

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

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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
- 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 side bar voir dire

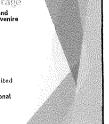
Attorney participation in voir dire: lessons learned

- $\ensuremath{\,{\scriptscriptstyle\parallel}}$ 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 yoir 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 ${\bf r}$
 - Requests for attorney/party voir dire
 - : Method of jury telection
 - ϵ -Subject matter of quartities, including requests ret differented subjects of Exquiry
 - » Supplemental questionnaire
 - > Prefiningry legal Instructions
 - Courtroom legistics

Rule 6 - Voir Dire questions

- Disfavored topics:
 - Political views, voting patterns or party preferences
 - Religious beliefs or affiliation
- Prohibited topics:
 - Prejudgment questions (how the jurer would decide the case), including hypotheticals that are close/specific to facts of case

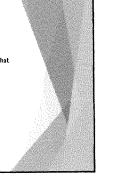
 - Commitment questions (e.g., what evidence would cause juror to find in favor of a side or party) $% \left(\frac{1}{2}\right) =\frac{1}{2}\left(\frac{1}{2}\right) \left(\frac{1}{2}\right)$ Indoctrination questions (sole purpose is to argue for a side or party)
 - Prior tury service outcome questions (verdict or juror's own vote)
 - Confidential questions (specifically referencing answers to the confidential juror questions are)

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 note 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

- E 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:

 - > 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

QandA

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?