

SUPREME JUDICIAL COURT

Boston, Massachusetts 02108

NOTICE OF APPROVAL

Notice is hereby given that the Supreme Judicial Court has approved and promulgated rules as further indicated below.

RALPH D. GANTS  
Chief Justice

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1. Court Submitting Rules for Approval:

Superior Court

2. Date Rules Submitted for Approval:

July 17, 2017

3. Date Approved & Promulgated by the Supreme Judicial Court:

July 26, 2017

4. Rule or Rules, or Amendments Thereto, Approved and Promulgated:

Amendments to Superior Court Rules 9A (Civil Motions) and 9D (Motions for Reconsideration), and revised Superior Court Rule 6 (Jury Selection) to replace existing Superior Court Rule 6 (Peremptory Challenges of Jurors), as attached hereto.

5. Effective Date:

September 1, 2017

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(The original of this notice is to be filed in the office of the Clerk of the Supreme Judicial Court for the Commonwealth, and a copy to be sent by the Clerk to the court which requested approval of the rules.)



COMMONWEALTH OF MASSACHUSETTS  
THE SUPERIOR COURT  
THREE PEMBERTON SQUARE  
BOSTON, MA 02108

JUDITH FABRICANT  
CHIEF JUSTICE

TELEPHONE  
617-788-7301

July 17, 2017

Hon. Frank M. Gaziano  
Chair of the Rules Committee  
Supreme Judicial Court  
John Adams Courthouse, Suite 2200  
One Pemberton Square  
Boston, MA 02108

**RE: Request for Changes to Superior Court Rules**

Dear Justice Gaziano:

I submit for approval by the Supreme Judicial Court the following proposed rules changes:

1. technical amendments to Superior Court Rules 9A (Civil Motions) and 9D (Motions for Reconsideration); and
2. a new version of Superior Court Rule 6 (Jury Selection), to replace existing Superior Court Rule 6 (Peremptory Challenges of Jurors) and Superior Court Standing Order 1-15.

These proposals were posted for comment on the Superior Court's website on December 7, 2016, and notice was sent to Massachusetts Lawyers Weekly on the same day. The Court set a deadline for submitting comments of February 15, 2017, but received and accepted comments on proposed Rule 6 through February 24, 2017. The Superior Court Rules Committee reviewed comments on Rules 9A and 9D, and recommended adoption of the proposed amendments as published, without change. Regarding proposed Rule 6, the Ad Hoc Committee to Revise Standing Order 1-15, which I appointed in the summer of 2016 after the issuance of the report of the Supreme Judicial Court Committee on Juror Voir Dire, reviewed the comments received, and recommended adoption of the proposed rule with revisions.

Each committee sent its recommendations to all justices of the Superior Court in advance of the Court's semi-annual business meeting on April 29, 2017. At that meeting the justices discussed each proposed rule, with the changes recommended to proposed Rule 6, and voted to approve each for submission to the Supreme Judicial Court for its approval. Below is a summary of the proposed rules that were approved for submission to the Supreme Judicial Court.

1. **Proposed Amendments to Superior Court Rules 9A and 9D**

The technical changes to Superior Court Rules 9A and 9D would: (i) correct the reference in Rule 9A(a)(5) to the length of a reply brief from 10 pages to 5 pages, to conform to the as-of-right page limit in Rule 9A(a)(3); (ii) correct the reference in Rule 9A(a)(5) from Rule 30A to Rule 9C(b), in accordance with a re-designation of that rule in 2016; and (iii) fill a gap in Rule 9D, which currently has no provision for the Regional Administrative Justice to assign Motions for Reconsideration when a judge has retired or is otherwise unavailable.

2. **Proposed Superior Court Rule 6 – Jury Selection and accompanying Addendum A – Sample Panel Voir Dire Protocol**

The proposed new Rule 6 (Jury Selection) would replace existing Rule 6 (Peremptory Challenges of Jurors) and Superior Court Standing Order 1-15 (Participation in Juror Voir Dire by Attorneys and Self-Represented Parties). New Rule 6 would simplify and clarify the procedures that govern jury selection; remove some requirements and constraints on attorney voir dire that some attorneys and judges have found to be unnecessarily cumbersome or constraining; and implement recommendations in the report of the Supreme Judicial Court Committee on Juror Voir Dire. Publication of the proposed rule elicited comments from a number of sources, including various bar groups and the Office of Jury Commissioner. As compared with the version published for comment, the rule as now proposed includes two changes in response to suggestions from the Jury Commissioner: additional language in Rule 6(4)(c) to provide for reasonable accommodation of a juror with a disability; and a change in paragraph 5(c) of the Addendum to clarify the method by which juror numbers are assigned randomly under G. L. c. 234A. The Superior Court did not adopt the suggestions of bar groups, which, in the Court's view, would limit the discretion granted to judges under G. L. c. 234A to manage the process of attorney participation in voir dire.

The Superior Court requests that the SJC approve these proposed rule changes **effective September 1, 2017**. I would be happy to discuss any questions you may have, or provide any additional information. Thank you for your consideration.

Very truly yours,



Judith Fabricant

cc: Chief Justice Paula M. Carey  
Hon. Douglas H. Wilkins, Chair, Superior Court Rules Committee  
Hon. Maynard Kirpalani, Chair, Ad Hoc Committee to Revise Standing Order 1-15  
Christine Burak, Esq., Secretary of the Rules Committee

**PROPOSED AMENDMENTS TO**  
**SUPERIOR COURT RULE 9A**

Propose to make the following amendments to Superior Court Rule 9A – ~~strikeouts~~ = deleted;  
**bolded** = added]:

**RULE 9A. CIVIL MOTIONS**

[9A(a)(5) - Format and Length - third sentence]

. . . Unless leave of court has been obtained in advance, all memoranda of law and the  
oppositions thereto shall not exceed 20 pages, and ~~any reply memoranda shall not exceed 10~~  
~~pages~~ **any reply memoranda shall not exceed 5 pages.** . . .

[9A(a)(5) - Format and Length - fourth sentence]

. . . Any appendix permitted by Superior Court Rule ~~30A~~ **9C(b)** shall not be included in the page  
limit. . . .

PROPOSED AMENDMENTS TO  
SUPERIOR COURT RULE 9D

Propose to make the following amendments to Superior Court Rule 9D -- [~~strikeouts~~ = deleted;  
**bolded** = added]:

**RULE 9D. MOTIONS FOR RECONSIDERATION**

[9D - second paragraph - second sentence]

. . . Upon filing, the clerk shall transmit the motion and supporting papers to the Justice who decided the original motion, **but if that Justice has retired or is otherwise unavailable, the clerk shall transmit the motion to the Regional Administrative Justice for the region where the case is pending.**

[To replace existing Superior Court Rule 6. Peremptory Challenges of Jurors and Superior Court Standing Order 1-15 – Participation in Juror Voir Dire by Attorneys and Self-Represented Parties]

**PROPOSED SUPERIOR COURT RULE 6**

**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 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 and to determine whether a reasonable accommodation would enable the juror to serve; (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 3(e) 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 A

### 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 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), 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.