

Introduction to Panel Voir Dire Pilot Project

The Superior Court will implement the Panel Voir Dire Pilot Project beginning February 2, 2015. The Project was designed as a result of a joint effort by the Superior Court, under the leadership of Chief Justice Judith Fabricant, and the Superior Court Implementation Subcommittee of the Supreme Judicial Court Committee on Juror Voir Dire.¹ The purpose of the Project is to contribute significantly to the ongoing evaluation by the Judiciary and members of the bar as to the efficacy of group or “panel” voir dire in jury selections that will include questioning by attorneys or self-represented parties pursuant to St. 2014, c. 254, § 2, Superior Court Standing Order 1-15 (“Participation in Juror Voir Dire by Attorneys and Self-Represented Parties”), and any rules, protocols, or guidelines the Supreme Judicial Court or the Superior Court may hereafter adopt or approve relative to the conduct of such questioning. The principal objective is to employ a largely uniform “panel voir dire” method in selected civil and criminal sessions during 2015, in order to obtain experience and data from trial judges, attorneys, court officers, clerks, court reporters, jurors, the Office of Jury Commissioner, and other identified stakeholders concerning the effectiveness and benefits of a panel method as compared to individual questioning. Over the next year, that experience and data will be the subject of detailed consideration by the Supreme Judicial Court Committee on Voir Dire, in an effort by the Judiciary to identify best practices, with due regard to the goals of permitting attorneys and self-represented parties a fair and meaningful opportunity to participate in voir dire, supporting all

¹ The Superior Court Implementation Subcommittee is chaired by Chief Justice Fabricant and Justice Peter Lauriat, and includes Justices Bertha D. Josephson, Maynard M. Kirpalani, and Robert C. Rufo, Douglas Sheff of the Massachusetts Bar Association, Mark Smith of the Boston Bar Association, Suffolk County ADA Mark Lee of the Massachusetts District Attorneys’ Association, and Carolyn McGowan of the Committee for Public Counsel Services. Former Chief Justice Barbara Rouse served on the Subcommittee *ex officio* until her retirement on November 30, 2014.

stakeholders' efforts to identify inappropriate bias, and conducting jury selection with reasonable expedition while always respecting the dignity and privacy of each potential juror.

Pilot Project Structure and Procedures

Prior to February 2, 2015, the Superior Court will identify judges who volunteer to participate in the Pilot Project, and who are assigned to sit in active trial sessions during the 2015 calendar year. The Court will seek to involve judges sitting in at least three different counties, in an effort to generate useful data concerning the conduct of panel voir dire in different courthouses. Considering that there exist unique needs and concerns with respect to criminal cases (including legally-mandated individual voir dire on certain subject matters, the frequency of questioning as to highly sensitive personal issues or statutorily-protected information, the number of peremptory challenges in life-felony cases, and the responsibilities of Court Officers in criminal sessions), the Pilot Project will not involve life-felony cases at the outset.² Prior to the commencement of each sitting of the judges who participate, the Superior Court will provide public notice of which judges/sessions are part of the Pilot Project on the Trial Court website as well as to major bar organizations.

As to all cases scheduled for trial in Pilot Project sessions, Superior Court Standing Order 1-15, and the following procedures, shall apply:

1. Pretrial Procedures

- A. All requests to conduct voir dire pursuant to St. 2014, c. 254, § 2, shall be made in compliance with Standing Order 1-15, and all relevant provisions of the Order (including

² This is not intended to preclude a trial judge in a life-felony case from conducting, pursuant to Superior Court Standing Order 1-15 and in the exercise of his or her discretion, some form of group or "panel" voir dire outside the Pilot Project, but that circumstance is beyond the scope of the structured project.

as to the mechanics of those parts of empanelment that shall be conducted individually), shall apply.

- B. In cases where all parties are represented by counsel, jury selection in Pilot Project sessions shall include panel voir dire, except for good cause shown. In light of special considerations with respect to the conduct of voir dire by self-represented parties, the Pilot Project preserves the discretion of the participating judge to decline to employ panel voir dire in a trial involving one or more self-represented parties.
- C. Parties assigned for trial to a Pilot Project session are asked to notify the Court at the earliest possible time if they have conferred and it is known either that the trial is likely to be a bench trial, or that no party will seek leave to conduct voir dire pursuant to the statute and Standing Order, in an effort to concentrate trials where such voir dire will occur in the Pilot Project sessions.
- D. Final Pretrial Conferences in criminal cases, and Final Trial Conferences in civil cases, shall be scheduled for a date at least two (2) weeks prior to the trial date. At the conference, the judge shall:
 - i. confer with the parties as to the mechanics of the panel voir dire process and whether the judge or any party anticipates, based on the circumstances of the individual case, good cause to diverge from the protocols set forth below, or from the applicable portions of Standing Order 1-15;
 - ii. address with the parties whether time limits for panel questioning will be set, and if so, what the limits should be, and how such limits should be monitored and enforced;

- iii. rule as to whether any motion for the use of a supplemental juror questionnaire is allowed, and, if so, confer with the parties as to the specific questions and instructions to be included in the document, the format of the document, the mechanics of when and how venire members will be provided the document, and all other necessary considerations as identified by the judge or the parties.
- E. If the judge has not made a finding as to time limits by the conclusion of the conference, but later determines that time limits are warranted, the judge shall confer with the parties and provide reasonable notice of such limits prior to trial.

2. Trial Procedures

- A. Sections C.5(a)-(c) of Standing Order 1-15 shall apply in full to Pilot Project trials, except that after the judge explains the empanelment process to the venire pursuant to Section C.5(c) of the Order, each party shall be permitted 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. Such statements are not intended to address the evidence anticipated at trial.
- B. The term “panel” as used herein refers to the group of the fourteen (14) or more jurors who have each been seated in the jury box upon the judge’s preliminary finding of the juror’s indifference and ability to serve. Where a jury box allows for the seating of sixteen (16) jurors, a panel shall include that many jurors.
- C. Consistent with Section C.5(d) of Standing Order 1-15, the judge should, prior to any panel questioning, conduct those portions of his or her own questioning that are to occur individually outside the presence or hearing of other jurors. To the extent the judge has ruled that some approved questions by the attorneys or self-represented parties must be

asked individually, because, for example, they would elicit highly sensitive personal information about a juror, and to the extent the judge has not found a hardship or other cause to excuse the juror at the conclusion of the judge's own questioning, such questioning by the attorneys or self-represented parties shall follow the judge's questioning, with the party bearing the burden of proof proceeding first.

- D. Consistent with Section C.5(e) of Standing Order 1-15, the judge shall, prior to any panel questioning, and as to each juror questioned individually, excuse the juror if the judge has doubt as to the juror's impartiality; otherwise the judge shall find the juror indifferent, and the juror shall be seated in the jury box.
- E. 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. It shall be incumbent on all attorneys at the trial to correct any misstatement as to juror numbers and seat numbers being read for the record.
- F. Prior to any panel questioning, the judge 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.
- G. 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, and, in the absence of agreement, the judge shall assign an order. Questions may be posed to the entire panel, or to individual members. Jurors shall be addressed by reference to either juror number or seat number, and not by name.

- H. The 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.
- I. To the extent a juror is brought to sidebar to answer a question out of the hearing of other jurors, in the judge's discretion all other parties may be directed to do their own intended questioning on the same subject matter at that time in order 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, such time at sidebar shall not be deducted from the questioning party's time.
- J. The judge may at any time bring an individual juror to sidebar to pursue the judge's own concerns about potential improper bias or partiality revealed during the panel questioning. If a challenge for cause is made at that time, the judge may rule on the challenge then, or at the conclusion of all panel questioning. If time limits on panel questioning have been set, such time at sidebar shall not be deducted from the questioning party's time.
- K. Time at sidebar to address objections generally should not reduce the time available to the questioning party, though the judge may in his or her discretion deem the questioning so plainly objectionable as to warrant charging that time to the questioning party.
- L. There shall be no follow-up questioning of a panel by attorneys or self-represented parties once each has taken his or her turn, except in the judge's discretion and for good cause shown.

- M. After questioning of a panel by all parties is concluded, challenges for cause as to any panel members shall be heard and ruled upon at sidebar.
- N. The parties shall then exercise at sidebar any peremptory challenges they have as to the remaining panel members. 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 remaining jurors shall then be directed to a separate location.
- O. The same procedures shall apply for all subsequent panels required to seat a full jury. If 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.
- P. Where a trial attorney brings in another attorney to assist with empanelment, the latter shall be permitted to enter a limited appearance for purposes of empanelment only.

Results of the Pilot Project

The Superior Court will solicit feedback from all participants and stakeholders, including the Office of Jury Commissioner, and the Court expects that members of the bar who participate in the Pilot Project will be willing to provide timely responses so that useful data may be gathered and analyzed to assess the efficacy of the panel voir dire method described herein. Questionnaires will be distributed to jurors, attorneys, and self-represented parties upon the conclusion of their trials, and responses will be welcomed immediately, when the events of the empanelment process are fresh in participants' minds. To the extent parties generate transcripts

of jury selections conducted in the Pilot Project, they are asked to notify the Session Clerk of the existence of the transcript.

The Court will seek to collect data and suggestions with respect to: the lengths of attorney-conducted questioning and the lengths of the entire empanelment processes; juror utilization and satisfaction; the number and types of topics and questions proposed to and approved by the judge pursuant to Standing Order 1-15, and whether the ensuing panel questioning was conducted within the limits of pre-approvals by the judge; the number and types of topics and questions proposed that the judge approved for use at sidebar only and the length of that portion of the voir dire process; the number and length of trips to sidebar during panel questioning; the frequency of and treatment of objections arising during panel questioning; the number of challenges for cause raised and allowed after questioning by attorneys or self-represented parties; and the precise size of the panels utilized and the number of panels needed to seat a full jury. Special attention will be paid to practical concerns of panel questioning in sessions employing an electronic audio-recording system.