly inappropriate comment (e.g., “Isn’t this just like the McDonald’s coffee case,” or worse) thereby poisoning an entire venire in seconds. Such a spontaneous, ill-considered, but perhaps heartfelt comment by a juror can, in a moment, potentially destroy the impartiality of an entire venire. Such a comment, once expressed, cannot be easily forgotten; it is akin to “unringing a bell.”

The quixotic endeavor of panel voir dire dismisses a fundamental characteristic of many individuals who comprise the jury pool: most people are uncomfortable with public speaking (a fact likely lost on many trial attorneys). Social science research refutes the contention that panel voir dire yields the greatest candor from potential jurors; instead, research shows individual attorney-directed voir dire is the most effective method. Moreover, the unfamiliar experience of jury selection leads jurors to the comfort of conformity. This results in potential jurors not speaking their mind or not volunteering information, so as not to draw unwanted attention.

A final, compelling and overriding principle governs my perception of panel voir dire: citizen-jurors do not forfeit their right to privacy and dignity at the courthouse door. Forcing reluctant volunteers who come into our courts to publicly announce their views on any matter is just not right. We are, after all, New Englanders, who treasure our privacy and our judicial system must respect and honor this rich and longstanding tradition. Any other view is inimical to our local culture.


71 See Suggs & Sales, supra note 13, at 259-60 (discussing social science research pertaining to modes of voir dire questioning).

72 See Robert Frost, Mending Wall, in NORTH OF BOSTON 6 (1914). A poem in which the sometimes typical New England view is expressed: “Good fences make good neighbours.” Id.
IX. MY DECADE-LONG, PREFERRED PROCEDURE

The *voir dire* practice I have employed for several hundred civil and criminal trials over the past decade emanates from a procedure “borrowed” (actually, truth be told, stolen) from an esteemed colleague, Honorable Raymond J. Brassard. In an article entitled “Individual Voir Dire and Fair Juries, Treatment of Jurors” Justice Brassard believed firmly in attorney participation in the *voir dire* process, but with counsel suggesting additional questions to the judge; at that point, only the judge would ask selected questions posed by the attorneys to prospective jurors. I took that progressive step and advanced it by permitting the attorneys to ask questions directly of the potential juror, but only individually, and only at sidebar. With some cautionary words to counsel before the trial begins, I remind them of the need to respect the dignity of each citizen and the reality that ultimately any one juror—whether counsel foresees it at the time or not—could well decide, with their vote, their client’s fate. The lesson is not lost upon counsel. This process works smoothly and wonderfully (with but one unusual exception by a rather quirky and likely nervous lawyer) in all cases. As judges, we sometimes forget that attorneys are bound by a professional oath, that they do respect the system (yes, they will, if they see an opportunity, try to push the envelope), but with a firm and gentle hand on the judicial tiller, attorney-directed questioning works just fine. In this fashion, the judge remains “the directing and controlling mind at the trial . . .”

This process has been described as “elegant in its simplicity” by a member of the trial bar. This trial attorney (who incidentally did not prevail at trial) lauded this different approach as “The Solution” to the court problem of trying to “seat a [jury] without predisposition of any kind.” As she wrote:

> In the first place, the judge reads all of the questions requested by both counsel and then adds additional questions, with advance notice to counsel, that he feels are more likely to eke out hidden biases.

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74. Henry T. Lummus, *The Trial Judge* 8 (1937). Justice Lummus served Massachusetts with distinction, having been appointed by the governor as a special justice of the Lynn Police Court in 1903, then as presiding justice of that court, later as an Associate Justice of the Superior Court in 1921 where he served until 1932, and then an Associate Justice of the Supreme Judicial Court in 1932 where he served for thirty-three years until his death in 1955.


76. *Id.*
But the real innovation is this: When the individual venire members are called to sidebar with the court and counsel after the judge poses these expected questions, he allows each counsel to ask follow-up questions directly. This gives each counsel the opportunity to pursue her instincts on matters of concern.

Of equal importance, it permits counsel to look directly into the eyes of each prospective panel member, an event of some importance since a person’s eyes are said to be the window to his soul. One can fairly assume that a social contract forms between two people who lock eyes and exchange a promise of fairness . . .

This proposed simple approach is superior [to other systems] in these respects: The trial judge is the enforcer, the time keeper and the protector of the prospective juror’s privacy. Is it really necessary for us to know in a case unrelated to the entertainment industry that someone is a faithful adherent to [a particular television show]? In roughly the same amount of time as that consumed by the [then]-current inadequate process, most of the benefits inherent in full attorney voir dire systems are achieved.  

This simple approach only requires that judges be prepared to exercise their broad supervisory powers in an innovative way that is far more likely to achieve their own intended objective of a fair, unbiased jury by allowing attorneys to pose follow-up questions at sidebar.

This approach is the best means of jury selection because it “prompt[s] jury reflection, probing, and subsequent disclosure of information, opinion, bias or prejudices which might prevent a juror from attending the requisite degree of neutrality required.” Moreover, it is fully consistent with the American Bar Association’s position that “the best voir dire system seems to be where the judge conducts a preliminary examination of jurors and, subsequently, the attorneys conduct a direct oral examination of the venire for a limited period of time.”

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77 Id.
79 See Moloney, supra note 30, at 1066 (citing STANDARDS RELATING TO JUROR USE AND MANAGEMENT (AM. BAR. ASS’N 1983) [hereinafter “A.B.A. STANDARDS”]). Those standards
Justice—the fundamental purpose of a judge’s existence—is thereby served.

X. CONCLUSION

The purpose of this article is now fulfilled. The uncharted territory of a new frontier of attorney-directed voir dire has been staked out. The duty now falls upon counsel’s shoulders to use the tools available to fulfill his or her duty of zealous advocacy. The right to attorney voir dire has been vigorously sought for so many years and by so many distinguished leaders of the trial bar, that we fail to honor their legacy by neglecting this valuable opportunity to promote justice.

Attorney Michael E. Mone, Sr., former President of the American College of Trial Lawyers, has incisively observed:

It’s a power that exists in almost every other state in the nation . . . . The problem with judges, much like the lawyers, is that they are often resistant to change. I’ve heard all of the arguments, but no one has ever convinced me that attorney voir dire is does anything other than result in a better selection of jurors.  

Finally, as trial attorney Douglas K. Sheff, past President of the MBA, has succinctly stated: “This is a major victory for fairness in the courtroom—a great asset going forward.”

DEDICATION

This article is dedicated to two mentors, Chief Justice John T. recommend that a judge permits counsel to question the prospective juror “for a reasonable period of time.” See A.B.A STANDARDS.

80 Frank, supra note 48.


82 The authors wish to thank former Journal Editor-in-Chief and (now Attorney) Joseph P. McCarthy for inspiring this article, as well as the Journal’s Managing Editor Alyssa M. Johnson for her hard work in editing and encouraging this article to its completion. Finally, the authors wish to acknowledge the assistance of Attorneys Louisa E. Gibbs, A.J. Capuno, and John T. Curran in their research, writing, and editing.
Broderick, Jr. of the New Hampshire Supreme Court (ret.) and Chief Justice Frank J. Williams of the Rhode Island Supreme Court (ret.).
APPENDIX A

SAMPLE VOIR DIRE QUESTIONS FOR CIVIL CASES

Judge’s Introduction

Members of the jury pool, I am going to speak with you about the nature of this case and the burden of proof that applies to such a case. My remarks at this time are not a substitute for the more detailed instructions on the law that I will be providing you with at the end of the case.

This is a trial of a civil case involving a dispute between private parties.

It involves the following allegations. [Read the Agreed Description of the Facts that appears in the Final Pretrial Memorandum].

In a civil case, the plaintiff, who is the party bringing the claim, must prove the case by the civil standard of proof, which is a “preponderance of the evidence.” What that means is that the plaintiff must prove that his/her/its case is more probably true than not true.

The plaintiff does not have to prove the case by the criminal standard of proof, which you may be familiar with from television or news programs, which is “proof beyond a reasonable doubt.” That is not the standard that applies in civil cases. The civil standard of proof is not as strict as the criminal standard. In a civil case such as this one, the plaintiff is not required to prove his/her/its case beyond a reasonable doubt. In this case, the plaintiff must prove the case by a “preponderance of the evidence,” which, as I have said, means “more probably true than not true.”

I will give you a visual example. If you think about the scales of justice, you should put all the credible evidence on opposite sides of these scales. The plaintiff must then produce enough evidence to make the scales tip in his/her/its favor ever so slightly. If you were to put it into numbers, the plaintiff must prove his/her/its case by 51%. If the plaintiff fails to do this, you must return a verdict for the defendant.

Let me tell you now what the elements of the legal claim(s) is/are against the defendants.

[Read each element of the legal claim(s) the plaintiff must prove from the standard jury instructions].

At the end of this trial, I will review with you again the elements of the plaintiff’s claim(s), that is, what the law requires the plaintiff to prove by a preponderance of the evidence.
And finally, it is my responsibility during this case to rule on any of the issues that come up and to instruct you on the law as it applies to this case.

**It is your sworn duty to accept the law as I state it to you.**

Ultimately, you must decide whether or not the plaintiff has proven his/her/its case by a preponderance of the evidence, that is, remember, “more likely than not,” satisfying at least that 51% burden.

TABLE OF CONTENTS

PLAINTIFF COMPENSATION ................................................................. 37
TORT REFORM / LAWSUIT CRISIS .................................................. 37
TRIAL LAWYERS .................................................................................. 38
POLICE OFFICERS ................................................................................. 38
NEGLIGENCE ......................................................................................... 38
DEFENDANT’S CONDUCT ................................................................. 39
TRAFFIC ACCIDENTS ........................................................................... 39
PEDESTRIAN AND BICYCLE ACCIDENTS ........................................ 40
MULTIPLE-VEHICLE ACCIDENTS ....................................................... 41
PREMISES LIABILITY / SLIP AND FALL ........................................... 41
CORPORATE RESPONSIBILITY / VICARIOUS LIABILITY ................... 42
MEDICAL NEGLIGENCE ........................................................................ 42
  a. Generally ................................................................................. 42
  b. Patient and Doctor Responsibilities ........................................ 43
  c. Credibility ............................................................................... 44
  d. Other Medical Issues .............................................................. 44
ALCOHOL-RELATED ACCIDENTS ..................................................... 45
THE PLAINTIFF’S STANDARD OF PROOF ........................................ 46
WRONGFUL DEATH ........................................................................... 46
COMPARATIVE NEGLIGENCE ............................................................. 47
DAMAGES ............................................................................................ 48
  a. Compensatory Damages .......................................................... 48
  b. Verdict Limits .......................................................................... 52
MITIGATION OF DAMAGES (DEFENSE) .......................................... 52
CONTRACT DISPUTES ....................................................................... 52
WORK ACCIDENTS ............................................................................. 54
SYMPATHY ......................................................................................... 55
CLOSING QUESTIONS ........................................................................ 56
Sample Questions

Plaintiff Compensation

[P] Do you believe that a plaintiff should be compensated to the full extent the law will allow?*

[P] Through monetary compensation, the law seeks to make the plaintiff “whole,” that is, the law seeks to compensate the plaintiff for his/her/its suffering. This may be economic loss, loss of physical abilities, and/or other kinds of losses. Do you have any reservation in awarding monetary damages for these types of losses in rendering your verdict?*

[P] Do you believe that every effort should be made to compensate a plaintiff for another’s negligence?*

[D] Do you believe that all injured people deserve to be compensated, even if that means that a defendant who is not negligent pays the award?*

[D] In awarding damages, will you award only those damages proven by the plaintiff?

Tort Reform/Lawsuit Crisis

[P] Do you feel that juries award too much money these days?

[P] Do you feel that juries generally award too much money to people who claim they have been injured in an accident?

[P] Do you feel that people who sue for personal injuries win too often?

[P] Do you feel that it is too easy for someone to sue and win big verdicts in our courts?

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* Kindly note each question is closed-ended in nature to conserve time but more importantly, to protect the privacy of the prospective juror. The time for asking open-ended questions is at sidebar.


[P] Plaintiff questions

[D] Defense questions

[N] Neutral
Do you feel that there are too many unjustified or frivolous lawsuits in our courts?

Do you feel that personal injury or accident lawsuits have an adverse impact on you, people, society, the courts, or the economy in general?

Do you feel that there are too many lawsuits?

Do you feel that people today are too eager to file lawsuits?

Do you feel that people today are too quick to sue others?

Do you feel that most people who sue others do not have legitimate grievances?

Do you support efforts to place a cap or a limit on the amount of money juries can award?

In a lawsuit between an individual and a company, would you tend to favor the individual?

**Trial Lawyers**

Some people have negative feelings about trial lawyers. Do you share that feeling?

**Police Officers**

One (or several) of the witnesses in this case may be a police officer(s). Would you tend to give the testimony of a police officer less credibility as opposed to that of a civilian simply because he/she is a police officer?

Conversely, would any of you tend to give the testimony of a police officer greater credibility simply because he/she is a police officer?

**Negligence**

During the course of this trial, you will hear several important legal terms; one such term is “negligence.” Negligence is simply the
lack of “ordinary (reasonable) care.” It is the failure to do what a reasonably careful and prudent person would have done or doing something that a reasonably careful and prudent person would not have done. In this case, the ordinary care standard applies to what a reasonably careful and prudent driver would have done in this situation. Would you have any reservations applying this standard of care to [the defendant’s] actions?*

[P] Do you believe that the defendant would have to intend to harm the plaintiff in order for him/her to be negligent, instead of the defendant failing to act with the proper care given the circumstances?*

[D] Do you believe it is important that if the defendant was not negligent, the verdict should be in favor of the defendant?*

[P] Would you have any difficulty in finding the defendant negligent if he/she did not intend to hurt the plaintiff?*

[D] Would you have any reservations finding in favor of the defendant if the plaintiff failed to prove that the defendant was negligent [liable]?*

[D] In applying the negligence standard, will you be able to find for the defendant even if the harm to the plaintiff was significant?

**Defendant’s Conduct**

(D) Do you believe that an injured person should receive more compensation if he/she is injured by a drunk driver?

(D) Do you believe that an injured person should receive more compensation if he/she is injured by someone under the influence of drugs?

(D) Do you feel that the amount or degree of the defendant’s negligence or fault should affect the amount of money to be awarded to the injured party?

**Traffic Accidents**

[P] Do you believe that it is reasonable to expect drivers to be in control at all times while driving on interstate highways?*
Do you believe that drivers should always be on the lookout for pedestrians who may attempt to cross the road in front of them?*

Do you believe that most accidents that occur between vehicles and pedestrians are the result of carelessness on the part of the pedestrian?*

Do you believe that tractor-trailer drivers often drive too fast for road conditions?*

Do you believe that professional drivers of large commercial trucks [such as tractor-trailers] should be required to drive more cautiously than drivers of private automobiles?*

Do you believe that trucking companies often ignore safety issues in the operation of their vehicles?*

Do you believe that many claims brought against trucking companies are frivolous?*

Do you believe that bad traffic accidents can happen with no one being at fault?*

Do you believe that if a pedestrian is in a crosswalk that fact alone should make the driver responsible?

Do you believe that if a pedestrian is not in a crosswalk that fact alone should not make the driver responsible?

Does it make any difference to you where the pedestrian is located in the crosswalk, how long the pedestrian has been there, or from where the pedestrian entered the crosswalk?

**Pedestrians and Bicyclist Accidents**

Do you believe that pedestrians should always use crosswalks if they are within a reasonable distance from where they are crossing?

Do you believe that pedestrians must exercise due care when crossing the road?
If you find evidence that a pedestrian was drinking alcohol or taking drugs, do you believe that the substance can impair a pedestrian’s judgment and due care in crossing the street?

Do you believe that bicyclists have more of a right to be on the roadway than do motor vehicles?

Do you believe that in an accident between a bicyclist and a truck or tractor-trailer, that the truck or tractor-trailer is most likely responsible?

Multi-Vehicle Accidents

Some people believe that when a driver on the highway hits another vehicle that has stopped or slowed down during bad weather conditions, the driver is at fault for not leaving sufficient distance to stop or avoid an accident. Others believe that the driver is not at fault because bad weather simply can cause accidents to happen.*

[For possible follow-up at sidebar]. How do you feel about this? [Or] which view is closer to your own: the driver is at fault for not leaving sufficient distance to stop or avoid an accident, or the driver is not at fault because bad weather simply can cause accidents to happen?*

Do you believe that when there is a large multi-vehicle accident, everyone is partially at fault?*

Do you believe that a driver who rear-ends the vehicle in front of him/her is automatically at fault?

Premises Liability/Slip and Fall

Do you believe that people sometimes fall on another’s property without anyone being at fault?

Do you believe that if a tenant is injured on the landlord’s property, that the landlord is most likely responsible?

Do you believe that sometimes people fall on ice or snow without anyone being at fault?
Do you believe that the presence of ice or snow alone makes the owner responsible for the plaintiff’s injuries?

**Corporate Responsibility/Vicarious Liability**

According to the law, a corporation is responsible for the actions of its employees while they are on the job. If the plaintiff shows that the injury to him/her was caused by the negligent actions of the employee defendant, would you have any reservations in awarding damages to the plaintiff even if the corporation has to pay?

Do you have any reservations or concerns with the law that holds a corporation responsible for the actions of its employees?

Would you have any reservations in holding the defendant responsible for the negligent actions of its employees?

Do you believe that you can fairly evaluate the defendant’s conduct even if it is a major corporation?

Knowing the plaintiff’s significant injuries, do you believe that can you fairly evaluate the conduct of a major corporation?

**Medical Negligence**

a. **Generally**

Do you believe that patients should not have a right to sue doctors for negligent treatment?

Do you have any reservations about lawsuits against doctors?

Do you have an overall positive impression of the quality of care provided at [defendant] hospital?

Do you have an overall negative impression of the quality of care provided at [defendant] hospital?

Do you believe that just because a patient is injured, the doctor is negligent?

Do you feel that because there has been a bad outcome in a medical situation, the nurse or doctor must be at fault?
[D] Do you feel that just because someone dies in the hospital, the doctor or nurses must have done something wrong?

[D] Do you believe that when something goes wrong, it must be the doctor’s fault?

[P] Do you believe that a doctor should not be responsible for the consequences of his/her failure to perform appropriate medical tests?

[P] Do you believe that just because a doctor does not intend to hurt his/her patient, he/she should not be responsible for any negligent actions on his/her part?

[P] Do you believe that even if the treatment a doctor gives is below the standard of care (or what competent doctors should do), the doctor should not be held liable for any injury resulting from his/her treatment?

[P] Sometimes bad things happen through no fault of those involved. However, do you believe that if a doctor is negligent he/she still should be held responsible for his/her negligence?

[P] In lawsuits against a doctor/nurse, would you tend to give them the benefit of the doubt in evaluating their actions?

[P] Do you believe that medical negligence lawsuits result in higher medical costs? If so, would that in any way affect your ability in this case to render a true and just verdict?

[P] Have you or any member of your family ever had an experience with a doctor that might affect your ability to be a fair and impartial juror in a case where the defendant is a doctor?

b. Patient and Doctor Responsibilities

[P] Do you believe that it is not a doctor’s duty to perform the necessary tests to ensure that selected treatments or operations are appropriate for his/her patients?

[P] Do you think that doctors should not be responsible for the treatment of their patients?
Do you believe that doctors should not be held responsible for injuries resulting from their negligent care or treatment?

Do you think that it is not the patient’s responsibility to know what is best for him/her?*

Do you believe that patients have a right to expect quality care from their doctors?*

Would you have any reservations in returning a verdict in favor of the plaintiff in a case involving the doctor’s failure to diagnose a serious illness?*

Would you have any reservations in filing a lawsuit against a doctor or other medical personnel if you felt that you were hurt as a result of their negligence?*

Do you believe that patients should be able to withhold important information from their doctor?*

Do you believe that not only the doctor, but the patient is also responsible for the success of his/her treatment?*

c. Credibility

Do you believe that a doctor is more credible than other people just because he/she is a doctor?*

Do you feel that you really can’t trust medical personnel or can’t believe their testimony when they are sued for negligence?*

If you hear evidence for the Plaintiff that is contradicted by the doctor, would you believe the doctor just because he is/she is a doctor?

Do you feel that you really can’t believe the testimony of doctors/nurses when they are accused of negligence?*

d. Other Medical Issues

Do you believe that some patients may not receive proper medical treatment when seen by a doctor?*
Do you believe that some doctors may be more concerned with making money than helping their patients?*

Do you believe that when it comes to hospital records or charts, if the doctors or nurses do not record an action in the paperwork (or in the hospital computer), they probably didn’t do it?*

Do you feel that if something is NOT written in the nurse’s notes or patient’s chart (or in the hospital computer) that it never happened?*

Do you feel that it is possible for a nurse to do something and simply not write it down in the midst of treating patients?*

Alcohol-Related Accidents

Do you believe that when someone drinks and chooses to drive, he/she should be sure that his/her driving will be unaffected?*

There may be evidence that the defendant was drinking before his/her driving that [evening]. Do you believe that alcohol can impair driving abilities (e.g. reaction time) even if one is not legally intoxicated?*

Do you believe that Massachusetts laws concerning drinking and driving are:

- Too harsh?
- Just about right?
- Too lenient?*

Do you believe that it is the driver’s responsibility to make sure he/she is in a condition to drive safely?*

Do you believe that an injured person should receive more compensation if he/she is injured by a drunk driver?

Do you believe that an injured person should receive more compensation if he/she is injured by someone under the influence of drugs?
[D] Do you feel that the amount or degree of the defendant’s negligence or fault should affect the amount of money to be awarded to the injured party?

[D] Do you think it is improper to drink and then drive a motor vehicle?*

[D] Do you understand that it is not against the law to drink and drive?*

[D] Do you feel that drivers are impaired by drinking any amount of alcohol?

[D] Do you believe that if someone drank alcohol and is involved in a traffic accident, it must automatically be his/her fault?*

**The Plaintiff’s Standard of Proof**

[P] Do you believe that by the greater weight of the evidence (i.e., 51%) is too low a standard for plaintiffs in [personal injury] cases?

[P] As I have stated, the standard of proof in a criminal case is “proof beyond a reasonable doubt.” However, in a civil case such as this one, the standard is more lenient and the plaintiff needs to prove his/her/its case by a “preponderance of the evidence.” Do you have any difficulty in accepting and applying this principal of law?

**Wrongful Death**

[P] This lawsuit seeks money damages from the defendant for the loss of a life, the life of [the plaintiff]. Do you feel uncomfortable about providing money damages for the death of a family member?

[P] Do you feel that providing money damages for negligently causing someone’s death is wrong?

[P] Do you believe that money can’t bring a person back, so why try?*

[P] Do you believe that a lawsuit for the death of someone is not appropriate?*

[P] Do you believe that money damages are not appropriate when it involves the death of someone?*
Do you feel that since you really cannot compensate someone for the loss of a loved one, such compensation should not be given?*

Do you believe that since money won’t bring back people who have been killed [in traffic accidents or other relevant situation], lawsuits of this type should be limited to economic losses, such as lost income and medical bills?*

Do you think that because of the difficulty in determining a figure for damages, only a token amount should be awarded?*

Do you feel that awarding money damages for sorrow, mental anguish, and emotional pain is not as important as awarding money damages for loss of income or other monetary or economic damages?*

Do you believe that in a case where a person has died because of the negligence of another person, people would be better off if they would “get on with life” rather than filing a lawsuit?

Do you believe that a family deserves monetary compensation simply because they have chosen to bring a lawsuit?*

Will you be able to award damages limited to: burial expenses, the value of the relationship of the deceased person to the survivors, and the economic value of what the deceased provided to the survivors?

Comparative Negligence

Do you believe that when it comes to car accidents, everybody is usually at least a little at fault?*

The law says that if the plaintiff was also negligent [this is called contributory negligence], and he/she is entitled to money damages, the damages should be less than the full damages if the plaintiff had not been negligent. Do you have any problem with this concept?

Would you have any reservations in turning to the plaintiff and saying that you find him/her contributorily negligent?*
[D] Do you feel that by raising this fact we are trying to put the blame where it doesn’t belong? That is, the plaintiff has been injured and it just isn’t right to say he/she may have contributed to his/her own injury?*

[D] According to the law, if a plaintiff contributes in any way to his/her injury, he/she is not entitled to recover any damages. If you found that any or all of the plaintiffs were contributorily negligent, would you have any reservations in returning a verdict of no monetary damages for each of those plaintiffs?

[D] In considering the [number] of plaintiffs, would you have any problem treating each plaintiff separately in recognizing how his/her actions may have contributed to his/her injury?

**DAMAGES**

**a. Compensatory Damages**

[P] When it comes to awarding [including] money in a lawsuit [your verdict], which do you think is worse: to award too little money to an injured party OR to award too much money to an injured party?*

[P] When it comes to including money in your verdict, which do you think is worse: to include too little money for an injured party OR to include too much money for the injured party?*

[P] In your role as juror, should you find that the defendant is liable (was negligent), would you award the full amount of damages allowed by law? Would you have any reservation in doing so?*

[P] If you were a juror, would you have any negative feelings about returning a multimillion dollar verdict if the evidence supported such a verdict?*

[P] According to the law [describe elements of damages]. Some of these damages we usually do not think of in terms of money. Would you give careful consideration to [pain and suffering or other factors] and assign a dollar figure for each of these factors if the evidence supported such a finding? Would you have any reservations/any hesitation in doing so? [If possible, ask for jurors’ view on each major element].*
Do you believe that a verdict of money damages for pain and suffering is just as important as a verdict of money damages for financial losses such as medical expenses or lost income?*

Do you feel that a verdict of money damages for physical or emotional pain is just as important as a verdict of money damages for loss of income or other money or financial damages?

Do you feel that compensation for the loss of companionship is just as important as a verdict of money damages for loss of income or other money or financial damages?

Would you have any reservations awarding damages for the pain and suffering of the plaintiff?*

Do you believe that these elements [list relevant elements] are any less important than damages for the loss of income or other money damages?*

Some people think that a person injured by another should be compensated not only for their lost wages and medical bills but also for the pain and suffering that comes with an injury. And other people think the injured person should be compensated but only for their lost wages and medical bills. Do you have an opinion either way on this issue?

Would you have any reservations awarding substantial money damages?*

Some people would have a problem awarding a significant amount of money in a civil lawsuit simply because it seems like a large sum of money. Do you feel this way?*

Would you have reservations awarding no money damages, that is, a verdict of zero dollars to the plaintiff, if he/she failed to prove all aspects of their case under the laws of Massachusetts?*

Do you feel that it would be difficult for you to rule in favor of [the defendant(s)], knowing the plaintiff would not be entitled to receive any money from him/her/them?
[D] Would the fact that the plaintiff has claimed [X dollars] in damages produce in your mind an impression that the plaintiff deserves [X dollars]?*

[D] The injuries alleged by the plaintiff are [insert description of damages], have you or any family member ever suffered a similar injury?

[D] Have you or any family member ever brought a claim or lawsuit for personal injuries arising out of an accident?

[D] Have you or any family member ever suffered an injury caused by the negligence of another?

[D] Will you be able to find for the defendant if the evidence warranted it even if a serious injury or death is involved?

[D] Do you feel that the fact that the plaintiff is claiming substantial money damages produces in your mind an impression that the plaintiff deserves some financial award?*

[D] Does [this fact] lead you to believe that the plaintiff deserves at least some money?*

[D] Do you believe that just because someone is injured he/she should receive some compensation?*

[D] Do you believe that just because someone files a lawsuit he/she deserves something?*

[D] Do you feel that, if a verdict for money damages is rendered, those damages should reflect a logical analysis of the case based on the law?*

[D] Do you have any concerns that your emotions may influence you in considering the amount of money, if any, that should be awarded in this case?*

[D] Do you feel it is important that if the defendant is not negligent, the plaintiff should not receive any monetary award?*

[D] Would you have any reservation awarding no money to the plaintiff if the evidence supported such a finding? That is, no matter how much sympathy you may have for him/her and his/her
family, would you have any reservations in returning a verdict of no money damages?*

[D] Do you believe that given the fact that the defendant is a corporation, it should pay for the injuries to the plaintiff no matter what the evidence shows or the law says?

[D] Do you believe that given the fact that the defendant is a large corporation, it should pay for the injuries to the plaintiff, regardless of whether or not it was negligent?*

[D] The plaintiff has asked for a significant amount of money. Do you feel that it would be easier for you to award money damages to the plaintiff when the defendant is a corporation rather than when the defendant is a person?*

[D] Do you feel that justice would be done if you found, given the evidence and the law, that the defendant was not negligent and, hence, that the plaintiff is not entitled to money damages?*

[D] Do you feel, for whatever reason, that a money award for any emotional suffering of someone should necessarily be a large sum of money?*

[D] Given your views about life, would you tend to initially accept the damages figures claimed by the plaintiff as being appropriate?*

[D] Do you believe that it would take a little more evidence to render a verdict against a person than to return a verdict against a corporation like the defendant?*

[D] Based on what you know at this time, do you think that the defendant should be punished for what happened to the plaintiff?

[D] Have you had a negative experience with the defendant, and if so, will that negative experience influence your decision regarding the award of money damages?

[D] Some people think that a person injured by another should be compensated not only for their lost wages and medical bills but also for the pain and suffering that comes with an injury. And other people think the injured person should be compensated but only for their lost wages and medical bills. Do you have an opinion either way on this issue?*
b. Verdict Limit

[P] Would the fact that the damages in this case could run high produce any hesitation in your mind in returning an award in this amount?*

[P] Do you believe that a significant money award would simply not be justified under any circumstances—even if the evidence in the case supported such a finding?*

[P] Do you believe that there should be a maximum amount of money or limit on what juries can award?*

Mitigation of Damages (Defense)

[D] According to the law, individuals have a duty to mitigate or minimize the injury they receive. In this case, that means [describe circumstances] means the failure to mitigate damages. If the plaintiff failed to mitigate his/her damages, the law says that he/she is not entitled to compensation for any injury that would not have occurred if [specify appropriate behavior that should have occurred].*

[D] If you serve on the jury in this case and find that the plaintiff failed to [specify appropriate behavior], would you have any reservations in reducing any award, if the defendant is found to be liable, by the amount that reflects this difference in injury?*

[D] Tell me what you think about someone’s failure to [specify appropriate behavior] in this situation.*

[D] If you find that the plaintiff failed to [specify appropriate behavior], would you have any reservations in reducing a significant award by the amount that reflects this difference even if that reduction is significant?

Contract Disputes

[P] Do you believe that when people sign a contract they should live up to the agreement?*
Do you believe that when corporations sign a contract they should live up to the agreement?*

Do you believe that verbal contracts are any less valid than written contracts?*

Would you have any reservation in holding a party to his/her/its verbal commitments?*

Do you believe that if a company has any questions about the terms or tasks involved in a contract it should ask about these items before signing the contract?*

If you find that both parties signed the contract, would you have any problems in making both the parties live by the contract terms?*

Would it make any difference to you that it would cost one party money to live up to the contract terms?

Do you believe that a person should follow the contract terms no matter the consequences?*

Do you feel that there are any situations where a party should not be required to fulfill the terms of a contract? What would be examples of those situations?*

Do you believe that businesses should not be held to unfair terms in a contract?*

Would the fact that one party must pay additional money to meet the terms of the contract be a good excuse for not following the contract?*

Do you feel that lawsuits should not be used by businesses as a way to make up for money lost through a bad business decision?*

Do you believe that businesses should be held to the same standards of fairness that we expect from individuals?*

Which do you feel is more important—the intent of the parties when they signed the contract or the actual wording of the contract that the parties signed?*
[P] After defining fiduciary duty, do you feel it’s significant that when a party has a fiduciary duty to another it avoids even the appearance of acting for its own benefit?*

[P] Do you feel that fairness and honesty have different meanings when you are dealing with business investments as compared to individual relationships?*

Work Accidents

[P] Do you believe that businesses in the [name] industry generally put profits over worker safety?*

[P] Do you believe that businesses are more concerned with making profits than keeping workers safe?*

[P] Do you believe that [certain businesses/industries] do not do enough to promote workplace safety?*

[D] Do you believe that construction workers often take shortcuts that go against common safety rules?*

[D] Do you feel that workers should not sue for injuries on the job when they did not follow safety rules?*

[D] Do you feel that most accidents occurring in the workplace are the result of carelessness on the part of the workers?*

[D] Do you believe that construction workers are responsible for their own safety?

[D] Do you believe that construction workers are responsible for the safety of others while on a job site?

[D] Do you believe that even if a contractor is partially responsible for an injured worker’s accident and injuries, the injured worker can be responsible for his/her accident and injuries at the same time?

[D] Would the fact that the plaintiff is a member of a union affect your decision in any way?
The judge will instruct you that you should not base your decision on liability of the defendant on sympathy. The plaintiff [plaintiff’s family] has not come here today seeking sympathy. However, when you consider the issue of damages, you will need to come to grips with exactly what has happened—how this tragedy has changed his/her life. If you serve as a member of this jury, would you be able to consider this and not “close your eyes” to these facts? Would you have any reservations in doing so?

This is a case in which we all feel great sympathy for the plaintiff. However, the judge will instruct you that you are not to base your decision in this case on sympathy.

If you serve as a member of this jury, would you be able to set all sympathy aside and decide this case on the facts and law presented in this trial?

Would you have any reservations in doing so?

In this case, you will be asked to make a decision that may disappoint the plaintiff. That is, the jury may find that the defendant is not liable. Would you have any hesitation in returning a verdict in favor of the defendant if it results in disappointing the plaintiff?

Do you think that making one side or the other happy is how this case should be decided?

Could you have sympathy for the plaintiff or his/her family and still understand that his/her/its own actions caused his/her injury [death]?

Do you feel that your emotions or feelings of sympathy would influence your decision in any way regarding the causes of this accident or the amount of money you would award against the defendant?

Would you have any reservations in deciding this case strictly on the evidence and the law in this case and not on any sympathy you may feel for either party?
Closing Questions

[P] Do you have any religious, moral, or ethical beliefs that someone should not sue another person?*

[P] Do you have a religious or personal belief that what happens in life must be accepted and that people should not seek to recover for losses in lawsuits?*

[P] Do you have any religious or personal beliefs that would give you any reservation in providing money compensation for suffering?*

[N] Do you believe that if the law, as I instruct you at the end of this case, goes against your personal views of what the decision should be, you would tend to base your verdict on your personal views of the case?*

[N] Is there anything about your [experience/situation/opinions] that would cause you to lean a little in favor of the plaintiff/defendant?

[N] In your mind, do you feel that the plaintiff/defendant starts out a little ahead of the defendant/plaintiff at this time?*

[N] Given the past [experiences/situations/opinions] you told us about, would you tend to give the benefit of the doubt to the plaintiff/defendant?*

[D] The defense presents his/her/its case last, after the plaintiff presents all of his/her/its evidence. Would you have any problem in waiting to make up your mind until the defense has had a chance to present its case?*

[D] Would you wait until after the defense presented its case and you have heard the judge’s instructions on the law before making up your mind?*

[D] Would you expect the defense to prove the plaintiff wrong? That is, you would not require the plaintiff to prove its own case?*

[D] If you believed, from what you heard and saw in court, that the plaintiff had failed to prove by a preponderance of the evidence that [the defendant] was negligent, would you be willing to stand by your decision no matter how the other jurors felt?*
[D] Do you feel that it is important that you stand by your opinion? Why is that?*

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N.B. Adapted and reprinted from the superb book by Jeffrey T. Frederick Ph.D., *Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury, 3rd Edition.* © 2011 American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Justice Curran also wishes to acknowledge the assistance of the following individuals who have worked on these questions and revised them to the extent necessary for Massachusetts jurors: Attorney David P. Angueria of Swartz and Swartz, Attorney Joseph T. Black of Sherry Black Geller & Cain, Attorney Vincent N. DePalo of the Governo Law Firm, LLC, Attorney Frederic N. Halstrom, Attorney Kenneth F. Rosenberg of Fuller Rosenberg Palmer & Belliveau of Worcester, Massachusetts and Hannah Dayle Carlin, first-year law student at the Boston University School of Law.
APPENDIX B

AN ANALYSIS OF JURY COMPOSITION BY EDUCATIONAL LEVEL

Cast against the backdrop of the vanishing jury trial, the cases that do go to trial reveal an important message.

The most common complaint I hear from jurors when I return to the jury deliberation room to thank them for their service is that they feel as though many trial lawyers treat them like dolts. They resent repeated questioning, and attorneys who waste their time.

Having presided over several hundreds of jury trials—many in Middlesex County—I am continually impressed by the jurors’ sophistication, ability to cut right through to the heart of the issues, intelligence, dedication, and deep commitment to justice under the law.

I have also been profoundly impressed by how well-educated our jurors tend to be, as well as their professions: engineers, physicians, attorneys, microbiologists, and many other notable vocations.

Recently, I reviewed my trial notes from the past 66 jury trials in the Middlesex Superior Court to find out exactly how well educated our jurors are in Middlesex County.

The results are striking. Among 850 jurors, their education levels ranged as follows:

- 81.4 % have attended some college or held an associate’s degree;
- 67.1 % held bachelor’s degrees;
- 20.6 % also held master’s degrees;
- 2.2 % held MBA degrees;
- 6.6 % held M.D.s, J.D.s or Ph.D.’s.

More than 81% of Middlesex County jurors who have sat in Superior Court Civil Session “F” have either attended college, have a college degree, or higher. Granted, these results are from one county only; and surely, the results may vary from county-to-county, but I suspect, admittedly without evidence that several other counties in the Commonwealth may show either the same or similar level of educational and professional attainment. See supra Figures 1-3, at 18-21.
The take-away point: the next time that trial lawyers feel that their jurors “didn’t get it” or correspondingly, trial or appellate judges are only too willing to reverse a jury verdict, we should simply pause and think again. The jurors may well have understood the real issues far better than we.

Our judicial system succeeds when judges and the trial bar cherish the wisdom of our jurors and respect the vitality and dynamism afforded by our jury system.
APPENDIX C

THE NEW VOIR DIRE LAW IN MASSACHUSETTS

Section 28 of chapter 234 of the General Laws, as so appearing, is hereby amended by adding the following paragraph:

"Notwithstanding the above, the following procedures shall govern in all criminal and civil superior court jury trials:

(1) In addition to whatever jury voir dire of the jury venire is conducted by the court, the court shall permit, upon the request of any party’s attorney or a self-represented party, the party’s attorney or self-represented party to conduct an oral examination of the prospective jurors at the discretion of the court.

(2) The court may impose reasonable limitations upon the questions and the time allowed during such examination, including, but not limited to, requiring pre-approval of the questions.

(3) In criminal cases involving multiple defendants, the commonwealth shall be entitled to the same amount of time as that to what which all defendants together are entitled.

(4) The court may promulgate rules to implement this section, including, but not limited to, providing consistent policies, practices and procedures relating to the process of jury voir dire."
## APPENDIX D

### RELEVANT RULES AND STATUTES BY STATE

<table>
<thead>
<tr>
<th>State</th>
<th>Method of Examination of Jurors</th>
</tr>
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<tbody>
<tr>
<td>Alabama</td>
<td>“The court <em>may permit</em> the parties or their attorneys to conduct the examination . . . or <em>may itself conduct</em> the examination.”&lt;sup&gt;85&lt;/sup&gt;</td>
</tr>
<tr>
<td>Alaska</td>
<td>“The court <em>may permit</em> the parties or their attorneys to conduct the examination . . . or <em>may itself conduct</em> the examination.”&lt;sup&gt;86&lt;/sup&gt;</td>
</tr>
<tr>
<td>Arizona</td>
<td>“The court shall control voir dire and conduct a thorough oral examination of prospective jurors. Upon the request of any party, the <em>court shall permit that party</em> a reasonable time to conduct a further oral examination of the prospective jurors.”&lt;sup&gt;87&lt;/sup&gt;</td>
</tr>
<tr>
<td>Arkansas</td>
<td>“The <em>Court shall either permit the parties or their attorneys</em> to conduct the examination of prospective jurors or itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper.”&lt;sup&gt;88&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

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<sup>85</sup> ALA. R. Civ. P. 47(a) (emphasis added).
<sup>86</sup> ALASKA R. CIV. P. 47(a) (emphasis added).
<sup>87</sup> ARIZ. R. CIV. P. 47(b) (emphasis added).
<sup>88</sup> ARK. R. CIV. P. 47(a) (emphasis added).
<table>
<thead>
<tr>
<th>State</th>
<th>Law</th>
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</table>
| California | “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.”

89 CAL. CODE CIV. PROC. § 222.5 (emphasis added).

| Colorado | “The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The parties or their counsel shall be permitted to ask the prospective jurors additional questions. In the discretion of the judge, juror questionnaires, poster boards and other methods may be used. The judge may limit the time available to the parties or their counsel for juror examination based on the needs of the case.”

90 COLO. R. CIV. P. 47(a)(3) (emphasis added).

| Connecticut | “In any civil action tried before a jury, either party shall have the right to examine, personally or by his counsel, each juror outside the presence of other prospective jurors as to his qualifications to sit as a juror in the action, or as to his interest, if any, in the subject matter of the action, or as to his relations with the parties thereto.”

91 CONN. GEN. STAT. § 51-240(a) (emphasis added).
<table>
<thead>
<tr>
<th>Location</th>
<th>Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware</td>
<td>“In jury trials, the Court alone shall examine all jurors on the Voir Dire unless it shall otherwise direct. When the Court examines, either attorney may request the Court to examine the jurors as to certain matters, and the Court may do so if in its opinion such matters are the proper subject of inquiry.”(^{92})</td>
</tr>
<tr>
<td>Florida</td>
<td>“The parties have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The court may ask such questions of the jurors as it deems necessary, but the right of the parties to conduct a reasonable examination of each juror orally shall be preserved.”(^{93})</td>
</tr>
<tr>
<td>Georgia</td>
<td>“The court may propound, or cause to be propounded by counsel such questions of the jurors as provided in OCGA § 15-12-133; however, the form, time required and number of such questions is within the discretion of the court.”(^{94})</td>
</tr>
<tr>
<td>Hawaii</td>
<td>“The court shall permit the parties or their attorneys to conduct the examination of each prospective juror. The court may conduct such examination, but in such instance, the court shall permit the parties or their attorneys to supplement the examination by further inquiry.”(^{95})</td>
</tr>
</tbody>
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\(^{93}\) Fla. R. Civ. P. 1.431(b) (emphasis added).
\(^{95}\) Haw. R. Civ. P. 47(a) (emphasis added).
<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
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<tbody>
<tr>
<td>Idaho</td>
<td>“Voir dire of the prospective jurors drawn from the jury panel shall first be conducted by the court. The plaintiff, and then the defendant, and then each other party to the action must be permitted to question to each prospective juror concerning qualifications to sit as a juror in the action.” 96</td>
</tr>
<tr>
<td>Illinois</td>
<td>“The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching upon their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature and extent of the damages.” 97</td>
</tr>
<tr>
<td>Indiana</td>
<td>“The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself.” 98</td>
</tr>
<tr>
<td>Iowa</td>
<td>“On demand of either party to a challenge, the juror shall answer every question pertinent to the inquiry, and other evidence may be taken.” 99</td>
</tr>
</tbody>
</table>

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96 IDAHO R. CIV. P. 47(i)(1) (emphasis added).
97 ILL. SUP. CT. R. 234 (emphasis added).
98 IND. TRIAL R. 47(D) (emphasis added).
99 IOWA R. CIV. P. 1.915(5) (emphasis added).
<table>
<thead>
<tr>
<th>State</th>
<th>Law</th>
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</thead>
<tbody>
<tr>
<td>Kansas</td>
<td>“Prospective jurors must be examined under oath or affirmation regarding their qualifications to sit as jurors. The <strong>court must permit the parties or their attorneys to conduct an examination of prospective jurors.</strong>”¹⁰⁰</td>
</tr>
<tr>
<td>Kentucky</td>
<td>“The <strong>court may permit</strong> the parties or their attorneys to conduct the examination . . . or may itself conduct the examination.”¹⁰¹</td>
</tr>
<tr>
<td>Louisiana</td>
<td>“A. The court shall examine prospective jurors as to their qualifications and may conduct such further examination as it deems appropriate. B. The <strong>parties or their attorneys shall individually conduct such examination of prospective jurors as each party deems necessary</strong>, but the court may control the scope of the examination to be conducted by the parties or their attorneys.”¹⁰²</td>
</tr>
<tr>
<td>Maine</td>
<td>“The <strong>court shall</strong> conduct the examination of prospective jurors <strong>unless in its discretion</strong> it permits the parties or their attorneys to do so.”¹⁰³</td>
</tr>
<tr>
<td>Maryland</td>
<td>The <strong>court may permit</strong> the parties to conduct an examination of jurors or may itself conduct the examination after considering questions proposed by the parties.¹⁰⁴ MD R RCP CIR CT Rule 2-512.</td>
</tr>
</tbody>
</table>

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¹⁰⁰ *KAN. R. CIV. P.* 60-247(b) (emphasis added).
¹⁰¹ *KY. R. CIV. P.* 47.01 (emphasis added).
¹⁰² *LA. CODE CIV. P.* art. 1763 (emphasis added).
¹⁰³ *Me. R. CIV. P.* 47(a) (emphasis added).
¹⁰⁴ *MD. CT. R.* 2-512(d)(1) (emphasis added).
<table>
<thead>
<tr>
<th>State</th>
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</table>
| Massachusetts | The judge conducts the examination and may also permit the parties or their attorneys to make further inquiry of the jurors.  
**After February 2, 2015:** “(1) The court shall permit, upon the request of any party’s attorney... an oral examination of the prospective jurors at the discretion of the court. (2) The court may impose reasonable limitations upon the questions and the time allowed, including, but not limited to, requiring pre-approval of questions.” |
| Michigan    | “The court may conduct the examination of prospective jurors or may permit the attorneys to do so.” |
| Minnesota   | “The court may permit the parties or their attorneys to conduct the examination... or may itself conduct the examination.” |
| Mississippi | “The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination.” |
| Missouri    | “Attorneys shall not, as part of the voir dire examination, examine a member of the jury panel as to any matter contained on the jury questionnaire (except to clarify any answer therein) without the permission of the court obtained in advance of the commencement of the voir dire examination.” |

105 See **MASS. R. Civ. P. 47(a).**  
106 **MASS. GEN. LAWS ch. 234 § 28** (repealed 2016).  
107 **MICH. CT. R. 2.511(C)** (emphasis added).  
108 **MINN. R. CIV. P. 47.01** (emphasis added).  
109 **MISS. R. CIV. P. 47(a)** (emphasis added).  
110 **MO. 7TH CIR. CT. R. 52.1.1** (emphasis added).
<table>
<thead>
<tr>
<th>State</th>
<th>Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montana</td>
<td>“The court shall permit the parties or their attorneys to conduct the examination of prospective jurors under its supervision.”¹¹¹</td>
</tr>
<tr>
<td>Nebraska</td>
<td>The judge shall examine all jurors so selected who appear . . .¹¹²</td>
</tr>
<tr>
<td>Nevada</td>
<td>“Each side shall be allowed 15 minutes of voir dire, which time shall not be deducted from the 2 hours of presentation time provided under Rule 39A(c).”¹¹³</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>“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.”¹¹⁴</td>
</tr>
<tr>
<td>New Jersey</td>
<td>“For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court’s interrogation in its discretion.”¹¹⁵</td>
</tr>
<tr>
<td>New Mexico</td>
<td>“The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination.”¹¹⁶</td>
</tr>
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</table>

¹¹¹ MONT. R. CIV. P. 47(a) (emphasis added).
¹¹² NEB. REV. STAT. §25-1631.03 (1915) (emphasis added).
¹¹³ NEV. SUP. R. CIV. P. 47(c) (emphasis added).
¹¹⁴ N.H. REV. STAT. § 500-A:12-a(III) (emphasis added).
¹¹⁵ N.J. CT. R. 1:8-3(a) (emphasis added).
¹¹⁶ N.M. R. CIV. P. 1-047(A) (emphasis added).
<table>
<thead>
<tr>
<th>State</th>
<th>Law and Practice</th>
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<tbody>
<tr>
<td>New York</td>
<td>The “judge shall be present for the examination of the jurors.” (Commentary: It is not the New York practice in civil actions to have the judge conduct the voir dire (the questioning of jurors to determine their qualifications). The attorneys do the questioning, with resort had to a judge only when the parties reach some unresolvable dispute.)(^1)</td>
</tr>
<tr>
<td>North Carolina</td>
<td>“The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged.”(^2)</td>
</tr>
<tr>
<td>North Dakota</td>
<td>“The court may examine prospective jurors itself and it must permit the parties or their attorneys to make their own examination.”(^3)</td>
</tr>
<tr>
<td>Ohio</td>
<td>“The court may permit the parties or their attorneys to conduct the examination . . . or may itself conduct the examination.”(^4)</td>
</tr>
</tbody>
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\(^1\) See N.Y. CIV. PRACT. R. 4107 (emphasis added).

\(^2\) N.C. GEN. STAT. § 9-15 (1806) (emphasis added).

\(^3\) N.D. R. CIV. P. 47(a)(2) (emphasis added).

\(^4\) OHIO R. CIV. P. 47(B) (emphasis added).
<table>
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<tbody>
<tr>
<td>Oklahoma</td>
<td>“The judge shall initiate the voir dire examination of jurors by identifying the parties and their respective counsel. He may outline the nature of the case, the issues of fact and law to be tried, and may then put to the jurors any questions regarding their qualifications to serve as jurors in the cause on trial. The <strong>parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination.</strong>”&lt;sup&gt;121&lt;/sup&gt;</td>
</tr>
<tr>
<td>Oregon</td>
<td>“When the full number of jurors has been called, they shall be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant.”&lt;sup&gt;122&lt;/sup&gt;</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>“The <strong>parties or their attorneys may conduct the examination of the prospective jurors</strong> unless the court itself conducts the examination or otherwise directs that the examination be conducted by a court employee.”&lt;sup&gt;123&lt;/sup&gt;</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>“The <strong>court may permit the parties or their attorneys to conduct the examination of prospective jurors</strong> or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.”&lt;sup&gt;124&lt;/sup&gt;</td>
</tr>
</tbody>
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<sup>121</sup> **OKLA. ST. ch. 2, Appx., R. 6** (emphasis added).
<sup>122</sup> **OR. R. CIV. P. 57(C)** (emphasis added).
<sup>123</sup> **PA. R. CIV. P. 220.3(c)** (emphasis added).
<sup>124</sup> **R.I. R. CIV. P. 47(a)** (emphasis added).
<table>
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</thead>
<tbody>
<tr>
<td>South Carolina</td>
<td>“The <em>court may permit</em> the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination.”¹²⁵</td>
</tr>
<tr>
<td>South Dakota</td>
<td>“The <em>court shall permit the parties or their attorneys to conduct the examination of prospective jurors.</em>”¹²⁶</td>
</tr>
<tr>
<td>Tennessee</td>
<td>“The <em>court shall permit the parties or their attorneys to conduct the examination.</em>”¹²⁷</td>
</tr>
<tr>
<td>Texas</td>
<td>The custom in many courts of allowing counsel to question prospective jurors as to their relationships and acquaintances with persons who might be witnesses at the trial promotes sound advocacy in that it allows peremptory challenges to be intelligently made.¹²⁸</td>
</tr>
<tr>
<td>Utah</td>
<td>“The <em>court may permit</em> the parties or their attorneys to conduct the examination . . . or may itself conduct the examination.”¹²⁹</td>
</tr>
<tr>
<td>Vermont</td>
<td>“The <em>parties or their attorneys shall conduct the examination,</em> but the court may ask additional questions to supplement the inquiry, or, upon agreement of the parties, may conduct the examination.”¹³⁰</td>
</tr>
</tbody>
</table>

¹²⁵ S.C. R. Civ. P. 47(a) (emphasis supplied).
¹²⁶ S.D. Stat. §15-6-47(a) (emphasis added).
¹²⁷ TENN. R. Civ. P. 47.01 (emphasis added).
¹²⁹ UTAH R. Civ. P. 47(a) (emphasis added).
<table>
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<tr>
<th>State</th>
<th>Requirement</th>
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<tbody>
<tr>
<td>Virginia</td>
<td>The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein[].¹³¹ VA ST § 8.01-358.</td>
</tr>
<tr>
<td>Washington</td>
<td>“The court may examine the prospective jurors to the extent it deems appropriate, and shall permit the parties or their attorneys to ask reasonable questions.”¹³²</td>
</tr>
<tr>
<td>West Virginia</td>
<td>“The court may permit the parties or their attorneys to conduct the examination . . . or may itself conduct the examination.”¹³³</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>“The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case . . . This section shall not be construed as abridging in any manner the right of either party to supplement the court’s examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.”¹³⁴</td>
</tr>
</tbody>
</table>

¹³¹ VA. CODE § 8.01-358 (1950) (emphasis added).
¹³² WASH. SUPER. CT. R. 47(a) (emphasis added).
¹³³ W. VA. R. CIV. P. 47(a) (emphasis added).
¹³⁴ WIS. STAT. § 805.08(1) (1975) (emphasis added).
| Wyoming | “[T]he attorneys, or a pro se party, shall be entitled to conduct the examination of prospective jurors, but such examination shall be under the supervision and control of the judge, and the judge may conduct such further examination as the judge deems proper.”135 |

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135 WYO. R. CIV. P. 47(c) (emphasis added).
### CONFIDENTIAL JUROR QUESTIONNAIRE

You are required by law to complete and sign this form, which is not a public record and will be destroyed by the court as soon as practicable after you are excused. Answer all questions, even if the answer is "none." Complete answers help ensure selection of fair and impartial juries.

**PLEASE PRINT YOUR ANSWERS ON THIS FORM IN BLACK INK AND BRING IT WITH YOU WHEN YOU APPEAR FOR JURY DUTY.**

**YOUR BACKGROUND INFORMATION**

<table>
<thead>
<tr>
<th>Name</th>
<th>Social Security Number</th>
<th>City/State/Zip Code</th>
<th>Place of Birth</th>
<th>Age</th>
</tr>
</thead>
</table>

**YOU MUST BE A CITIZEN, UNDERSTAND ENGLISH, AND BE 18 OR OLDER TO SERVE. ARE YOU QUALIFIED?**

- [ ] Yes
- [ ] No

**EDUCATION:** Highest grade completed in school?

**CURRENT OR PAST WORK AND/OR SCHOOL:**

- [ ] Employed
- [ ] Unemployed
- [ ] Self-employed
- [ ] Part-time
- [ ] At home
- [ ] Retired
- [ ] Student
- [ ] Other

**HOUSEHOLD:**

<table>
<thead>
<tr>
<th>Status</th>
<th>No of Adult or Minor Children</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single</td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td></td>
</tr>
<tr>
<td>Domestic Partner</td>
<td></td>
</tr>
<tr>
<td>Separated</td>
<td></td>
</tr>
<tr>
<td>Divorced</td>
<td></td>
</tr>
<tr>
<td>Widowed</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
</tr>
</tbody>
</table>

**Are you the parent or guardian of any adult or minor children?**

- [ ] No
- [ ] Yes: List their ages

**YOUR SPOUSE OR PARTNER**

<table>
<thead>
<tr>
<th>Name</th>
<th>Age</th>
</tr>
</thead>
</table>

**EDUCATION:** Highest grade he/she completed in school?

**CURRENT OR PAST WORK AND/OR SCHOOL:**

- [ ] Employed
- [ ] Unemployed
- [ ] Self-employed
- [ ] Part-time
- [ ] At home
- [ ] Retired
- [ ] Student
- [ ] Other

**YOUR EXPERIENCE WITH THE LAW:**

- [ ] No
- [ ] Yes

**Have you or anyone in your household or family ever had any of the following experiences with the law?**

- [ ] Been arrested?
- [ ] Been charged with a crime?
- [ ] Been convicted of a crime?
- [ ] Been a crime victim?
- [ ] Been served with a court order?
- [ ] Been a witness in a civil/criminal case?
- [ ] Been seated on a jury?
- [ ] Sought a court order (restraining order, stay-away order, injunction, etc.)?

If "Yes," please describe:

- [ ] No
- [ ] Yes: List their ages

**Have you or anyone in your household or family ever worked for any of the following?**

- [ ] Law enforcement agency?
- [ ] Court system?
- [ ] Corrections/detention system?
- [ ] Other law-related employer?

If "Yes," please describe:

- [ ] No
- [ ] Yes: List their ages

**Is there anything else in your background, experience, employment, training, education, knowledge, or beliefs that might affect your ability to be a fair and impartial juror?**

- [ ] No
- [ ] Yes

If "Yes," please describe:

**JUROR'S DECLARATION:** I certify that the information I have supplied on this form is true and complete to the best of my knowledge. I understand that a willful representation or omission of a material fact on this form is a crime, which may be punished by a fine of not more than $2,000 upon conviction.
APPENDIX F

MASSACHUSETTS SUPERIOR COURT
STANDING ORDER 1-15:
Participation in Juror Voir Dire by
Attorneys and Self-Represented Parties
(Applicable to All Counties)

A. Purpose.

The purpose of this Standing Order is to provide an interim procedure for the implementation of
St. 2014, c. 254, § 2, pending completion of the work of the Supreme Judicial Court Committee on
Juror Voir Dire. The Superior Court anticipates that this Standing Order may be superseded by, or may
be modified in response to, such rules, protocols, or guidelines as the Supreme Judicial Court may
hereafter adopt or approve, as well as in response to experience in the implementation of this Standing
Order, including experience with the pilot project referred to in paragraph C(9) hereof. This Standing
Order is adopted pursuant to Trial Court Rule V; shall take effect on February 2, 2015, coincident with
the effective date of St. 2014, c. 254, § 2; and shall remain in effect until such time as it may be
superseded or modified.

B. Preamble.

In enacting St. 2014, c. 254, § 2, the Legislature recognized and preserved the discretion of the
trial judge to lead and supervise the process of juror voir dire, including oral examination of
prospective jurors by attorneys and self-represented parties in the exercise of the right granted by the
statute. The Superior Court recognizes that trial judges may properly exercise discretion to employ
procedures for the examination of prospective jurors by attorneys and self-represented parties that may
differ from those set forth herein, as well as to use written juror questionnaires where they deem
appropriate in addition to the Confidential Juror Questionnaire required by
G. L. c. 234A, § 22 (hereinafter, the “statutory Confidential Juror Questionnaire”). This Standing
Order fully preserves the discretionary authority of the trial judge with respect to the examination and
selection of jurors in each case, and provides a standard procedure that will apply in each civil and
criminal case unless otherwise ordered by the trial judge, while permitting attorneys and self-
represented parties a fair opportunity to participate in voir dire so as to identify inappropriate bias.

C. Procedure:

1. Any attorney or self-represented party who seeks to examine the prospective jurors shall
serve and file a motion requesting leave to do so. In civil cases such motion shall follow the procedure
provided by Superior Court Rule 9A, and shall be filed with the Court, along with any opposition or
other response received, not later than the earlier of (a) the final trial conference if such a conference is
scheduled in the case, or (b) fourteen days prior to the date scheduled for trial. In criminal cases the
motion shall be served on all parties at least one week before filing, and the motion and any opposition
or other response shall be filed with the Court not later than two business days prior to the scheduled
date of the final pretrial conference, or, in the event that no final pretrial conference is scheduled, five
business days before the scheduled trial date.

2. The motion shall identify generally the topics of the questions the moving party proposes to
ask the prospective jurors. Topics identified shall be interpreted to include reasonable follow-up
questions. Any opposition or response to any such motion may address the proposed topics. The trial
judge may, in the exercise of discretion, and after notice to the parties, require attorneys and self-
represented parties to submit the specific language of the proposed questions for pre-approval. The
motion and any responsive filing shall also include any proposed language for brief preliminary
instructions on principles of law to be given pursuant to paragraph 5(b) hereof.

3. The trial judge shall approve or disapprove the topics of questions proposed, or, if the trial
judge requires pre-approval of the specific language of the proposed questions, shall approve or
disapprove each proposed question. In doing so the judge shall give due regard to the goals of: (a)
selecting jurors who can and will decide the case based on solely the evidence and the law, fairly and
impartially to all parties, without in the process exposing jurors to any extraneous matter that would
undermine their impartiality; (b) conducting the selection process with reasonable expedition, in
proportion to the nature and seriousness of the case and the anticipated length of the trial, and with due
regard for the needs of other sessions that draw on the same jury pool for access to potential jurors; and
(c) respecting the dignity and privacy of each potential juror.

4. (a) Questions that should generally be approved are:

(1) those seeking factual information about the prospective juror’s background and experience
pertinent to the issues expected to arise in the case, along with reasonable follow-up questions
regarding whether and how such background or experiences might influence the juror in the case,
provided that questions that would elicit sensitive personal information about a juror, or that
specifically reference information provided in a juror’s statutory Confidential Juror Questionnaire, shall
be permitted only outside the presence or hearing of other jurors, so as to preserve the confidentiality
required by G. L. c. 234A, s. 23.

(2) those regarding preconceptions or biases relating to the identity of the parties or the nature
of the claims or issues expected to arise in the case.

(3) those inquiring about the prospective jurors’ willingness and ability to accept and apply
pertinent legal principles as instructed, after consultation with the judge regarding the principles of law
on which the judge will instruct the jury.

(b) Questions that should generally be disapproved are those:

(1) that duplicate the questions that appear on the statutory Confidential Juror Questionnaire, or
any other written juror questionnaire used in the case, but questions seeking further detail regarding
information provided on a juror’s questionnaire, or completion of any uncompleted answers on the
questionnaire, should generally be approved, subject to the limitation stated in paragraph (a)(1) hereof;

(2) regarding the prospective juror's political views, voting patterns, party preferences, religious beliefs or affiliation, reading or viewing habits, patterns of charitable giving, opinions on matters of public policy, hobbies or recreational activities, or similar matters, or regarding insurance, except insofar as such matters may be relevant to issues expected to arise, or may affect the juror's impartiality in the case;

(3) regarding the outcome of any trial in which the prospective juror has previously served as a juror, or deliberations in or the prospective juror's vote in such trial;

(4) purporting to instruct jurors on the law;

(5) that make arguments on any issue of fact or law; that tend to indoctrinate or persuade; that encourage the juror to identify with a party, victim, witness, attorney, or other person or entity, or to send a message; or that encourage the juror to prejudge any issue in the case, to make a commitment to support a particular result, or to do anything other than remain impartial and follow the Court's instructions.

(6) that require a juror to guess or speculate about facts or law.

(7) that would tend to embarrass or offend jurors or unduly invade jurors' privacy.

5. Prior to any questioning by attorneys or self-represented parties, the trial judge shall:

(a) provide the venire with a brief description of the case, including the nature of the facts alleged and of the claims or charges, including the date and location of the pertinent alleged event(s), and the identity of persons or entities significantly involved;

(b) provide the venire with brief, preliminary instructions on significant legal principles pertinent to the case. Such instructions should include a brief recitation of: the burden and standard of proof; the elements of at least the primary civil claim or at least the most serious criminal charge, and,
if appropriate to the case and requested by counsel or a self-represented party, the elements of any affirmative defense that will be presented to the jury; and, in criminal cases, the defendant's right not to testify.

(c) explain to the venire the empanelment process, including, in cases where attorneys and/or self-represented parties will pose questions, the nature and topics of the questions that will be posed, and that any juror who finds either a particular question or the process of questioning by attorneys or self-represented parties intrusive on the juror's privacy may request to be permitted to decline to answer and/or that steps be taken to protect the privacy of any information disclosed. Upon request, the judge may permit each party to make a brief introductory statement to the venire limited to explaining the process and purpose of the questioning of jurors by attorneys or self-represented parties.

(d) ask all questions required by statute or case law, and any additional questions the judge deems appropriate in light of the nature of the case and the issues expected to be raised. The judge may ask questions of the venire as a group, but should conduct at least part of the questioning of each prospective juror individually outside the presence or hearing of other jurors.

(e) as to each prospective juror questioned individually, excuse the juror if the judge determines that service would pose a hardship, or if the judge has doubt as to the juror's impartiality; otherwise find the juror indifferent and able to serve.

6. After the judge has found an individual juror indifferent and able to serve, the judge shall permit questioning by attorneys or self-represented litigants if and to the extent that the judge has previously approved such questioning upon motion submitted in the manner provided herein. Such questioning shall begin with the party having the burden of proof.

(a) Except as provided in paragraphs C(6)(b) and C(9) hereof, the judge may require that such questioning be conducted of each prospective juror individually, outside the presence or hearing of
other jurors. Parties may assert challenges for cause based on the juror’s responses to questions posed by attorneys or self-represented parties, notwithstanding that the judge has previously found the juror indifferent based on the judge’s questioning and information provided in the statutory Confidential Juror Questionnaire. If the juror is not excused for cause upon such challenge, the judge may require the exercise of any peremptory challenge at that time, beginning with the party who has the burden of proof and, in civil cases, the judge may alternate sides thereafter. Alternatively, the judge may seat the juror subject to the parties’ later exercise of peremptory challenges.

(b) Upon request of one or both parties, the trial judge may permit counsel or self-represented parties to question jurors as a group, in a so-called “panel voir dire” procedure. Such questioning shall occur of those jurors whom the judge has already questioned individually and found indifferent and able to serve, after the judge has so found with respect to at least the number of jurors that will be seated for trial. If questioning occurs in this form, the judge shall not permit any questions that would elicit sensitive personal information about an individual juror, or that would specifically reference information provided in a juror’s statutory Confidential Juror Questionnaire. Jurors to whom questions are addressed, or who respond to questions, shall be identified on the record by juror number only. After completion of questioning the parties may assert challenges for cause based on responses to questions posed by attorneys or self-represented parties, although the judge has previously found the challenged juror indifferent. The judge shall require that such challenges for cause, as well as peremptory challenges, be asserted outside the hearing of other jurors. Upon any challenge for cause, the judge may allow opposing counsel further opportunity to question the juror.

7. Whether questioning of jurors by attorneys or self-represented parties occurs individually or in a group, any party may object to a question posed by another party by stating “objection,” without elaboration or argument. The judge may rule on the objection in the presence of the juror or jurors, or
may hear argument and rule on the objection outside the presence or hearing of the juror or jurors.

8. The trial judge may set a reasonable time limit for questioning of prospective jurors by attorneys or self-represented parties, giving due regard to (1) the objective of identification of inappropriate bias in fairness to all parties; (2) the interests of the public and of the parties in reasonable expedition, in proportion to the nature and seriousness of the case and the length of the anticipated evidence, and (3) the needs of cases scheduled in other sessions drawing on the same jury pool for access to prospective jurors.

9. The Court will establish a pilot project, in which judges who volunteer to do so will conduct so-called "panel voir dire," according to a consistent procedure to be determined and described in a separate document. During the course of the pilot project, the Court will compile data regarding identified measures. Upon completion of the pilot project, the Court will issue a public report of such data.

Judith Fabricant
Chief Justice

Adopted: December 5, 2014
Effective: February 2, 2015
PROPOSED NEW SUPERIOR COURT RULE 6. JURY SELECTION
(Applicable to all cases)

1. Subject to applicable statutes, rules, and controlling authority, the trial judge in each case has
discretion to determine a procedure for examining and selecting jurors designed to maintain juror
privacy and dignity, identify explicit and implicit bias, and foster efficiency in the session and
among sessions using the same jury pool. This rule provides a standard procedure for each civil
and criminal case unless otherwise ordered by the trial judge, while permitting attorneys and self-
represented parties a fair opportunity to participate in voir dire so as to identify inappropriate bias.

2. Conference With the Trial Judge
   a. In civil cases, unless otherwise ordered, the court shall schedule a final trial conference in
      accordance with Standing Order 1-88, as may be amended from time to time. In criminal
cases, unless otherwise ordered, a final pretrial conference shall be scheduled in
      accordance with Standing Order 2-86. These conferences with the trial judge shortly
before trial serve as the primary opportunity to discuss empanelment, including without
limitation: the statement of the case to be read to the venire; the extent of any pre-charge
on significant legal principles; the method and content of the judge’s intended voir dire of
jurors; the method and content of any attorney or party participation in voir dire; judicial
approval or disapproval of proposed questions or subject matters; any time limits on
attorney or party voir dire; the number of jurors to be seated; any agreement to allow
deliberation by fewer jurors if seated jurors are dismissed post-empanelment; the content
and method of employing any supplemental juror questionnaire; the number of
peremptories; and the order and timing of the parties’ assertions of challenges for cause
and peremptory challenges.
   b. If the court has not scheduled a final trial conference in a civil case or a final pre-trial
      conference in a criminal case, any party planning to submit a request, proposal, or motion
      regarding jury selection should request such a conference or submit a motion requesting
      voir dire procedures in time for a pretrial ruling by the trial judge. All parties shall avoid
      proposing jury selection procedures (including attorney/party voir dire) for the first time
      on the day of trial.

3. Voir Dire by Attorneys and Parties
   a. On or before the final trial conference in a civil case or final pre-trial conference in a
      criminal case, or 5 business days before trial if no such conference is scheduled, the parties
      shall submit in writing any requests for attorney/party voir dire; motions in limine
      concerning the method of jury selection; proposed subject matters or questions for inquiry
by the parties or trial judge; any proposed supplemental questionnaire; any proposed preliminary legal instructions to the venire or juror panels; the location within the courtroom where jurors and parties will stand or sit during voir dire; and any other matter setting forth the party’s position regarding empanelment.

b. The trial judge shall allow attorney or party voir dire if properly requested at or before the time set forth in paragraph 3(a), above. The trial judge may deem any subsequent request for attorney or party voir dire untimely, but may in the judge’s discretion allow the request in the absence of prejudice to any other party or significant impact on trial efficiency or on other sessions using the same jury pool.

c. When attorney or party voir dire is allowed, the trial judge shall, at a minimum, allow the attorneys or parties to ask reasonable follow-up questions seeking elaboration or explanation concerning juror responses to the judge’s questions, or concerning any written questionnaire. After considering the goals set forth in paragraph 1 above, the trial judge should generally approve a reasonable number of questions that (i) seek factual information about the prospective juror’s background and experience pertinent to the issues expected to arise in the case; (ii) may reveal preconceptions or biases relating to the identity of the parties or the nature of the claims or issues expected to arise in the case; (iii) inquire into the prospective jurors’ willingness and ability to accept and apply pertinent legal principles as instructed; and (iv) are meant to elicit information on subjects that controlling authority has identified as preferred subjects of inquiry, even if not absolutely required.

d. At the final trial conference in a civil case, or final pre-trial conference in a criminal case (or in a written submission in lieu of such conference), any attorney or party wishing to inquire into any of the following disfavored subjects must explain how the inquiry is relevant to the issues, may affect the juror’s impartiality, or may assist the proper exercise of peremptory challenges:

i. The juror’s political views, voting patterns or party preferences;

ii. The juror’s religious beliefs or affiliation.

e. Counsel and Parties May Not Ask:

i. Questions framed in terms of how the juror would decide this case (prejudgment), including hypotheticals that are close/specific to the facts of this case (any hypotheticals that may trigger this rule must be presented to the judge before trial).

ii. Questions that seek to commit juror(s) to a result, including, without limitation, questions about what evidence would cause the juror(s) to find for the attorney’s client or the party.

iii. Questions having no substantial purpose other than to argue an attorney’s or party’s case or indoctrinate any juror(s).
iv. Questions about the outcome in prior cases where the person has served as a juror, including the prior vote(s) of the juror or the verdict of the entire jury.

v. Questions in the presence of other jurors that specifically reference what is written on a particular juror’s confidential juror questionnaire.

f. The trial judge may impose reasonable restrictions on the subject matter, time, or method of attorney or party voir dire and shall so inform the attorneys or parties before empanelment begins.

g. In approving or disapproving voir dire questions and procedures, the trial judge, on request, should consider whether questions or methods proposed by the attorneys or parties may assist in identifying explicit or implicit bias.

h. If employing panel voir dire, the trial judge shall determine the procedure and may elect to follow the method set forth in Addendum A or adopt variations thereof. The trial judge may also elect to use some of the methods set forth in Addendum A even if not employing panel voir dire. Nothing in Appendix A restricts the trial judge from selecting an alternative method of voir dire, including but not limited to:

i. Filling empty seats as they arise due to challenges for cause or the exercise of peremptories. The trial judge may do this by clearing additional prospective jurors or filling in from additional already cleared jurors;

ii. The “Walker method”: Through panel voir dire or otherwise, the trial judge may clear as indifferent a number of prospective jurors that equals or exceeds the total number of jurors needed, plus alternates, plus the total number of peremptory challenges held by the parties. See Commonwealth v. Walker, 379 Mass. 297, 299 n.1 (1979). But see Commonwealth v. Johnson, 417 Mass. 498, 507–508 (1994).

4. Empanelment

a. The trial judge shall ask all voir dire questions specifically required by statute, court rule, or controlling authority, but retains discretion as to when and how to do so. The trial judge may allow individual voir dire, panel voir dire, or any combination.

b. Questioning shall occur through individual voir dire if (i) required by statute, rule, or controlling authority; (ii) inquiry concerns private or potentially embarrassing information; or (iii) questioning would specifically reference what is written on a particular juror’s confidential juror questionnaire.

c. The trial judge should consider some individual voir dire in all cases to (i) determine whether any juror has an impediment concerning hearing, language or visual ability, mental health, or comprehension; (ii) address any private or embarrassing information not disclosed in public portions of the voir dire; or (iii) identify any other impediment to jury
service that the trial judge and parties might not observe without personal contact with the juror.

d. Attorneys and parties shall limit their questioning of any juror(s) to such subject matters and methods as previously approved by the trial judge and shall avoid questions set forth in paragraph 3c above, even as follow-up, without court approval.

e. Questions about the Law

i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief pre-charge; requiring the questioner to use the words specifically approved by the judge; stating the law in a written supplemental questionnaire; or contemporaneous instructions by the trial judge at the time the question is asked.

ii. If a juror asks counsel a question to clarify an aspect of the law, counsel shall request that the trial judge answer the question; the trial judge may interrupt if counsel attempts to respond to a juror question by instructing on such a point of law.

f. Any party may object to a question posed by another party by stating “objection,” without elaboration or argument. The trial judge may rule on the objection in, or outside of, the juror’s presence. The trial judge may, on the judge’s own motion, strike or rephrase a party’s question and may interrupt or supplement a party’s questioning to provide the juror(s) with an explanation of the law or the jury trial process, or to ask any additional questions that the trial judge believes will assist the trial judge in determining the juror’s impartiality.

g. Counsel and the parties must ensure an accurate record of attorney or party voir dire. In an electronically recorded courtroom, counsel must stand near a microphone at all times. During panel voir dire in any courtroom, counsel must also call out the juror seat number (or juror number) of any individual juror who is questioned individually or who responds audibly. Failure to do so may constitute a waiver of any claim of error arising from any inaudible or unattributable portions of the record.

h. Challenges for Cause

i. The court will consider all its observations, including the juror’s responses, to determine whether or not the juror will be fair, focus on the facts of the case and follow the law despite a particular viewpoint or experience.

ii. Whether at side bar or during panel inquiry, a juror’s “yes” or “no” answer to a question about a viewpoint or experience may not, by itself, support a challenge for cause. If intending to challenge a juror for cause as a result of attorney or party voir dire, the questioner ordinarily should lay an adequate foundation showing that, in
light of the information or viewpoint expressed, the juror may not be fair and impartial and decide the case solely on the facts and law presented at trial. The court may inquire further or may decide without further questioning, if the judge believes that the existing record is sufficient to resolve the challenge for cause.

i. Peremptory Challenges

i. After the trial judge finds that each juror stands indifferent, the parties shall exercise their peremptory challenges. The trial judge may require exercise of peremptory challenges after completion of side bar inquiry of an individual juror, after filling the jury box with jurors found to stand indifferent, or at some other time after the trial judge’s finding of indifference.

ii. If the trial judge does not expressly rule on a juror’s bias or impartiality, the trial judge's direction for the parties to exercise peremptory challenges constitutes an implicit finding that the juror stands indifferent. On request, made after the trial judge's direction but before exercise of a peremptory challenge, the trial judge shall make an explicit finding as to the juror’s impartiality.

5. Supplemental Juror Questionnaires

Supplemental juror questionnaires are not protected by G.L. c. 234A, § 23 and cannot be kept confidential without complying with the impoundment procedures set forth in Trial Court Rule VIII. If using supplemental juror questionnaires, the judge shall consider methods to ensure the juror’s personal privacy and to promote the candor of responses, including but not limited to asking jurors whether they wish to keep responses confidential, asking the grounds for any such request, and complying with applicable impoundment procedures.
ADDENDUM

SAMPLE PANEL VOIR DIRE PROTOCOL

1. Pretrial

The trial judge may permit counsel or self-represented parties to question jurors as a group, in a so-called “panel voir dire” procedure. Any attorney or self-represented party who seeks to examine the prospective jurors in panel format shall serve and file a motion requesting leave to do so in accordance with Superior Court Rule 6(3)(a). The motion shall identify generally the topics the moving party proposes to ask the prospective jurors and shall state whether each topic is for individual voir dire or for a panel of jurors. The trial judge may, in the exercise of discretion, require attorneys and self-represented parties to submit the specific language of the proposed questions for pre-approval. The motion and any responsive filing shall also include any proposed language for brief preliminary instructions on principles of law to be given pursuant to paragraph 2(b) below.

2. Initial Stages of Empanelment

Before any questioning of a juror panel by attorneys or self-represented parties, or at such other time as the trial judge deems most appropriate, the trial judge shall:

(a) provide the venire with a brief description of the case, including the nature of the facts alleged and of the claims or charges, including the date and location of the pertinent alleged event(s), and the identity of persons or entities significantly involved;

(b) provide the venire with brief, preliminary instructions on significant legal principles pertinent to the case. Such instructions should include a brief recitation of: the burden and standard of proof; the elements of at least the primary civil claim or at least the most serious criminal charge; if appropriate to the case and requested by counsel or a self-represented party, the elements of any
affirmative defense that will be presented to the jury; and, in criminal cases, the defendant’s right not to testify or to present any evidence;

(c) explain the empanelment process, describe the nature and topics of the questions that will be posed during panel examination, and inform the jurors that any juror who finds either a particular question or the process of questioning by attorneys or self-represented parties intrusive on the juror’s privacy may request that steps be taken to protect the privacy of any information disclosed;

(d) ask all questions required by statute or case law, and any additional questions the trial judge deems appropriate in light of the nature of the case and the issues expected to be raised;

(e) if not previously established, inform the parties of any reasonable time limit the trial judge has set for examination of each panel of prospective jurors by attorneys or self-represented parties, giving due regard to (i) the objective of identifying inappropriate bias in fairness to all parties; (ii) the interests of the public and of the parties in reasonable expedition, in proportion to the nature and seriousness of the case and the extent of the anticipated evidence; and (iii) the needs of cases scheduled in other sessions drawing on the same jury pool for access to prospective jurors;

(f) ask the clerk to direct into the jury box any juror who appears impartial, based upon initial questioning of the venire and individual voir dire, if any. The trial judge has discretion to seat a juror on a voir dire panel without making a preliminary determination of impartiality.

3. Panel Examination

(a) As the jury box is filled, and prior to any panel questioning, the clerk shall read into the record which juror, identified by juror number, is seated in which numbered seat in the jury box. All attorneys and self-represented parties at the trial are responsible for correcting any misstatement as to juror numbers and seat numbers being read for the record.
(b) If the trial judge has not already done so, he or she shall remind the jurors that during such questioning, if any juror seeks, due to privacy concerns, to respond to a question outside the presence of other jurors, the juror may alert the judge to that request.

(c) Upon request, the trial judge may permit each party to make a brief introductory statement to the venire limited to explaining the process and purpose of the questioning of jurors by attorneys or self-represented parties. During the introductory statement and subsequent questioning, counsel shall not refer to his or her own personal circumstances, personal history, or family, even by way of example. Any examples of what may or may not make a juror biased shall be phrased hypothetically.

(d) The parties shall then proceed with the panel portion of questioning. Parties with the burden of proof shall conduct their questioning first. In cases with multiple parties on a side, the parties on each side shall agree as to an order in which to proceed. In the absence of agreement, the judge shall assign an order. The attorney or party may pose questions to the entire panel, or to individual members.

(e) The trial judge and the attorneys participating shall at all times during panel questioning take reasonable steps to ensure that the identity of each juror speaking is adequately maintained on the record, by reference to juror number or seat number. In particular:
   i. In an electronically recorded courtroom, the attorney or party shall stand near a microphone; and
   ii. When posing questions to, or receiving a response from, any specific juror(s), the attorney or party must identify each such juror(s) by juror seat number (or, less ideally, by juror number). They shall not refer to any juror by name.

(f) The trial judge may intervene at any time to ensure an accurate record (including recording of seat numbers of jurors who respond to questions), to clarify or instruct on a point of law, or to ensure that panel voir dire proceeds in an orderly, fair, and efficient manner.
(g) The trial judge may at any time bring an individual juror to sidebar for questioning out of the hearing of other jurors about any potential bias revealed by panel questioning. If a juror is brought to sidebar, the judge may direct all other parties to do their own questioning on the same subject matter at that time to avoid a need to return to sidebar for later questioning on that subject matter. If the juror’s responses to such questioning at sidebar result in a challenge for cause, the judge may rule on the challenge at that time or at the conclusion of all panel questioning. If time limits on panel questioning have been set, the judge may decide whether to exclude all or part of the time spent at side bar from the questioning party’s time.

(h) Any party may object to a question posed by another party by stating “objection,” without elaboration or argument. The judge may rule on the objection in the presence of the juror or jurors, or may hear argument and rule on the objection outside the presence or hearing of the juror or jurors.

(i) Unless the judge specifically allows, there shall be no follow-up questioning of a panel by attorneys or self-represented parties once each has taken his or her turn.

4. Challenges for Cause and Peremptories

(a) After panel examination by all parties, the trial judge shall hear any further challenges for cause as to any panel members at sidebar.

(b) Unless the trial judge decides to postpone exercise of peremptories until after voir dire of additional panels, the parties shall then exercise at sidebar any peremptory challenges they have as to any jurors remaining on the panel. The party with the burden shall proceed first, using all peremptories the party seeks to use with that panel. All other parties shall then proceed, using all peremptories each seeks to use with that panel. In civil cases, the judge may alternate sides. The jurors remaining after challenge shall then be directed to a separate location, usually outside the courtroom.
(c) Upon any challenge for cause, the judge may ask additional questions, with or without further instructions on the law, and may allow opposing counsel further opportunity to question the juror.

5. Additional Panels of Jurors

The same procedures shall apply for all subsequent panels required to seat a full jury, except:

(a) the judge may seat a different number of jurors in a subsequent panel;

(b) the judge may allow a different amount of time for attorney or party voir dire of second and subsequent panels;

(c) if, after the final panel, more than the necessary number of jurors have been declared indifferent and remain unchallenged at the conclusion of those procedures, the jurors shall be seated for trial in the order in which they were originally seated for panel questioning (generally in order of juror number as assigned by the jury pool), and the remaining jurors shall be excused; and

(d) the judge has discretion to vary panel voir dire procedures after the first panel in any lawful manner the judge deems fair and efficient.