



**PANEL VOIR DIRE: TOOLS,
TIPS & TECHNIQUES
FOR ITS EFFECTIVE USE –
WHAT FOUR YEARS HAVE
TAUGHT US**

~

A Bench-Bar Workshop

October 24, 2019 — 1:00 to 4:30 p.m.

Suffolk University Law School, 120 Tremont St., Boston, MA 02108

Program

- 1:00 – 2:30 **Plenary Session:**
Panel discussion on rules, methods & logistics applicable in
civil & criminal trials
- 2:30 – 2:45 **Break & Disperse into Civil & Criminal Break-Out Sessions**
- 2:45 – 3:45 **Break-Out Sessions:**
Civil demonstration
Criminal demonstration
- 4:00 – 4:30 **Summary, comment & questions**

Personae Dramatis

- Venire** **Suffolk Law School Students**
- Jurists** **Judges Tuttman, Kirpalani, Wilkins, Fishman & Wall**
- Civil Lawyers** **Marc Breakstone & Steven Coren**
Kurt Fliegauf & Susan Donnelly Murphy
- Criminal Lawyers** **Suzanne M. Wiseman & Mark Lee**
Larry Tipton & Karen Smolar

**Sponsored by: Flaschner Judicial Institute, Suffolk Law Trial and
Appellate Advocacy Concentration, Mass. Academy of Trial Attorneys &
Mass. Defense Lawyers Association**

Please click here to register.

Panel Voir Dire: TOOLS, TIPS & TECHNIQUES FOR ITS EFFECTIVE USE - WHAT FOUR YEARS HAVE TAUGHT US

A Bench-Bar Workshop
October 24, 2019

Why panel voir dire works

- ▶ Promotes fairness/parties' perception of fairness
- ▶ Allows greater transparency for civil parties and public
- ▶ Allows criminal defendants to see and hear without being at sidebar
- ▶ Allows pro se parties to participate in voir dire, while reducing potential:
 - ▶ security concerns
 - ▶ issues with direct interpersonal interaction with jurors
- ▶ Greater potential for juror honesty/accuracy when interacting with attorneys rather than with judge (black robe and elevated position may be intimidating)

Introduction

- ▶ "[T]he consensus is that [attorney participation in voir dire] has improved the process of jury selection. As a result, judges and attorneys should have greater confidence that the jurors who are ultimately empaneled are more likely to be impartial." *Commonwealth v. Dabney*, 478 Mass. 839, 848 (2018), quoting from Supreme Judicial Court Committee on Juror Voir Dire, Final Report to the Justices, at 5 (July 12, 2016).

Why panel voir dire works, cont.

- ▶ Allows jurors to engage with counsel at early stage of proceedings
- ▶ Open ended questions help to develop more information about individual jurors
- ▶ Jurors volunteer more information when they know their opinions matter
- ▶ Hearing some jurors speak may encourage/empower other jurors to volunteer important information
- ▶ Opportunity for more effective exercise of challenges, both for cause and peremptory
- ▶ Allows for control of time, especially as compared to extensive sidebar voir dire

Attorney participation in voir dire: lessons learned

- ▶ Attorneys have not abused the voir dire process
- ▶ Jurors are not offended by attorney questions
- ▶ Attorney questioning may help in identifying jurors who should be struck for cause

Supreme Judicial Court Committee on Juror Voir Dire, Final Report to the Justices, at 6-8.

Panel voir dire is a simple and straightforward process; it differs from traditional voir dire in Mass. at only one stage

- ▶ Judge starts with same introduction, including statement of case and description of pertinent legal issues, followed by inquiry to entire venire with statutory questions; jurors raise their hands to respond
- ▶ Judge conducts same individual voir dire:
 - ▶ follow up on responses to statutory questions
 - ▶ additional case-specific questions on sensitive issues
 - ▶ attorney questions and/or follow-up
- ▶ Jurors who are not excused for cause fill the box
- ▶ Attorneys give brief introductory statements and conduct time-limited voir dire of panel(s)
- ▶ Attorneys exercise peremptory challenges (and request any additional challenges for cause)

Results of recent survey of Superior Court Judges

Rule 6 - Voir Dire questions

- ▶ Question should generally be approved when they:
 - ▶ Seek factual information about prospective juror's background and experience pertinent to issues in case
 - ▶ 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
 - ▶ Inquire into the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed
 - ▶ Are meant to elicit information on subjects that controlling authority has identified as preferred subjects of inquiry, even if not absolutely required

Superior Court Rule 6
Effective September 1, 2017

- ▶ Judicial discretion re: subject matter, time and method of attorney/party voir dire (individual, panel or combination)
- ▶ Final Trial Conference (civil) or Final Pre-Trial Conference (criminal) with the trial judge
 - ▶ Requests for attorney/party voir dire
 - ▶ Method of jury selection
 - ▶ Subject matter of questions, including requests re: disfavored subjects of inquiry
 - ▶ Supplemental questionnaire
 - ▶ Preliminary legal instructions
 - ▶ Courtroom logistics

Rule 6 - Voir Dire questions

- ▶ Disfavored topics:
 - ▶ Political views, voting patterns or party preferences
 - ▶ Religious beliefs or affiliation
- ▶ Prohibited topics:
 - ▶ Prejudgment questions (how the juror would decide the case), including hypotheticals that are case-specific to facts of case
 - ▶ Commitment questions (e.g., what evidence would cause juror to find in favor of a side or party)
 - ▶ Indoctrination questions (sole purpose is to argue for a side or party)
 - ▶ Prior jury service outcome questions (verdict or juror's own vote)
 - ▶ Confidential questions (specifically referencing answers to the confidential juror questionnaire)

Rule 6 - Importance of individual voir dire in all cases

- ▶ To identify impediments due to hearing, language ability, visual ability, mental health, comprehension, or any other impediment to jury service that might not be noted absent personal contact with the juror
- ▶ To determine whether reasonable accommodations would enable juror to serve
- ▶ To address private or embarrassing information not disclosed in public portions of voir dire

District Court Standing Order 1-18: Voir Dire Protocol

- ▶ Effective date 5/1/18
- ▶ Protocol for attorney/party individual voir dire and panel voir dire
- ▶ Scope and subject matter of questions
- ▶ Prohibited and disfavored subjects

Panel Discussion: Experience since 2015: observations/concerns/strategies

- ▶ **Larry Tipton:**
 - ▶ What kind of advance planning is necessary to prepare effectively for panel voir dire, both inside and outside of the courtroom?
 - ▶ What are the typical questions you want to ask in a criminal case and why?
- ▶ **Susan Donnelly Murphy:**
 - ▶ What is the value to be gained from talking directly with prospective jurors in a panel setting?
 - ▶ What are your objectives? Themes?
 - ▶ What are the best questions to ask in a civil case?

Experience since 2015: observations/concerns/strategies, cont.

- ▶ Do you allow/encourage the use of supplemental questionnaires with panel? In what types of cases?
- ▶ Do you permit panel when one side asks for it, even if the other side objects? In civil cases? In criminal cases?
- ▶ What advice would you give to encourage judges who are skeptical about the process to try it?

Experience since 2015: observations/concerns/strategies, cont.

- ▶ **Marc Breakstone:**
 - ▶ Time allocation: Individual vs. panel voir dire
 - ▶ Value of engaging jurors in the process earlier
 - ▶ Juror "rehabilitation" -- addressing juror's expressed viewpoint vs. ability to judge case fairly
- ▶ **Suzanne Wiseman:**
 - ▶ Getting pre-approval for questions
 - ▶ How do you break the ice and get jurors to talk?
 - ▶ What are the best/most important questions to ask in a criminal case?
 - ▶ How to maintain juror confidentiality on sensitive topics

Q and A

Experience since 2015: observations/concerns/strategies, cont.

- ▶ **Judge Fishman and Judge Kirpalani:**
 - ▶ What has been your experience generally with panel voir dire?
 - ▶ Have you had concerns about lawyers posing questions that go beyond the scope of Rule 67?
 - ▶ How much vetting do you do of proposed questions prior to lawyer's panel inquiry?
 - ▶ Do you set strict time limits for panel questioning?
 - ▶ Do you permit/encourage pre-panel introductory statements?
 - ▶ Are there questions/topics you will allow counsel to explore during panel that you will not ask in individual voir dire? What and why?