

Boston Municipal Court Department Standing Order 1-18: Voir Dire Protocol

Preamble

Subject to applicable statutes, rules, and controlling authority, the trial judge in each civil or criminal jury case has discretion to allow for a procedure for examining and selecting jurors designed to maintain juror privacy and dignity, identify explicit and implicit bias, and foster efficiency in our jury sessions and among sessions using the same jury pool. If allowed by the trial judge, this rule provides a uniform 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.

1. Requests for Attorney or Party Voir Dire.

In civil and criminal cases, 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 judge; 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 impanelment.

In a civil case, all voir dire related requests shall be filed no later than at the final pretrial conference scheduled pursuant to Joint Standing Order 1-04, Civil Case Management, as may be amended from time to time.

In a criminal case, all voir dire related requests shall be filed by a date set by the Court, but not later than five (5) business days before trial.

A judge may order, or an attorney or party may request, a hearing in advance of the trial date. The attorney or party shall request such a hearing in time for a pre-trial ruling by the trial judge if the attorney or party is requesting extensive participation in voir dire (e.g., panel voir dire or to be allowed to ask a substantial number of questions).

Upon hearing any written request for attorney/party voir dire, consideration should be given to procedural issues including:

- a. a statement of the case to be read to the venire;
- b. the number of jurors to be seated;
- c. the extent of any pre-charge jury instructions on significant legal principles;
- d. the method and content of the judge's intended voir dire of jurors;
- e. the method and content of any attorney or party participation in voir dire;
- f. judicial approval or disapproval of proposed questions or subject matter;
- g. any time limits on attorney or party voir dire;
- h. the number of peremptories;
- i. the order and timing of the parties' assertions of challenges for cause and peremptory challenges;

- j. any agreement to allow deliberation by fewer jurors in a civil case if seated jurors are dismissed post-impement.

2. Scope and Subject Matter of Permissible Attorney or Party Voir Dire.

A. General Matters

The trial judge may allow attorney or party voir dire if properly requested according to the time as set forth in Section 1 above. The trial judge has discretion regarding the scope and manner of voir dire.

If allowed by the judge:

1. The judge should, at a minimum, allow reasonable questions seeking elaboration or explanation concerning juror responses.
2. A trial judge should allow 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; (iv) are meant to elicit information on subjects that controlling authority has identified as preferred subjects of inquiry, even if not absolutely required; and (v) are proportional in quantity to the anticipated length and complexity of the trial.
3. A trial judge may impose reasonable restrictions on the subject matter, time, number of questions, or method of attorney or party voir dire. The judge may utilize individual voir dire, panel voir dire, or any combination of the two. 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. (Addendum A)
4. A party objecting to a question posed by another party shall state, "objection," without elaboration or argument. The judge may rule on the objection in, or outside of, the juror's presence. The trial judge may *sua sponte* strike or rephrase a party's question. The judge may interrupt or supplement a party's questioning to provide the juror(s) with an explanation of the law or the jury trial process. The judge may ask additional questions to assist in the determination of a juror's impartiality.
5. An attorney or party may ask questions about the law if approved by the trial judge. The judge may require the questioner to use specific words or phrases and may give an instruction on the law beforehand or at the time the question is asked. If a juror asks a question to clarify an aspect of the law, the questioner shall defer to the judge to answer the question.

6. 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. A juror's "yes" or "no" answer to a question about a viewpoint or experience may not, by itself, support a challenge for cause. An attorney or party challenging a juror for cause shall state the reason and 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.

B. Prohibited and Disfavored Subjects

1. No attorney or party may inquire into the following prohibited subjects:
 - a. questions framed in terms of how the juror would decide the outcome of the case (prejudgment), including hypotheticals that are close/specific to the facts of the case (any hypotheticals that may trigger this rule must be presented to the judge before trial);
 - b. 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;
 - c. questions having no substantial purpose other than to argue an attorney's or party's case or indoctrinate any juror(s);
 - d. 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;
 - e. questions in the presence of other jurors that specifically reference what is written on a particular juror's confidential juror questionnaire.
2. No attorney or party may inquire into any of the following disfavored subjects absent the trial judge's prior express approval:
 - a. the juror's political views, voting patterns or party preferences;
 - b. the juror's religious beliefs or affiliation.

To obtain approval, an attorney or party must at a minimum explain how the inquiry is relevant to the issues, may affect a juror's impartiality, or may assist the proper exercise of peremptory challenges.

C. Procedural Matters

1. Mandatory Voir Dire

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.

2. Individual Voir Dire

- a. 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.
- b. The trial judge should conduct an individual voir dire in all cases to: (i) determine whether any juror has any issues concerning hearing, vision, language, mental health, or comprehension, and to determine whether a reasonable accommodation can enable a 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.

3. Timing of Challenges

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

4. Maintaining the Record

Counsel and the parties must ensure an accurate record of attorney or party voir dire. During panel voir dire, an attorney or a party must refer to 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 unattributed portions of the record.

ADDENDUM A TO BOSTON MUNICIPAL COURT DEPARTMENT
STANDING ORDER 1-18

PANEL VOIR DIRE

1. Pretrial Procedure

Any attorney or self-represented party who requests panel voir dire shall serve and file a motion requesting leave to do so in accordance with Boston Municipal Court Department Standing Order 1-18: Panel Voir Dire. The motion shall identify the general areas of panel inquiry by topic, recognizing some topics must be raised with each juror individually.¹ 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 a concise description of the case, along with any proposed language for brief preliminary instructions on principles of law to be given pursuant to paragraph 2(b) below.

The trial judge should 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 (a) the objective of identifying inappropriate bias in fairness to all parties; (b) 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 (c) the needs of cases scheduled in other sessions drawing on the same jury pool for access to prospective jurors.

2. Venire Examination

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 should:

(a) provide the venire with a brief description of the case, including the nature of the facts alleged and of the claims or charges;

(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 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

¹ Individual voir dire is required in cases involving alleged sexual assault of a minor, lack of criminal responsibility defense, and certain cases involving interracial violence. See District Court model jury instruction 1.100 fn 2.

questions the trial judge deems appropriate in light of the nature of the case and the issues expected to be raised; and

(e) conduct individual voir dire of those jurors who will be part of the panel voir dire. The trial judge should then hear challenges for cause based upon the initial questioning of the venire and individual voir dire.

3. Panel Examination

After the initial questions are asked, and individual voir dire is conducted, the judge shall seat the jurors found preliminarily indifferent as a panel. There are various versions of panel voir dire that may be employed by the Boston Municipal Court Department. The judge may employ multiple panels or a single panel depending upon recording capabilities, the size and physical layout of a courtroom, jury box, or jury venire, and the number of court officers. If more than one panel is used, the judge should consider whether the jurors who remain qualified should be temporarily excused from the courtroom while the next panel is seated and questioned.

(a) The parties shall then proceed with questioning the panel. 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.

(b) Throughout the proceedings, 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.

(c) If the trial judge has not already done so, he or she shall remind the jurors that during such questioning a juror may request to respond to a question outside the presence of other jurors.

(d) 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.

(e) 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.

(f) 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.

(g) 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.

(h) 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 may then be directed to a separate location, possibly 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, 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.