Supreme Judicial Court

Committee on Juror Voir Dire

Final Report to the Justices

Submitted July 12, 2016

Executive Summary

On August 6, 2014, the Legislature enacted Chapter 254 of the Acts of 2014, granting attorneys and self-represented parties the right to question potential jurors in all Superior Court trials, effective February 2, 2015.[1] Chief Justice Ralph Gants convened the SJC Committee on Juror Voir Dire (Committee) in September, 2014.[2] Composed of judges from the five Trial Court Departments with jury trials, as well as attorneys with a wide variety of trial experience, the Committee was chaired by Justice Barbara A. Lenk. The Committee's mandate was to recommend how jury selection might be enhanced throughout the Trial Court, including but not limited to how best to implement Chapter 254.

This Report describes the Committee's work and outlines its major findings and recommendations, as well as those of the National Center for State Courts' Center for Jury Studies, which conducted a year-long analysis of the implementation of Chapter 254.[3]

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[1] Section 2 of Chapter 254 provides that: Section 28 of chapter 234 of the General Laws, as so appearing, is hereby amended by adding the following paragraph:-

> "Notwithstanding the above, the following procedures shall govern in all criminal and civil superior court jury trials:
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> }(1) In addition to whatever jury voir dire of the jury venire is conducted by the court, the court shall permit, upon the request of any party's attorney or a self-represented party, the party's attorney or self-represented party to conduct an oral examination of the prospective jurors at the discretion of the court.
>
> "(2) The court may impose reasonable limitations upon the questions and the time allowed during such examination, including, but not limited to, requiring pre-approval of the questions.
>
> "(3) In criminal cases involving multiple defendants, the commonwealth shall be entitled to the same amount of time as that to which all defendants together are entitled.
>
> "(4) The court may promulgate rules to implement this section, including, but not limited to, providing consistent policies, practices and procedures relating to the process of jury voir dire."

[2] The Committee members include Boston Municipal Court Judge David J. Breen; Professor R. Michael Cassidy, Boston College Law School; John W. Cavanaugh, Office of Jury Commissioner; Superior Court Chief Justice Judith Fabricant; Boston Municipal Court Judge Serge Georges, Jr.; District Court Judge Jennifer L. Ginsburg; Superior Court Judges Maynard M. Kirpalani, Peter M. Lauriat, Robert Rufo, and Bertha Josephson; Assistant District Attorney Mark Lee, Massachusetts District Attorney's Association; Carolyn I. McGowan, Esq., Committee for Public Counsel Services; Juvenile Court Judge Lawrence Moniz; Douglas K. Sheff, Massachusetts Bar Association; Mark. D. Smith, Boston Bar Association; Housing Court Judge Jeffrey M. Winik; and Commissioner Pamela Wood, Office of Jury Commissioner.

Four fundamental principles guided the Committee's analysis and recommendations:[4]

- Judicial discretion must be respected and supported.
- Juror privacy and dignity must be respected and maintained.
- The system of identifying potential juror bias must be fair and effective.
- Any system of jury selection must be consistent with efforts to preserve and foster efficiency in trial sessions.

Superior Court Standing Order 1-15

The Committee's first task was to draft a standing order to recommend to the Superior Court to guide implementation of Chapter 254.

A Superior Court Implementation Subcommittee, co-chaired by Chief Justice Judith Fabricant and Judge Peter M. Lauriat, was charged with that task. Composed of five Superior Court judges and four attorneys, [5] the subcommittee began by reviewing a recent survey of the 76 then-sitting Superior Court judges regarding their voir dire practices in order to understand the nature and scope of any changes from existing practices that implementation of Chapter 254 might require or suggest.

Of the fifty-nine judges who responded,[6]

- 90% always or usually conducted some form of individual voir dire in each jury trial;

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[3] The appendices include all reports and significant documents associated with the Committee's work.

[4] Enunciated initially by the Working Group on Other Courts, these principles were adopted by the Committee as applicable to jury selection throughout the trial courts.

[5] The Superior Court Implementation Subcommittee included Judge Bertha D. Josephson, Judge Maynard M. Kirpalani, Judge 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 J. Rouse served on the Subcommittee ex officio until her retirement on November 30, 2014.

[6] Of the seventy-eight sitting judges surveyed, fifty-nine responded, a 76% response rate.

- 98% allowed counsel to propose follow-up questions to jurors during individual voir dire at side-bar or with others not present;

- of those who allowed counsel to propose follow-up questions, 38% allowed them to ask the questions directly of the individual juror, and

- 44% of judges already allowed some form of lawyer-conducted voir dire.

The survey responses demonstrated that, even prior to the enactment of Chapter 254, many Superior Court judges were already engaged in some form of the jury selection process envisioned by the new law. Accordingly, while Chapter 254 would push attorney involvement further, it could be implemented without radical changes to the judges' current approaches to jury selection in civil and criminal cases.

Building on those current practices, the subcommittee drafted a recommended standing order to provide an interim procedure for the implementation of Chapter 254, pending completion of the Committee's work. The subcommittee's recommendation was unanimously adopted by the Superior Court on December 5, 2014, and approved by the Chief Justice of the Trial Court as Superior Court Standing Order 1-15, effective February 2, 2015, coinciding with the effective date of the new law. [7]

As the Standing Order states, "in enacting St. 2014, c. 254, § 2, the Legislature recognized and preserved the discretion of the trial judge to lead and supervise the process of juror voir dire." Accordingly, the Standing Order "fully preserves the discretionary authority of the trial judge with respect to the examination and selection of jurors in each case, and provides a standard procedure that will apply in each . . . case unless otherwise ordered by the trial judge."[8]

Standing Order 1-15 describes two ways in which attorneys may participate in voir dire: examining jurors individually or as a group using the panel voir dire procedure.[9] It requires that attorneys file a motion requesting leave to participate in voir dire and propose in writing the

[7] Standing Order 1-15 is attached as appendix 1.

[8] Superior Court Standing Order 1-15 at p. 1-2. Note that the National Center for State Courts recommended that the Standing Order be amended "to make it clear that the outlined procedures are advisory rather than . . . mandatory absent a judicial order expressly modifying those procedures." The National Center's Report, Implementing Attorney Participation in Voir Dire in the Superior Court of Massachusetts: A Judicial Education Project (NCSC Final Report), is included as Appendix 2. The quoted statement is at p. 10.

[9] The standing order envisioned that, in using the panel voir dire procedure, judges would ensure that certain sensitive personal questions, and questions required by statute or case law to be posed individually, would still be asked of jurors using the individual method.

topics or questions they wish to pose to jurors. It lists the types of questions which generally should be approved and disapproved. It also provides for a pilot project to study the "panel voir dire" method.

In deciding whether to approve attorneys' proposed questions, judges are to give due regard to three goals:

> (a) selecting jurors who can and will decide the case based solely on the evidence and the law, fairly and impartially to all parties, without in the process exposing jurors to any extraneous matter that would undermine their impartiality;
>
> (b) conducting the selection process with reasonable expedition, in proportion to the nature and seriousness of the case and the anticipated length of the trial, and with due regard for the needs of other sessions that draw on the same jury pool for access to potential jurors; and
>
> (c) respecting the dignity and privacy of each potential juror.[10]

After reviewing the implementation of Standing Order 1-15 and the Committee's recommendations, the Superior Court will decide what, if any, modifications are warranted.

National Center for State Courts Study and Analysis

In order to assist the Superior Court and the Committee in assessing the experience with Chapter 254, the Center for Jury Studies at the National Center for State Courts in Williamsburg, Virginia (Center) collaborated on a year-long project to study the impact of attorney participation in voir dire on the attitudes, practices and experiences of judges, lawyers, and jurors.[11] An ad hoc group of thirty Superior Court judges met for three plenary sessions [12] with Paula Hannaford-Agor, the Center's Director,[13] to discuss their experiences and share their ideas

[10] Standing Order 1-15 at p. 2-3.

[11] The project was funded by a grant from the State Justice Institute. It was modeled on the Massachusetts Jury Trial Innovations Project (1998-2000), also funded by the State Justice Institute, in which 20 Superior and District Court judges met periodically over the course of a year to exchange information about their experiences with innovative techniques to improve juror performance, comprehension and satisfaction, and to develop protocols for using these innovations in jury trials.

[12] The judges met in Boston on April 22, 2015, October 20, 2015 and January 20, 2016.

[13] The ad hoc group included the fifteen judges who volunteered to participate in the Panel Voir Dire Pilot Project and the fifteen additional judges selected by Chief Justice Fabricant to reflect the Court in terms of geographic distribution, length of tenure on the bench and other characteristics of diversity: Judges John A. Agostini, Raymond J. Brassard, Kimberly S. Budd,

regarding attorney participation in voir dire.[14] Analysis of those discussions, as well as the findings of the Data Collection Working Group,[15] led the Center to conclude that, "overall, the judges tend to agree that the transition to [attorney participation in voir dire] has been smoother than expected." Although the empanelment process takes somewhat longer when attorneys participate in voir dire, the 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."[16]

The most significant problems the Center identified involve the "cascading effects" of longer empanelments, especially multi-day empanelments, on other trial calendars within the court. It found no clear evidence, however, that multi-day empanelments were directly or solely attributable to attorney participation in voir dire. Rather, attorneys appear to request participation in voir dire in more complex cases, which would normally require more time to select a jury.[17]

The Center's major recommendations include:

- amending Standing Order 1-15 to emphasize the trial judge's discretion during jury selection, and clarify that "the outlined procedures are advisory rather than . . . mandatory absent a judicial order expressly modifying those procedures."[18]

Richard J. Chin, Renee P. Depuis, Kenneth V. Desmond, Jr., Timothy Q. Feeley, Kenneth J. Fishman, Frank M. Gaziano, Bruce R. Henry, Garry V. Inge, Bertha D. Josephson, C. Jeffrey Kinder, Maynard M. Kirpalani, Peter B. Krupp, Angel Kelly Brown, Janet Kenton-Walker, Peter M. Lauriat, James R. Lemire, David A. Lowy, Edward J. McDonough, Jr., David Ricciardone, Robert C. Rufo, Mary-Lou Rup, Janet L. Sanders, Kathe M. Tuttman, Joshua Wall, Douglas H. Wilkins and Paul D. Wilson.

[14] The first meeting provided an overview of voir dire practices nationally, and a group discussion about the judges' early experiences with attorney participation in voir dire. The second involved small group discussions about the judges' experiences with individual voir dire. The third focused on experiences with panel voir dire as well as recommendations for the final report to the SJC.

[15] Ms. Hannaford-Agor served on the Data Collection Working Group and included their findings in her analysis.

[16] NCSC Final Report at p. 9.

[17] Id.

[18] NCSC Final Report at p. 10.

- educating and training judges, lawyers and court officers on effective practices to conduct voir dire when attorneys participate;

- developing tools and resources to make the process more efficient (e.g., checklists, model jury instructions, standardized set of juror badges); and

- exploring attorney participation in voir dire in the other trial courts:

  "Given the general consensus among Superior Court judges that [attorney participation] has improved the voir dire process, that attorneys have not abused the process, and that jurors do not appear to be offended by attorney questions, there is every reason to extend [it] to the other trial courts."[19]

The Committee's Working Groups

Following the adoption of Standing Order 1-15, the Committee organized four working groups to:

- document the experience with attorney participation in voir dire in the Superior Court (Data Collection Working Group);

- make recommendations regarding "best practices" to select juries in the other trial courts (Working Group on Other Courts);

- educate and train judges and attorneys about attorney participation in voir dire (Working Group on Training and Education); and

- oversee a pilot project of volunteer judges who would conduct trials utilizing the "panel method" of voir dire (Pilot Project Working Group).

Data Collection Working Group

During the first year following the effective date of Chapter 254, the Data Collection Working Group[20] collected and analyzed detailed information on the voir dire process in civil and criminal Superior Court jury trials.

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[19] NCSC Final Report at 10-11.

[20] This working group was chaired by Judge Robert C. Rufo and included Superior Court Judge Maynard M. Kirpalani; District Court Judge Jennifer L. Ginsburg; Michael Anthony Sullivan, Clerk, Middlesex County Superior Court; Attorney Douglas Sheff; Professor Jordan

To gather that information, the working group devised and analyzed data collection forms which documented the experiences with jury selection. The "Report on the Implementation of Chapter 254 of the Acts of 2014" (Implementation Report) [21] presents information regarding 739 (76%) of the 968 empanelments conducted during the year.

As detailed in the Implementation Report, the working group found that:

- Attorneys participated in voir dire extensively across the Commonwealth during the first year of implementation:
  - 95% of Superior Court judges (eighty judges) [22] presided over at least one empanelment where attorneys participated in voir dire;
  - Attorneys participated in voir dire in 70% of Superior Court empanelments, including 82% of criminal empanelments and 54% of civil empanelments; and,
  - 40,374 jurors were sent to courtrooms where attorneys participated in voir dire and 30,998 jurors participated in questioning by judges and attorneys in those courtrooms.
- Attorney participation in voir dire is associated with slightly longer empanelment times (slightly less than one minute longer per juror) as compared with judge-conducted voir dire;
- The data suggest that attorney participation in voir dire contributes to the decision-making process of identifying indifferent jurors. When attorneys participated in voir dire:
  - 26% of all challenges for cause occurred during the attorneys' participation (after the questioning by the judge), suggesting that this additional questioning may help identify indifferent jurors; and

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Singer, New England Law; Paula Hannaford-Agor, National Center for State Courts; Pamela J. Wood and John W. Cavanaugh, Office of Jury Commissioner; Jeff Travers, Judicial Information Services Department; and Linda K. Holt, Lee Kavanagh and Kevin T. Riley of the Trial Court Department of Research and Planning.

[21] The Implementation Report is attached as Appendix 3.

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[22] This number includes two District Court judges sitting as Superior Court judges by interdepartmental assignment.

- 62% of the challenges for cause asserted during the attorneys' participation were allowed, again suggesting that the additional questioning may result in the identification of indifferent jurors.

- The data suggest that attorney-participation voir dire was implemented without undue impact on court operations:
  - When comparing the first year of Chapter 254 implementation with the prior calendar year (2014), there was a slight increase in the number of multi-day empanelments. The increase in this measure appears to be part of a longer-term trend that cannot clearly be associated with attorney-participation voir dire;

  - While the total length of empanelment time was greater when attorneys participated in voir dire, this was also associated with the severity of the case and the number of jurors participating in the empanelment. The average difference in time per juror was less than one minute.

The working group's analysis of the first year of implementation suggests that the attorney-participation voir dire process:

- has been widely accepted and is being used by virtually all Superior Court judges;

- is associated with slightly longer empanelment times (25%, or slightly less than one minute longer per juror) as compared with the judge-conducted voir dire; and

- will need to continue to be evaluated with respect to its impact on court resources.[23]

The working group also designed and analyzed surveys to capture and compare the impressions of all of the major participants in juror voir dire: judges, attorneys, jurors and session clerks.[24] According to the "Analysis of Attorney, Clerk, Judge and Juror Voir Dire Surveys Pertaining to the Implementation of Chapter 254" (Survey Analysis),[25] the surveys

[23] In the first year, there was no change in the average number of jurors sent to empanelments overall, although parties elected to use attorney-participationvoir dire more often in more complex cases that require more jurors to be sent to the courtroom.

[24] There were 12,777 requests issued for participation in these surveys, resulting in 3,030 completed surveys (a total response rate of 24%). Jurors were the most responsive group: 3,030 survey responses, 2,722 (90%), were from jurors. One hundred seventy-five (6%), were from attorneys, seventy-seven (2%), from judges, and fifty-six (2%) from clerks.

[25] The Survey Analysis is attached as appendix 4.

identified many strengths as well as potential areas of improvement during the implementation of Chapter 254:

- Jurors perceive that judges and attorneys are deeply committed to the **preservation of juror dignity and privacy**, as evidenced by the overwhelming majority who perceived judges as having implemented protocols to protect jurors' dignity and privacy (91%) and who perceived attorneys as caring when it came to protecting the personal privacy of jurors (88%).[26]

- 94% of jurors **understand the reason for questions asked by judges and attorneys**.

- Attorneys, clerks, and judges appear to operate with a **high degree of professionalism and respect** for jurors, while facilitating a jury selection process committed to fairness and impartiality.[27]

To give a flavor of respondents' open-ended feedback and observations, the working group quoted the following comments:

- "My experience so far, with attorneys asking the individual voir dire questions instead of the judge doing so, has been very positive. The process seems to go faster, and the quality of information received has been high." (Judge)

- "This was the first time in [twenty-seven] years of practicing law where I felt that we 'chose' a jury instead of scrambling madly to get rid of jurors whom we did not believe we could live with . . . ." (Attorney)

- "I believe that, with time, the process will improve. The issues I witness result from all parties involved learning the process and refining the issues. Overall, I believe the process provides for a better jury in each case." (Clerk)

- "Jury selection and conduct of the trial by all parties was extremely professional and respectful. I am very proud to have been a part of the process. Thank you for doing such a fabulous job protecting the rights of citizens in the [C]ommonwealth." (Juror) [28]

[26] Survey Analysis at p. 9.

[27] Survey Analysis at p. 13.

[28] Survey Analysis at p. 12 -13. The working group also compiled, with the assistance of the Trial Court Department of Research and Planning, a 107-page "Analysis of General Commentary," which includes all the comments received from the attorneys, clerks, judges, and jurors who completed the surveys.

Working Group on Other Courts

The Committee formed this working group to analyze and recommend best practices in jury selection in all Trial Court Departments other than the Superior Court. Its mandate was to identify ways to enhance the effectiveness of jury selection, while promoting the fundamental principles of judicial discretion, juror dignity and respect, and efficiency.[29] In order to ensure that a wide range of views informed its deliberations, the working group invited five attorneys who were not members of the Committee to participate in its work.[30]

The working group developed and analyzed surveys, modeled on the 2014 survey of Superior Court judges, and individualized by court department, which asked judges to explain their current jury selection practices in the Boston Municipal, District, Housing, and Juvenile Courts. The surveys identified issues of special concern to each court as well as areas of shared concern.

In addition to analyzing the survey results, the working group considered practical issues in the Boston Municipal, District, Housing, and Juvenile Courts, such as high-volume caseloads in trial sessions, the press of other business, the varying length and complexity of cases brought to trial, the participation of self-represented parties, and attorneys' varying levels of experience participating in voir dire.

The working group also reviewed the approaches in other jurisdictions and closely monitored the Superior Court's experience with attorneys participating in voir dire. After considering its findings from all these sources, the working group proposed, and the Committee agreed, that the following should be considered "Best Practices" for jury selection.

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[29] The working group's Report and Recommendations on Best Practices in Jury Selection is attached as Appendix 5.

[30] This working group was chaired by District Court Judge Jennifer L. Ginsburg. The members included BMC Judge David J. Breen; Prof. R. Michael Cassidy, Boston College Law School; BMC Judge Serge Georges, Jr.; Robert Harnais, President, Massachusetts Bar Association; Carolyn I. McGowan, Committee for Public Counsel Services;
Juvenile Court Judge Lawrence Moniz; Radha Natarajan, New England Innocence Project; Dana Pierce, former Chief of the BMC, Central Division and Deputy Chief of District Courts, Suffolk County District Attorney's Office; Paul G. Pino, Managing Attorney, Law Office of Pino and Gilson, Brian A. Wilson, Clinical Instructor, Prosecutor Clinic, Boston University School of Law; and Housing Court Judge Jeffrey M. Winik.

Best Practices for Jury Selection throughout the Trial Court:

1. Meaningful pretrial communications between the judge and parties regarding empanelment (recognizing how difficult this would be in courts where judges and prosecutors often are assigned to cases at the last minute)

2. Written motion practice as to empanelment

3. Clarity with respect to the number of peremptory challenges

4. Consideration of supplemental juror questionnaires in appropriate cases

5. Individual voir dire of each prospective juror (noting that most judges reported that they already conduct some individual voir dire with each potential juror)

6. Allowance of attorney participation in voir dire, with the precise form left to the sound discretion of the trial judge (While Chapter 254 governs attorney participation in voir dire only in the Superior Court, General Laws chapter 234A, §67A, permits judges in any court to allow such participation.) [31]

7. Voir dire directed at explicit and implicit bias

8. Meaningful instructions to the venire

9. Allowance of time for meaningful consideration of juror responses to voir dire

10. Consideration of alternatives to individual voir dire at sidebar: When practicable, the judge should conduct individual voir dire of the prospective jurors at a location comfortable for the jurors and conducive to candor and confidentiality, such as with each juror and all participants sitting at counsel table, or with the juror on the witness stand, and with other jurors out of the courtroom.

The working group considered whether to recommend a specific form of attorney voir dire, i.e., exclusively individual voir dire, the pilot project model of panel voir dire, or another form of group voir dire. The consensus was that: (1) individual trial judges should have the benefit of the Superior Court judges' experiences, which have been wide-ranging in terms of mechanics; and (2) it is a best practice, in effect, to consider carefully the forms used in the

[31] G.L. c. 234A, §67A provides that: "Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror, to learn whether the juror related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice."

Superior Court, in light of the particular case to be tried, the preferences and experience levels of the attorneys involved, and the time and jurors available for empanelment.

Pilot Project Working Group

Standing Order 1-15 established a pilot project "in which judges who volunteer to do so will conduct so-called "panel voir dire."[32] This working group was created to design and oversee the pilot project.[33]

The pilot project's objective was to use a generally uniform method of panel voir dire, the "rounds" method,[34] to gain experience and develop data regarding the benefits and effectiveness of the panel method compared to attorneys' individual questioning of jurors. Fifteen Superior Court judges volunteered to participate in the year-long pilot project. Their judicial experience ranged from less than one year to over twenty-five years on the bench.[35]

Public notice of the pilot project sessions was provided on the court's website and by notice to major bar associations. By the end of the project, between eleven and fourteen pilot project sessions operated each month. The project operated in eleven counties and included criminal, civil, and hybrid sessions, in single and multi-session sittings.

The working group surveyed the fifteen pilot project judges to assess their experiences and to gauge their overall satisfaction with attorney participation in voir dire; thirteen (87%) responded. It is estimated that these judges conducted ninety-four empanelments utilizing the

[32] Standing Order 1-15 Section C(9).

[33] This working group was chaired by Judge Bertha D. Josephson and included Judge Raymond J. Brassard, Judge Kenneth J. Fishman, Carolyn I. McGowan, Committee for Public Counsel Services, and Mark Lee, Suffolk County District Attorney's Office. Its Report is attached as Appendix 6.

[34] In the rounds method, fourteen to twenty jurors are seated in the jury box and questioned. Attorneys challenge from that group. The jurors passed on are set aside. Subsequent new panels of fourteen to twenty jurors are seated and questioned until the attorneys are satisfied or exhaust their challenges.

[35] The pilot project volunteers included Judges John A. Agostini, Raymond J. Brassard, Kenneth V. Desmond, Jr., Renee P. Dupuis, Kenneth J. Fishman, Bertha D. Josephson, Angel Kelly Brown, Janet Kenton-Walker, Peter B. Krupp, Peter M. Lauriat, Edward J. McDonough, Jr., David Ricciardone, Mary-Lou Rup, Joshua Wall, and Douglas H. Wilkins.

panel method. While 39% indicated they would recommend changes, the vast majority (85%) were either satisfied or very satisfied with the panel voir dire process.

The survey results indicate that participating judges have embraced panel voir dire conducted according to the pilot protocol, which they report functioned well in the empanelment process. The overwhelming majority of participating judges (92%) will continue to use the panel method.

Judges' comments and empirical data suggest that panel voir dire may result in lengthier empanelments when compared with alternative jury selection methods. Some judges commented that jury empanelment by panel method may take less time as judges, attorneys and clerks become more familiar with panel voir dire protocols. The working group recommends continued attention to this issue to see if that prediction bears out.

Given the range of procedures the pilot judges used, the working group believes that more experience and considerable judicial latitude in panel voir dire could provide a basis for identifying desirable features of the panel method and developing "best practices."

Training and Education Working Group

This working group [36] was convened to educate and inform both the bench and bar of the Commonwealth about Chapter 254.

Given the need to prepare judges and attorneys for the anticipated changes in the method and manner of jury selection in Superior Court civil and criminal trials, and the compressed period between the adoption of Standing Order 1-15 in December, 2014, and its effective date, February 2, 2015, this working group prepared materials and offered trainings in a wide range of venues. It engaged with Superior Court judges, court personnel, the Flaschner Judicial Institute, numerous bar associations, continuing legal education organizations, District Attorneys' Offices, and the Committee for Public Counsel Services, to inform and educate them about the law, the Standing Order, and the protocol applicable in the pilot project sessions. [37]

[36] This working group included: Judge Peter M. Lauriat (Chair), Judge Bertha D. Josephson, Judge Maynard M. Kirpalani, 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.

[37] A partial listing of education and training programs in which working group members have been involved is included in the working group's Report, which is attached as Appendix 7.

To date, the primary focus of the education programs has been to introduce and explicate Standing Order 1-15 and the techniques of individual and panel attorney-participation voir dire. The educational techniques used in the programs included lectures, panel discussions, power-point presentations, and demonstrations, using hypothetical civil or criminal fact patterns, and involving attorney examination of mock jurors.

Proposals for Future Work

While attorney participation in voir dire has been successfully introduced in the Superior Court, it is still in its formative stage. Much remains to be done to inform, educate and train judges and attorneys about how to conduct voir dire examination of jurors, either individually or in a panel format, in a way that is productive, efficient, and effective.

Toward those ends, the working group recommends several different approaches:

1. Development and implementation of one or more programs, perhaps sponsored by the Flaschner Judicial Institute, which would address the education and training of judges and staff in the Boston Municipal, District, Housing, and Juvenile Courts in best practices for allowing and encouraging attorneys to participate in voir dire in their courts. Such programs would include demonstrations of jury selection techniques that could be used in or adapted to trials in those courts. These programs might include the use of mock jurors to participate in mock jury empanelments and feature panel discussions of the pitfalls, issues, and solutions that have arisen and been addressed by the Superior Court and counsel in jury selection where attorneys have participated.

2. Such programs could be coordinated with the release of the third edition of the *Massachusetts Jury Trial Benchbook* (Flaschner Judicial Institute 2016), since jury selection methods and techniques will be part of anticipated Flaschner full-day programs for trial court judges that will follow the release of this book. Similar programs, centered around the release of the *Benchbook*, will be planned for lawyers across the Commonwealth.

3. Teaching/learning/demonstrating the *art* (as opposed to the *mechanics*) of Lawyer Conducted Voir Dire:

- identifying the purposes and goals of voir dire examination,
- crafting questions that will identify bias in jurors,
- developing good methods of conversing with jurors, and
- encouraging jurors to discuss their concerns

4. Educating and training new Superior Court judges

5. Educating and training new lawyers

6. Continuing training and education of lawyers who have not yet participated in voir dire

Recommendations

The Committee recommends that the Supreme Judicial Court endorse the "Best Practices for Jury Selection throughout the Trial Court" (Best Practices) and issue a statement to the jury trial court chiefs encouraging implementation of those practices throughout the trial court. In particular, the Committee recommends that attorney participation in voir dire, one of the Best Practices, be encouraged in the Boston Municipal, District, Housing, and Juvenile Courts. [38]

Building upon the many strengths identified during the initial implementation of Chapter 254, the Committee recommends continued efforts to:

- educate judges, lawyers and court staff on effective practices to conduct voir dire when attorneys participate;
- assess the impact of attorney participation in voir dire on court resources; [39] and
- improve the process and foster meaningful collaboration and communication among all parties involved in jury selection.

[38] As discussed at a meeting with Chief Justice Carey and the jury trial court chiefs on May 31, 2016, the Committee proposes that the jury trial court chiefs encourage judges to allow attorneys to participate in voir dire, with the precise form left to the sound discretion of the trial judge. If this option is introduced gradually, on a voluntary basis, there will be ample opportunity to see what works best in individual departments, with an eye to formalizing processes -- if that is deemed appropriate -- at a later date.

[39] With respect to attorneys questioning jurors as a group, in the "panel voir dire" method, judges' comments and empirical data suggest that it may result in lengthier empanelments when compared with alternative jury selection methods. Because some judges suggested that the panel method may take less time as judges, attorneys, and clerks become more familiar with panel voir dire protocols, the Committee recommends continued attention to this issue to see if that prediction bears out. Because the collaboration among the pilot judges appeared to help them to explore methods and practices to improve the method of jury selection, the Committee recommends that a focus group of judges be convened to provide more information on their experiences. The Committee also recommends that those involved in jury selection continue to seek to improve the process and foster meaningful collaboration, which seemed to serve the participating judges well during the pilot project.

Appendix 1

MASSACHUSETTS SUPERIOR COURT
STANDING ORDER 1-15:
Participation in Juror Voir Dire by
Attorneys and Self-Represented Parties

(Applicable to All Counties)

A. Purpose.

The purpose of this Standing Order is to provide an interim procedure for the implementation of St. 2014, c. 254, § 2, pending completion of the work of the Supreme Judicial Court Committee on Juror Voir Dire. The Superior Court anticipates that this Standing Order may be superseded by, or may be modified in response to, such rules, protocols, or guidelines as the Supreme Judicial Court may hereafter adopt or approve, as well as in response to experience in the implementation of this Standing Order, including experience with the pilot project referred to in paragraph C(9) hereof. This Standing Order is adopted pursuant to Trial Court Rule V; shall take effect on February 2, 2015, coincident with the effective date of St. 2014, c. 254, § 2; and shall remain in effect until such time as it may be superseded or modified.

B. Preamble.

In enacting St. 2014, c. 254, § 2, the Legislature recognized and preserved the discretion of the trial judge to lead and supervise the process of juror voir dire, including oral examination of prospective jurors by attorneys and self-represented parties in the exercise of the right granted by the statute. The Superior Court recognizes that trial judges may properly exercise discretion to employ procedures for the examination of prospective jurors by attorneys and self-represented parties that may differ from those set forth herein, as well as to use written juror questionnaires where they deem appropriate in addition to the Confidential Juror Questionnaire required by G. L. c. 234A, § 22 (hereinafter, the "statutory Confidential Juror Questionnaire"). This Standing Order fully preserves the discretionary authority of the trial judge with respect to the examination and

selection of jurors in each case, and provides a standard procedure that will apply in 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.

C. Procedure:

1. Any attorney or self-represented party who seeks to examine the prospective jurors shall serve and file a motion requesting leave to do so. In civil cases such motion shall follow the procedure provided by Superior Court Rule 9A, and shall be filed with the Court, along with any opposition or other response received, not later than the earlier of (a) the final trial conference if such a conference is scheduled in the case, or (b) fourteen days prior to the date scheduled for trial. In criminal cases the motion shall be served on all parties at least one week before filing, and the motion and any opposition or other response shall be filed with the Court not later than two business days prior to the scheduled date of the final pretrial conference, or, in the event that no final pretrial conference is scheduled, five business days before the scheduled trial date.

2. The motion shall identify generally the topics of the questions the moving party proposes to ask the prospective jurors. Topics identified shall be interpreted to include reasonable follow-up questions. Any opposition or response to any such motion may address the proposed topics. The trial judge may, in the exercise of discretion, and after notice to the parties, 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 5(b) hereof.

3. The trial judge shall approve or disapprove the topics of questions proposed, or, if the trial judge requires pre-approval of the specific language of the proposed questions, shall approve or disapprove each proposed question. In doing so the judge shall give due regard to the goals of: (a)

selecting jurors who can and will decide the case based on solely the evidence and the law, fairly and impartially to all parties, without in the process exposing jurors to any extraneous matter that would undermine their impartiality; (b) conducting the selection process with reasonable expedition, in proportion to the nature and seriousness of the case and the anticipated length of the trial, and with due regard for the needs of other sessions that draw on the same jury pool for access to potential jurors; and (c) respecting the dignity and privacy of each potential juror.

4. (a) Questions that should generally be approved are:

(1) those seeking factual information about the prospective juror's background and experience pertinent to the issues expected to arise in the case, along with reasonable follow-up questions regarding whether and how such background or experiences might influence the juror in the case, provided that questions that would elicit sensitive personal information about a juror, or that specifically reference information provided in a juror's statutory Confidential Juror Questionnaire, shall be permitted only outside the presence or hearing of other jurors, so as to preserve the confidentiality required by G. L. c.234A, s. 23.

(2) those regarding preconceptions or biases relating to the identity of the parties or the nature of the claims or issues expected to arise in the case.

(3) those inquiring about the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed, after consultation with the judge regarding the principles of law on which the judge will instruct the jury.

(b) Questions that should generally be disapproved are those:

(1) that duplicate the questions that appear on the statutory Confidential Juror Questionnaire, or any other written juror questionnaire used in the case, but questions seeking further detail regarding information provided on a juror's questionnaire, or completion of any uncompleted answers on the

questionnaire, should generally be approved, subject to the limitation stated in paragraph (a)(1) hereof;

(2) regarding the prospective juror's political views, voting patterns, party preferences, religious beliefs or affiliation, reading or viewing habits, patterns of charitable giving, opinions on matters of public policy, hobbies or recreational activities, or similar matters, or regarding insurance, except insofar as such matters may be relevant to issues expected to arise, or may affect the juror's impartiality in the case;

(3) regarding the outcome of any trial in which the prospective juror has previously served as a juror, or deliberations in or the prospective juror's vote in such trial;

(4) purporting to instruct jurors on the law;

(5) that make arguments on any issue of fact or law; that tend to indoctrinate or persuade; that encourage the juror to identify with a party, victim, witness, attorney, or other person or entity, or to send a message; or that encourage the juror to prejudge any issue in the case, to make a commitment to support a particular result, or to do anything other than remain impartial and follow the Court's instructions.

(6) that require a juror to guess or speculate about facts or law.

(7) that would tend to embarrass or offend jurors or unduly invade jurors' privacy.

5. Prior to any questioning by attorneys or self-represented parties, 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, and,

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.

(c) explain to the venire the empanelment process, including, in cases where attorneys and/or self-represented parties will pose questions, the nature and topics of the questions that will be posed, and 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 to be permitted to decline to answer and/or that steps be taken to protect the privacy of any information disclosed. Upon request, the 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.

(d) ask all questions required by statute or case law, and any additional questions the judge deems appropriate in light of the nature of the case and the issues expected to be raised. The judge may ask questions of the venire as a group, but should conduct at least part of the questioning of each prospective juror individually outside the presence or hearing of other jurors.

(e) as to each prospective juror questioned individually, excuse the juror if the judge determines that service would pose a hardship, or if the judge has doubt as to the juror's impartiality; otherwise find the juror indifferent and able to serve.

6. After the judge has found an individual juror indifferent and able to serve, the judge shall permit questioning by attorneys or self-represented litigants if and to the extent that the judge has previously approved such questioning upon motion submitted in the manner provided herein. Such questioning shall begin with the party having the burden of proof.

(a) Except as provided in paragraphs C(6)(b) and C(9) hereof, the judge may require that such questioning be conducted of each prospective juror individually, outside the presence or hearing of

other jurors. Parties may assert challenges for cause based on the juror's responses to questions posed by attorneys or self-represented parties, notwithstanding that the judge has previously found the juror indifferent based on the judge's questioning and information provided in the statutory Confidential Juror Questionnaire. If the juror is not excused for cause upon such challenge, the judge may require the exercise of any peremptory challenge at that time, beginning with the party who has the burden of proof and, in civil cases, the judge may alternate sides thereafter. Alternatively, the judge may seat the juror subject to the parties' later exercise of peremptory challenges.

(b) Upon request of one or both parties, the trial judge may permit counsel or self-represented parties to question jurors as a group, in a so-called "panel voir dire" procedure. Such questioning shall occur of those jurors whom the judge has already questioned individually and found indifferent and able to serve, after the judge has so found with respect to at least the number of jurors that will be seated for trial. If questioning occurs in this form, the judge shall not permit any questions that would elicit sensitive personal information about an individual juror, or that would specifically reference information provided in a juror's statutory Confidential Juror Questionnaire. Jurors to whom questions are addressed, or who respond to questions, shall be identified on the record by juror number only. After completion of questioning the parties may assert challenges for cause based on responses to questions posed by attorneys or self-represented parties, although the judge has previously found the challenged juror indifferent. The judge shall require that such challenges for cause, as well as peremptory challenges, be asserted outside the hearing of other jurors. Upon any challenge for cause, the judge may allow opposing counsel further opportunity to question the juror.

7. Whether questioning of jurors by attorneys or self-represented parties occurs individually or in a group, 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.

8. The trial judge may set a reasonable time limit for questioning of prospective jurors by attorneys or self-represented parties, giving due regard to (1) the objective of identification of inappropriate bias in fairness to all parties; (2) the interests of the public and of the parties in reasonable expedition, in proportion to the nature and seriousness of the case and the length of the anticipated evidence, and (3) the needs of cases scheduled in other sessions drawing on the same jury pool for access to prospective jurors.

9. The Court will establish a pilot project, in which judges who volunteer to do so will conduct so-called "panel voir dire," according to a consistent procedure to be determined and described in a separate document. During the course of the pilot project, the Court will compile data regarding identified measures. Upon completion of the pilot project, the Court will issue a public report of such data.

Judith Fabricant
Chief Justice

Adopted: December 5, 2014

Effective: February 2, 2015

Appendix 2

Implementing Attorney Participation in Voir Dire in the Superior Court of Massachusetts: A Judicial Education Project

Final Report: April 24, 2016

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Project Background

On August 6, 2014, the Massachusetts legislature enacted Chapter 254 of the Acts of 2014, effective February 2, 2015, granting trial attorneys and self-represented litigants the right to examine jurors orally during jury selection in all Superior Court trials. Until that point, most judges in the Massachusetts trial courts had traditionally followed a practice of judge-conducted voir dire. In fact, the NCSC *State of the States Survey of Jury Improvement Efforts* found that Massachusetts ranked fourth in the nation in terms of judge-dominated voir dire proceedings.[1] Most Superior Court judges and practicing trial lawyers had little significant experience with attorney participation in voir dire (APVD).[2] The legislation provoked a great deal of uncertainty about the respective roles of the trial judge and lawyers under the new procedures and about the mechanics of how jury selection should take place. Of particular concern was the anticipated increase in the amount of time expended on jury selection and its implications for the rates of juror participation in voir dire and for shared jury pools in multi-use courts.

SJC Committee on Juror Voir Dire

To inform ongoing discussions about APVD, Chief Justice Ralph D. Gants appointed the Supreme Judicial Court Committee on Juror Voir Dire (SJC Committee) to examine jury selection practices broadly in all trial court departments. The work of the SJC Committee was initially undertaken by two subcommittees: the implementation subcommittee and the "other courts" subcommittee. The implementation subcommittee developed initial protocols for Superior Court judges to use when attorneys participate in questioning jurors during jury selection. The protocols were ultimately adopted by the Superior Court judges, then approved by the Chief Justice of the Massachusetts Trial Court, and finally issued by the Chief Justice of the Superior Court as Standing Order 1-15 (SO 1-15). SO 1-15 articulated three principal goals of voir dire: the selection of impartial jurors; reasonably expeditious empanelments; and respect for juror dignity and privacy. Key provisions of SO 1-15 included a requirement that attorneys file a motion requesting leave to participate in voir dire and written submission of the topics and/or questions they wished to pose to jurors; clarification of the judge's role in jury selection and discretion in managing the process; and protocols for conducting voir dire.

After SO 1-15 was adopted, the SJC Committee created several working groups to continue its mandate. The Data Collection Working Group was tasked with developing evaluation instruments to gauge the impact of the legislation on jury selection in the Superior Court. These instruments included a "supplemental data collection form" to be completed by the clerk or assistant clerk documenting whether attorneys participated in voir dire, and if so, the impact on

[1] GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS 79 (April 2007).

[2] A survey of Superior Court judges conducted in 2014 found that 44 percent allowed APVD, but it was primarily restricted to attorney questions at side bar following up on questions posed during the judges' voir dire of jurors. The majority of judges who permitted APVD either invited or required attorneys to submit their proposed voir dire questions in advance of trial.

challenges for cause and the amount of time expended in jury selection;[3] surveys distributed to Superior Court judges, trial attorneys, and jurors asking about the impact of APVD on the selection of impartial jurors, on the expeditiousness of the jury selection process, and on the protection of jurors' dignity and privacy;[4] and a survey distributed to clerks and assistant clerks seeking their perceptions about the impact of APVD on jurors and on trial logistics.[5] The Education Working Group was responsible for developing CLE training for judges and lawyers to educate them about the provisions of SO 1-15 and other recommendations concerning effective APVD techniques. The Other Courts Working Group was tasked with considering best practices for jury selection in the District Court, Juvenile Court, Housing Court, and Boston Municipal Court, including recommendations for APVD. As referenced in SO 1-15, the Chief Justice of the Superior Court implemented a Panel Voir Dire Pilot Project commencing on February 2, 2015 and recruited 15 Superior Court judges to participate. The Superior Court Implementation Committee also developed a set of protocols for the Panel Voir Dire Pilot Project.

A Judicial Education Project on APVD

The SJC Committee recognized that SO 1-15 would have to be revised over time as trial judges gained experience with APVD and learned techniques to make the process manageable for judges, lawyers, and jurors. To inform that process, the SJC Committee with the Chief Justice of the Superior Court undertook a judicial education project to provide structured opportunities for Superior Court judges to exchange information about their experiences with APVD.[6] A total of 30 Superior Court judges were appointed to the project.[7] See Appendix A for a list of project participants. Paula Hannaford-Agor, Director of the Center for Jury Studies at the National Center for State Courts (NCSC), was contracted by the Supreme Judicial Court to assist in planning the meetings, facilitating discussions with Superior Court judges, and planning a statewide judicial education program on APVD based on findings from the project.

The project involved three meetings with the participating judges on April 22 and October 20, 2015, and January 20, 2016, respectively. The first meeting provided judges with an overview of the project goals and objectives, an overview of voir dire practices nationally, and a group discussion among the judges about their early experiences with APVD. The second meeting involved small group discussions focused on individual voir dire. The third meeting focused on

[3] Supplemental Data Collection Forms were administered from February 2, 2015 through January 29, 2016.
[4] The Judge, Attorney and Juror Questionnaires were administered from August 2015 through January 2016.
[5] The Clerk Survey was administered in January 2016.
[6] The project was modeled on the Massachusetts Jury Trial Innovations project (1998-2000) in which 20 superior and district court judges met periodically over the course of one year to exchange information about their experiences with innovative techniques to improve juror performance, comprehension, and satisfaction, and to develop protocols for using these innovations in jury trials.
[7] Fifteen of the judges were selected based on their participation in the Panel Voir Dire Pilot Project. The other 15 judges were selected to reflect the Massachusetts Superior Court bench in terms of geographic distribution, length of tenure on the bench, and other characteristics of diversity.

judicial experiences with panel voir dire as well as input on specific recommendations for the report to the Supreme Judicial Court.

The discussions for all three project meetings were informed by empirical data compiled by the Data Collection Working Group. These data confirmed substantial and widespread use of APVD following implementation of the legislation.[8] Although the impetus for the APVD legislation originated with the civil bar, attorney voir dire was more prevalent in criminal trials (80%) than in civil trials (50%). The length of time expended on jury selection in cases in which the attorneys participated in voir dire increased by approximately 30 seconds per juror in criminal cases and one minute per juror in civil cases.[9] Most empanelments were completed within one day, but APVD was correlated with an increase in the number of multi-day empanelments.[10] Supplemental analysis suggests that case type and panel size are the primary causes of multi-day empanelments; that is, more complex cases were more likely to result in multi-day empanelments, and were also more likely to involve APVD. APVD also resulted in an increase in the number of challenges for cause raised and granted during jury selection, a decrease in the number of peremptory challenges exercised in criminal trials, and an increased rate of juror participation in jury selection as compared to judge-conducted voir dire.[11]

The Data Collection Working Group also distributed surveys to judges, clerks, attorneys, and jurors seeking input about their respective perceptions about the quality of the jury selection process under APVD. Overall, the surveys found a strong consensus among judges and attorneys that APVD provides useful information for asserting challenges for cause and for the intelligent exercise of attorneys' peremptory challenges.[12] Jurors reported very high levels of understanding of the reasons for judge and attorney questions as well as a high degree of comfort responding to those questions.[13] Only 12 percent of jurors reported that they were asked questions that they considered too personal, irrelevant, or made them feel uncomfortable.[14] In spite of longer

[8] Attorneys participated in voir dire in more than two-thirds of the empanelments (70%). In 81 percent of trials in which attorneys participated in voir dire, attorneys posed questions to jurors individually; in the remaining 19 percent of trials, attorneys conducted panel voir dire. Many judges participating in the Judicial Education Project noted that the most experienced attorneys, especially civil trial attorneys, were the most reluctant to request APVD. Almost all of the Superior Court judges (95%) who conducted empanelments during this period experienced at least one trial with APVD. REPORT ON THE IMPLEMENTATION OF CHAPTER 254 OF THE ACTS OF 2014 4-5 (March 17, 2016).

[9] *Id.* at 5.

[10] Eleven percent (11%) of judge-conducted empanelments required more than one day to complete compared to 39 percent of APVD individual voir dire and 31 percent of APVD panel voir dire. *Id.* at 6.

[11] Two-thirds of challenges for cause (65%) raised in APVD trials were granted. *Id.* at 6, 11-12.

[12] ANALYSIS OF ATTORNEY, JUDGE, AND JUROR VOIR DIRE SURVEYS 3 (March 17, 2016). The rates of judge and attorney agreement with the statement that APVD provided useful information on which to decide challenges for cause and peremptory challenges were somewhat lower for panel APVD compared to individual APVD, but reflected substantial majorities regardless. *Id.* at 3.

[13] *Id.* at 7-8.

[14] *Id.* at 10. A review of the specific types of questions that jurors identified as too personal, irrelevant, or uncomfortable suggests that, in certain types of cases, they would nevertheless be necessary to determine the impartiality of prospective jurors.

empanelment time under APVD compared to judge-conducted voir dire, most respondents reported that the amount of time expended to empanel the jury was "about right."[15] Jurors also expressed high levels of agreement that judges and lawyers took steps to protect juror privacy and dignity during jury selection.[16]

Key Findings from Judicial Discussions

Discussions during the project meetings focused on three general areas: the usefulness of the SO 1-15 provisions concerning motions for leave to participate in voir dire; the impact of APVD on the empanelment process including changes in the respective roles of the judge and attorneys; and logistical issues associated with APVD.

Standing Order 1-15 Provisions

There was a broad consensus among the judges that the requirement that attorneys file a written motion for leave to participate in voir dire[17] was not being rigorously enforced. In fact, some judges instructed their clerks or assistant clerks to reach out to lawyers who had not filed a written motion to ask about their interest in APVD, and even to encourage them to try APVD.[18] Judges reported that lawyers who did comply with SO 1-15 by filing a written motion generally did so only to preserve their right to participate in voir dire; those motions rarely included a description of the topics or specific questions they proposed to ask prospective jurors.

Some judges also raised concerns about the appropriateness of discussing APVD during initial pretrial conferences in civil cases, and particularly about deciding on the scope of attorney questions, given the possibility that they would not preside at the actual trial due to circuit rotations and trial assignments. They were resistant to the notion of making decisions for other Superior Court judges. Instead, they strongly recommended making the written motion for leave to participate in voir dire due immediately before the final conference before trial. The final conference, therefore, would be the appropriate forum in which to discuss all aspects of APVD with the attorneys.

During the second project meeting, one judicial discussion group developed a checklist of topics to discuss with attorneys about APVD. They recommended that the final trial conference include a general discussion about the legitimate objectives of voir dire (e.g., identifying juror bias, and gathering information for the intelligent exercise of peremptory challenges, but not engaging in advocacy on behalf of the client or attempting to build rapport with jurors). They recommended that the judge consult with the attorneys about the points they wanted the judge to address with

[15] *Id.* Clerks were the only respondents for a majority reported that empanelments took longer than necessary.
[16] *Id.* at 7-8.
[17] SO 1-15 (C).
[18] Judges' reported willingness to encourage APVD may be due to a self-selection bias of the judges who participated in the project.

jurors versus the issues and topics that the attorneys would like to reserve to themselves.[19] They also noted that attorneys are still learning voir dire techniques themselves and sometimes are unsure about how to respond to a juror's answers. They suggested that it is useful to initiate a discussion, or even to roleplay with the attorneys, about the likely responses to follow-up questions (e.g., "so, Counsel, what would you do or say if the juror said that she has doubts about the credibility of police officers?"). It was helpful to use the final conference before trial as an opportunity to explain the standard for removal for cause – specifically, that a juror's affirmative response to an attorney question will not necessarily mean that the judge will grant a motion to remove for cause. Finally, they recommended that judges inform attorneys about whether and how they would intervene if the empanelment appears to be going poorly (e.g., "if I tell you 'next question' or 'please move along,' it is a polite way of saying you're doing a lousy job, Counsel.").

For trials in which attorneys request panel APVD, the final pretrial conference is especially important insofar that discussions concerning APVD require additional time to address not only the basic information about APVD, but also issues unique to panel APVD. In fact, at least one judge recommended holding two pretrial conferences for trials involving panel APVD. Of particular concern during these discussions is clarification with the attorneys that they actually intended to request panel APVD for jury selection in the written motions. Several judges noted that many lawyers do not fully understand what panel APVD is and instead would prefer to engage jurors individually rather than as a group. Other issues unique to panel APVD include instructions concerning the mechanics of panel APVD such as restrictions on the amount of time allotted for APVD and ensuring that jurors are identified by number so that their responses to attorney questions will be properly recorded for the trial record. One judge suggests to attorneys that they bring an additional person from their law office to help them keep track of which jurors have responded to attorney questions. Another judge suggested that attorneys seek an opportunity to observe panel APVD before attempting it themselves.

SO 1-15 included procedures to be followed during panel APVD.[20] More detailed procedures were developed for use by judges and attorneys participating in the Panel Voir Dire Pilot Project.[21] During the third project meeting, most of the judges reported that they deviated from the outlined procedures. Some judges said that the procedures were unnecessarily time-consuming. Others viewed the procedures as a good starting place, but needed to modify the details to meet the needs of individual cases. One judge found the requirement that jurors be identified by number rather than by name as unduly cumbersome and confusing during panel APVD. Another judge disagreed with the restrictions articulated in SO 1-15(C)(4)(b) concerning

[19] Only a couple of judges reported that they impose time limits or limits on the number of questions that attorneys may pose to jurors, especially in individual APVD. Time limits were more commonly imposed in panel APVD.

[20] SO 1-15 (6)(b).

[21] SO 1-15 (9); Introduction to Panel Voir Dire Pilot Project 2-7, *available* at http://www.mass.gov/courts/court-info/trial-court/sc/sc-voir-dire-gen.html.

the types of questions that attorneys are to ask, arguing that attorneys find that many of those questions are useful for exercising peremptory challenges.[22]

Impact of APVD on the Empanelment Process

There was a general consensus among judges that APVD improved the voir dire process. Judges' perceptions that the number of challenges for cause that were granted have increased in APVD empanelments are consistent with the findings of the Data Collection Working Group. Judges had some reservations about the quality of lawyers' questions (e.g., characterizing them as "inartful" and "clumsy"), but recognized that APVD is new to the practicing bar as well as the Superior Court bench, and expressed expectations that the quality of lawyer questions would improve over time. They also explained that lawyers were not necessarily asking different questions than judges would have asked, but they were asking questions in ways that appeared to elicit more meaningful information for determining each juror's impartiality.[23] Although the judges uniformly agreed that they continued to apply the same legal standard for removal for cause, several judges noted that language employed in SO 1-15 that the judge "shall … excuse the juror if the judge … has doubt as to the juror's impartiality"[24] has suggested to attorneys that the standard for removal for cause has been relaxed.[25]

Several judges also reported that APVD has affected attorneys' use of peremptory challenges. That is, attorneys told the judges that they are striking jurors that they wouldn't have struck before and leaving jurors on the panel that they would have struck, suggesting that APVD may be providing a basis for more informed use of peremptory challenges, and ostensibly for greater attorney confidence in the fairness of the jury that is ultimately empaneled.[26]

Judges reported that overall their participation in the empanelment process is shorter, but they have retained exclusive responsibility both for making hardship determinations and for posing the legally mandated questions to jurors. Judges also reported that they spend more time explaining basic legal principles (e.g., presumption of innocence, burden of proof, right of the

[22] Attorney survey respondents reported that 18 percent of topics or questions requested were disallowed by the judge. ANALYSIS OF ATTORNEY, CLERK, JUDGE AND JUROR VOIR DIRE SURVEYS 5-6 (March 17, 2016).

[23] These observations are consistent with the empirical literature on APVD. *See, e.g.,* Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire,* 11 L. & HUMAN BEHAV. 131 (1987); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis* 56 IND. L. J. 245 (1981).

[24] SO 1-15 (5)(e).

[25] *Commonwealth v. Vann Long,* 419 Mass. 798 (1995) describes the legal standard for granting challenges for cause. The trial judge is responsible for determining whether a juror "may not stand indifferent" and "must be zealous to protect the rights of an accused." Although judges are afforded a great deal of discretion in jury selection, "none should sit who are not entirely impartial." *Id.* at 802-04

[26] The supplemental data collection form confirms a small, but significant, reduction in the number of peremptory challenges exercised by lawyers in criminal trials from 11.9 in 2014 to 10.2 in 2015. No reduction in the number of peremptory challenges was observed in civil trials.

defendant not to testify) because the "pre-charge" prevents the types of "set up explanations" that tend to lead to lengthy follow-up questions during individual APVD.[27]

The scope of the pre-charge became the focus of a prolonged discussion during the third project meeting. Although most judges agreed that delivering the pre-charge was a useful technique to save time and to prevent attorneys from misstating the law, several judges expressed doubts about the ability of jurors to fully understand the law in the contextual vacuum of voir dire, before hearing sufficient evidence to fully appreciate the application of the law to specific facts. One judge explained that he asks attorneys for suggestions about what information to include in the pre-charge during the final pretrial conference.

There was also an extended discussion about the appropriateness of attorney questions to jurors concerning their understanding of, and willingness and ability to comply with basic legal principles. Some judges believed that once jurors have indicated their ability and willingness to follow the judge's instructions on the law in response to the judge's voir dire, further questions by attorneys on that topic are inappropriate because they do not provide additional information concerning the jurors' impartiality. Other judges, however, explained that juror preconceptions and attitudes about the burden of proof, especially with respect to affirmative defenses, the presumption of innocence, and defendant's right not to testify, could provide information that would be useful for attorneys' exercise of peremptory challenges, and thus were valid topics of inquiry during APVD.[28]

During the third project meeting, judges also discussed the impact of panel APVD on jurors. Before implementation of the legislation, there was great concern that attorney questions would be unduly intrusive of jurors' privacy, particularly in a panel APVD setting in which jurors respond to attorney questions in open court.[29] Several judges expressed surprise, therefore, at the degree of candor and forthrightness from jurors responding to relatively sensitive questions in open court. As one judge noted, "you cannot underestimate human vanity – jurors seem to enjoy talking in open court, even on personal health-related matters."

There was strong sentiment that judges should not embarrass the lawyers and should only interrupt APVD "very gently" or if the attorney has indicated the need for an interruption. If the attorney's questioning was moving the empanelment process forward in a meaningful way, the judges should not interfere. Judges did not ordinarily impose time limits on individual APVD, but

[27] Some judges reported that they now also spend more time explaining basic legal principles in judge-conducted voir dire empanelments.

[28] The tension between the appropriate legal standard for removal for cause based on a juror's attitudes and opinions about the law versus the juror's attitudes and opinions related to factual issues likely to arise at trial arises in jury trials across the country. *See, e.g.,* PAULA L. HANNAFORD-AGOR & NICOLE L. WATERS, EXAMINING VOIR DIRE IN CALIFORNIA 31-35 (Aug. 2004).

[29] All of the judges with experience with panel APVD stressed the importance of informing jurors of their option to respond to a question privately.

some reserved the right to nudge the attorney to move to a new line of questions if they believe that attorney questions are not sufficiently on point.

In panel APVD, however, time limits were generally employed. Most judges restricted attorneys to ten to 15 minutes per side for the first box of jurors, and less time per side for subsequent boxes of jurors. One judge indicated that the amount of time allocated per side depends on the type of case, allowing more time per side in more complicated cases. Several judges noted, however, that after questioning the first box of jurors, attorneys rarely exhausted all of the time allotted. Several judges reported that they found panel APVD to take less time than individual APVD. In essence, panel APVD consists of judge-conducted voir dire plus an hour or so of panel APVD.

In terms of the voir dire process itself, most judges preferred to address challenges for cause in two separate steps: the first, immediately following the judge's voir dire (consisting of hardship requests and responses to legally mandated questions), and the second following the attorneys' voir dire. The general preference for managing peremptory challenges is to have the prosecution go first in criminal cases, but to alternate between the plaintiff and the defendant in civil cases. Some judges suggested that it was useful to have an agreed process in place to cut off voir dire questioning for jurors if it became apparent that the juror would be removed for cause. For example, one judge instructed the attorneys to place an index card on the table if they intended to raise challenge for cause; if the judge expected that the challenge would be granted, he would not ask all of the remaining questions.

There was much less consensus among judges about their appropriate role in clarifying juror responses to attorney questions that might appear to show a disqualifying bias. Some judges reported that jurors' responses sometimes indicated juror confusion (due to an attorney's poorly articulated question) rather than a disqualifying bias. One technique was simply for the judge to reframe the question or interpose a very basic question, which moves past the juror's confusion. Other judges preferred to use the juror's response as a "teaching moment" for the jurors (and attorneys) to provide a more comprehensive explanation of the empanelment process. Many judges thought it better to allow the opposing counsel to question the juror and explicitly address the issue of juror impartiality, but would eventually step in if necessary to resolve any lingering ambiguity. They agreed that ultimately the trial judge has the responsibility to remove any juror who cannot serve impartially.

Logistics of Individual APVD

Judges tended to agree that the availability of courtroom facilities and resources (e.g., court officers, stenographers or digital equipment) dictate how to conduct individual APVD. When the voir dire is conducted in the courtroom with the remaining venire in another location, there is some variation in practice concerning where the juror is questioned. Some judges prefer to sit at counsel table with the juror and attorneys, especially in cases in which the questioning is likely to be lengthy. Other judges seat the juror in the jury box or in the witness stand, although if

there are spectators in the courtroom, it is helpful for the juror to have his/her back to the public. It is important to have the attorneys question jurors from the well of the courtroom or judge's side bar to ensure their proximity to microphones for audio recording.

Conclusions and Recommendations

Overall, the judges tend to agree that the transition to APVD has been smoother than expected. Although the empanelment process takes somewhat longer when attorneys participate in voir dire, the consensus is that APVD 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. None of the judges expressed concern that attorneys are abusing the process or that jurors are offended or embarrassed by attorney questions. Judges recognize that both the criminal and civil bar in Massachusetts would benefit from additional training in questioning jurors, but they are fairly confident that meaningful discussions with attorneys during the final pretrial conference can prevent most problems from occurring.

The most significant problems to date have not occurred in the context of individual empanelments, but rather involve the cascading effects of longer empanelments, especially multi-day empanelments, on other trial calendars within the court. There was no clear evidence, however, that multi-day empanelments were directly attributable to APVD. Rather, supplemental analysis suggests that self-selection bias may be a substantial factor in the incidence of multi-day empanelments. Attorneys appear to be more likely to request APVD in more complicated cases, which would normally require more time to select a jury. During the second project meeting, several judges expressed their belief that cases with multi-day empanelments would have required multiple days to select the jury even under judge-conducted voir dire proceedings.

Recommendations

Amend SO 1-15 to clarify ambiguities and emphasize trial judge discretion during jury selection. Overall, SO 1-15 has provided a useful framework for Superior Court judges during the initial period of learning how to manage APVD. During project meetings, however, it became apparent that some provisions were not routinely enforced or simply contained ambiguities that complicated the jury selection process. For example, although judges uniformly support the requirement that attorneys file a written motion seeking leave to participate in APVD, most also thought that the timing and specificity of SO 1-15 with respect to the motion were unrealistic, especially in civil cases. The primary utility of the written motion requirement is to ensure that the judge schedules sufficient time for an in-depth discussion about APVD during the final conference, held shortly before the trial date. When required to file written motions too far in advance before the scheduled trial date, attorneys tended to file motions simply as a placeholder to reserve their right to APVD, but did not give serious thought to the topics or types of questions they might pose to jurors. Consequently, an amendment to SO 1-15 clarifying that the written motion must be filed before the final conference before trial and eliminating the requirement

that specific topics or questions be included in the motion should be considered. Similarly, the language concerning the standard for removal for cause should be modified to mirror the actual legal standard recognized in Massachusetts to avoid sending mixed signals to attorneys that the legal standard has changed.

Finally, although the Preamble states that SO 1-15 preserves judicial discretion to manage the jury selection process, it became clear during the project meetings that many judges felt that the procedures were unduly restrictive. Some judges simply exercised their discretion to modify the procedures based on the needs of the case and their level of comfort with APVD during the final conference before trial. But others felt that the restrictions articulated in SO 1-15 had an inhibiting effect, especially on attorneys, that keeps them from even suggesting topics or questions that were not explicitly authorized. SO 1-15 should be amended to make it clear that the outlined procedures are advisory rather than the current construction that they are mandatory absent a judicial order expressly modifying those procedures. If so, it may also be useful to incorporate the procedures from the Panel Voir Dire Pilot Project into SO 1-15, to avoid confusion concerning two sets of protocols. SO 1-15 should also specify that the time and place for determining the scope and mechanics of jury selection should take place during the final conference before trial.

Educate judges, lawyers, and court officers on effective APVD practices. A great deal of judicial and lawyer education about APVD is already underway. The Education Working Group has been involved in a variety of CLE programs over the past year. In addition, the SJC Committee plans to conduct a statewide education session for trial court judges later in 2016 to describe findings from its year-long examination of APVD in the Superior Court and its recommendations for best practices in all of the trial courts. Both the Superior Court and the District Court have already dedicated sessions at their 2016 judicial education conferences to the topic of APVD.

Education programs are an excellent format for communicating formal policies and procedures. The SJC Committee should consider other formats for judicial and lawyer education that provide opportunities for judges and lawyers to observe and practice APVD and to share information among judges and between the bench and the bar about best practices. Some formats to consider include demonstrations of individual and panel APVD that also include explanations about jury instructions and about the mechanics of APVD. Demonstrations of effective discussions during the final conference before trial would also be valuable. These types of demonstrations can be videotaped and used repeatedly in different education programs as well as posted online for individual education. Supplemental education materials could include checklists for judges to consult during the final conference before trial and model jury instructions explaining APVD. The SJC Committee should also consider developing training for newly appointed trial judges that provides opportunities to observe APVD by respected senior colleagues. Finally, the SJC Committee should develop and deliver training for court officers and other court staff that features an explanation of the APVD process and the role of the court officer in APVD.

With respect to lawyer education, the SJC Committee should certainly encourage experienced trial judges to participate in CLE programs to provide a judicial perspective on APVD practices. The same educational materials that are provided for judicial education may also be used in lawyer education (e.g., PPT slides, checklists, jury instructions, video-taped demonstrations). These will help establish normal expectations for the practicing bar. In addition, to the extent possible, trial judges should seek out opportunities to engage state and local bar organizations in informal discussions about effective APVD. These types of discussions could help develop mutual expectations about issues such as the appropriate amount of time in which to conduct jury selection and the types of questions that are appropriate for different types of cases.

Develop APVD tools and resources. Some tools, such as checklists and model jury instructions, have already been identified as helpful reference materials for judges. During the third project meeting, judges also identified additional tools and resources that would have been useful during the first year of APVD. First, a standardize set of juror badges displaying a juror identification number would be helpful, especially during panel APVD in which it is sometimes difficult to keep track of which jurors are responding to attorney questions. Appropriate technology solutions should also be made available to address problems associated with recording/audio equipment, especially the difficulty in capturing juror responses to attorney questions during panel APVD. Handheld microphones that are wired into each courtroom's audio recording system might be one solution. Finally, several judges noted that additional court officers are often necessary to manage the APVD process efficiently. Developing local procedures that provide additional flexibility with court officer assignments would be useful.

Recommendations for other trial courts. Although the SJC Committee has learned a great deal about effective management of APVD through the project meetings with Superior Court judges, the lessons may not translate universally for use in the District Court, Boston Municipal Court, Juvenile Court, and Housing Court. The trials that take place in those courts generally involve less serious criminal and civil matters, and are significantly shorter in duration (usually only one to two days). Nevertheless, the judges serving in these courts understand that trials have substantial implications for the litigants involved and thus the selection of a fair and impartial jury is just as important in these courts as it is in the Superior Court. Many judges in the other trial courts are open to requests for expanding APVD, and some judges already permit APVD.[30] Given the general consensus among the Superior Court judges that APVD has improved the voir dire process, that attorneys have not abused the process, and that jurors do not appear to be

[30] In 2015, the District Court, Boston Municipal Court, Juvenile Court and Housing Court surveyed their respective judges concerning APVD. Judges reported that the rate of some form of APVD permitted in their most recent jury trial ranged from 10 percent in the Boston Municipal Court to 38 percent in the Juvenile Court. RESULTS AND ANALYSIS: SURVEY ON DISTRICT COURT VOIR DIRE PRACTICES (Oct. 2015); RESULTS AND ANALYSIS: SURVEY ON BMC COURT VOIR DIRE PRACTICES (Dec. 2015); RESULTS AND ANALYSIS: SURVEY ON JUVENILE COURT VOIR DIRE PRACTICES (Dec. 2015); RESULTS AND ANALYSIS: SURVEY ON HOUSING COURT VOIR DIRE PRACTICES (Dec. 2015).

offended by attorney questions, there is every reason to extend APVD to the other trial courts. There are, however, lingering concerns about the logistical impact on trial calendars.

One concern involves the additional time that may be involved in selecting juries in these cases, especially the likelihood that formerly one-day trials will take two or more days to complete with APVD. The Superior Court data confirm that APVD takes slightly longer per juror than judge-conducted voir dire, but it is not clear how much more time APVD would add to jury selection in the other trial courts, especially given smaller jury panels. The Superior Court data also suggest that attorneys tend to request APVD in more complex cases. If so, it is possible that a smaller proportion of attorneys will seek APVD in the other trial courts, thus reducing the overall impact.[31]

The Superior Court judges also reported that setting time limits for panel APVD resulted in shorter empanelments than would have occurred with individual APVD. Other trial court judges should therefore consider encouraging panel APVD rather than individual APVD as a means to control the length of jury selection. Judges in the other trial courts should not be discouraged by the difficulty reported by Superior Court judges in restricting the amount of time or the number of attorney questions during individual APVD. As noted above, APVD appears to be more prevalent in more complex cases with potentially more nuanced issues to explore during jury selection. Other trial court judges, presiding in cases that are more straight-forward, may have greater success with this technique.

One practice developed by the Superior Court that should be adopted by the other trial courts is requiring advanced written notice from attorneys seeking APVD. This will provide other trial court judges with sufficient time to organize trial calendars to accommodate the anticipated longer jury selection and to communicate with jury pool officers or other staff needed for trial. In particular, it may be necessary to request larger panels for trials involving APVD in the other trial courts to accommodate the expected increase in challenges for cause.[32] To the extent possible, trial judges should also discuss APVD with attorneys during the final conference before trial to establish mutual expectations about the scope of inquiry during voir dire.

Ongoing Monitoring by the Office of Jury Commissioner. To a certain extent, adjusting to APVD in the other trial courts will require a "wait and see" approach to learn how these practices adapt

[31] Prior to implementation of APVD, Superior Court judges expressed similar concerns about the length of time APVD would add to jury selection. While jury selection takes longer with APVD, it is not clear that APVD is the sole cause, or even the primary cause, of longer multi-day empanelments, which tend to cause the most disruption. In fact, recent analyses suggest that the rate of multi-day impanelments had been increasing for several years before implementation of APVD, especially in more complex cases. REPORT ON THE IMPLEMENTATION OF CHAPTER 254 OF THE ACTS OF 2014 "AN ACT RELATIVE TO CERTAIN JUDICIAL PROCEDURES IN SUPERIOR COURT" 7-8 (March 17, 2016).

[32] In the Superior Court, APVD resulted in more prospective jurors used compared to exclusively judge-conducted voir dire (56% more for individual APVD, 46% more for panel APVD). The Office of the Jury Commissioner should document the impact of APVD in terms of number of jurors used and modify standard panel sizes for APVD in the other trial courts accordingly.

in this environment. Documenting the impact of APVD on other trial courts would be very helpful for this purpose, but replicating the supplemental data collection forms that were employed by the Data Collection Working Group would likely produce an overwhelming amount of work given the trial volume in the other trial courts. To document basic information, the Office of Jury Commissioner should explore the possibility of adding additional fields indicating whether APVD took place and if so, which type (individual or panel) to the data that are routinely entered by court officers following every jury trial. These two fields would permit the SJC to continue to monitor the impact of APVD across all of the trial courts.

A related issue involves ongoing challenges associated with allocating scarce resources – namely, a limited supply of jurors in the jury pool – among trial courts competing for panels. To the extent that APVD contributes to longer empanelments in the Superior Court, it delays jury selection in the other trial courts, sometimes causing the trial to be continued. This dilemma predates implementation of APVD in the Superior Court. However, anecdotal reports suggest that some multi-use courts have developed effective communication strategies to minimize disruption caused by inter-court competition for jurors. As such problems are unlikely to subside in the future, the Office of Jury Commissioner and the Jury Management Advisory Committee should undertake a research project to observe and document practices in effective courts and attempt to replicate those practices statewide. That effort might also include implementing pilot projects in some courts to test the effectiveness of providing a sufficient jury pool to permit simultaneous, rather than consecutive, empanelments.

Individual versus panel APVD. The NCSC expressly declines to make a recommendation concerning whether the preferred form of APVD in Massachusetts should be individual or panel APVD. Indeed, it is important not to confuse the environment in which jury selection takes place (open court versus individual voir dire) with the identity of who poses questions to prospective jurors (judge or attorney). Open court proceedings serve a necessary function not only for the efficiency of jury selection, but also the transparency of a public trial. Individual voir dire is a particularly useful technique, however, for inquiring about sensitive topics that prospective jurors might be unwilling to disclose in open court. The decision about whether APVD should take place in open court (panel APVD) or individually should be determined based on the nature of the information sought, and not on whether it is the judge or attorneys who seek it.[33] Given that the amount of time expended during APVD is one minute or less per juror longer than judge-conducted voir dire, and that both forms of APVD elicit meaningful information about prospective jurors' ability to be fair and impartial, a decision about which form of APVD to pursue should be determined based on the needs of the case during discussions among the trial judge and attorneys during the final conference before trial.

[33] The findings of the Data Collection Working Group show that the amount of time expended during jury selection does not differ based on the form of APVD, and that both forms of APVD elicit meaningful information about prospective jurors' ability to be fair and impartial.

Appendix A: Project Participants

Superior Court Judges

Honorable John A. Agostini

Honorable Raymond J. Brassard

Honorable Kimberly S. Budd

Honorable Richard J. Chin

Honorable Renee P. Depuis

Honorable Kenneth V. Desmond, Jr.

Honorable Timothy Q. Feeley

Honorable Kenneth J. Fishman

Honorable Frank M. Gaziano

Honorable Bruce R. Henry

Honorable Garry V. Inge

Honorable Bertha D. Josephson

Honorable C. Jeffrey Kinder

Honorable Maynard M. Kirpalani

Honorable Peter B. Krupp

Honorable Angel Kelly Brown

Honorable Janet Kenton-Walker

Honorable Peter M. Lauriat

Honorable James R. Lemire

Honorable David A. Lowy

Honorable Edward J. McDonough, Jr.

Honorable David Ricciardone

Honorable Robert C. Rufo

Honorable Mary-Lou Rup

Honorable Janet L. Sanders

Honorable Kathe M. Tuttman

Honorable Joshua Wall

Honorable Douglas H. Wilkins

Honorable Paul D. Wilson

Other Participants

Associate Justice Barbara A. Lenk, Supreme Judicial Court, SJC Committee Chair

Chief Justice Judith Fabricant, Superior Court

Honorable Jennifer L. Ginsburg, District Court, Other Courts Subcommittee Chair of the SJC Committee

Maureen McGee, SJC Committee Staff Attorney

Appendix 3

Report on the Implementation of Chapter 254 of the Acts of 2014 "An Act Relative to Certain Judicial Procedures in Superior Court"

Submitted to the Supreme Judicial Court Voir Dire Committee

Data Collection Working Group

Chair
Honorable Robert C. Rufo

Members:
Honorable Maynard M. Kirpalani, Superior Court
Honorable Jennifer L. Ginsburg, District Court
Michael Anthony Sullivan, Clerk, Middlesex County Superior Court
Attorney Douglas Sheff
Professor Jordan Singer, New England Law
Paula Hannaford-Agor, National Center for State Courts
Pamela J. Wood, Office of Jury Commissioner
John W. Cavanaugh, Office of Jury Commissioner
Jeff Travers, Judicial Information Services Department
Linda K. Holt, Department of Research and Planning
Lee Kavanagh, Department of Research and Planning
Kevin T. Riley, Department of Research and Planning

June 1, 2016

Executive Summary

Over the course of the 12-month period starting with the February 2, 2015 implementation of Chapter 254 of the Acts of 2014, "An Act Relative to Certain Judicial Procedures in Superior Court," the Supreme Judicial Court Voir Committee has collected detailed information on the voir dire process in Superior Court jury trials. Significant findings include:

- Attorney-participation voir dire was used extensively across the Commonwealth during the first year of implementation:
    - Attorney-participation voir dire was used in 70% of all Superior Court empanelments, including 82% of all criminal empanelments and 54% of all civil empanelments;
    - Attorney-participation voir dire was used in thirteen of the fourteen counties in Massachusetts (all but Dukes County);
    - 95% of Superior Court judges presided over one or more empanelments using attorney-participation voir dire; and,
    - 40,374 jurors were sent to court rooms using attorney-participation voir dire and 30,998 jurors participated in further questioning by judges and attorneys in those courtrooms.
- The data suggest that attorney-participation voir dire contributes to the decision-making process of identifying indifferent jurors:
    - In attorney-participation voir dire, 26% of all challenges for cause occurred during the attorney-participation portion of the voir dire (after the questioning by the judge had concluded), suggesting that the additional questioning may improve the identification of indifferent jurors;
    - In attorney-participation voir dire, 62% of the challenges for cause asserted during the attorney-participation phase of the voir dire were allowed, again suggesting that the additional questioning may result in the identification of indifferent jurors; and,
    - The participation rate of jurors (the percent of jurors participating in voir dire questioning by a judge or attorney) was higher in those empanelments using attorney-participation voir dire.

- The data suggest that attorney-participation voir dire was implemented without undue impact on court operations:

    - When comparing the first year of Chapter 254 implementation with the prior calendar year (2014), there was a slight increase in the number of multi-day empanelments. The increase in this measure appears to be part of a longer-term trend that cannot clearly be associated with the implementation of attorney-participation voir dire;

    - Attorney-participation voir dire was used more extensively in those cases where empanelments typically take longer due to the serious nature of the matter (life offenses and complex civil cases) and/or the number of jurors participating in the empanelment process. While the total length of empanelment time was greater in the attorney-participation voir dire, this was associated with the type of case and the number of jurors participating in the empanelment. The average difference in time per juror was less than one minute.

    - Similarly, more jurors were sent to cases with attorney-participation voir dire, and more jurors were used on average, than in judge-conducted voir dire. Therefore, the juror participation rate was higher in attorney-participation voir dire (more serious cases) than in judge-conducted voir dire (less serious cases).

    - Comparing the implementation period with calendar year 2014, on average there was no change in the number of jurors sent to each courtroom nor in the percentage of jurors participating in the empanelment process.

Supreme Judicial Court Voir Dire Committee

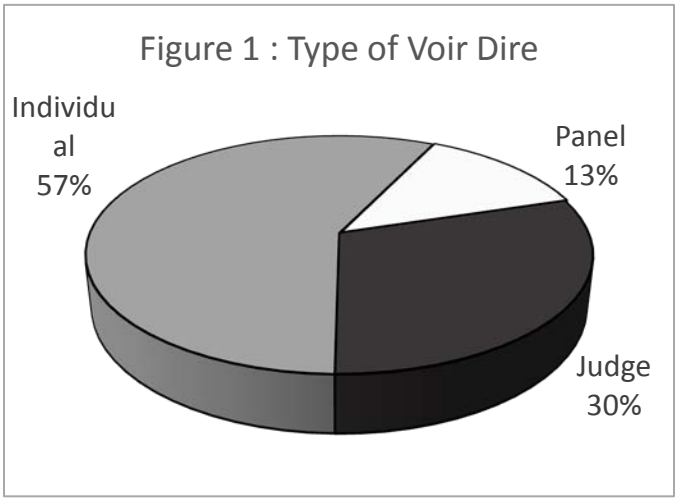
Report of Data Collection Working Group

The Data Collection Working Group is reporting on the first year of the new voir dire in the Superior Court, February 2 2015 – January 29 2016. During that period a total of 968 empanelments were conducted.

Type of Voir Dire

Following implementation of Chapter 254, voir dire now consists of two phases. In the first phase, the judge conducts voir dire of potential jurors and in the optional second phase, attorneys participate in voir dire of potential jurors. The second or "attorney-participation" voir dire is at the option of the attorneys or self-represented parties. The attorney-participation portion of the voir dire can be done using one of two methods: individual or panel. To evaluate the impact of Chapter 254, empanelments were divided into three groups based on the type of voir dire:

- Judge-conducted voir dire identifies those empanelments where there was no attorney-participation (or self-represented party) voir dire at any point during the process. This is similar to the form of voir dire that occurred prior to the implementation of Chapter 254, although prior to the statutory mandate, many judges allowed attorney participation in voir dire;



- Attorney-participation Individual voir dire identifies those empanelments where there was some attorney-participation (or self-represented party) voir dire of individual jurors at the side bar or outside the presence of other jurors and there is no use of attorney-participation (or self-represented party) panel voir dire at any time.

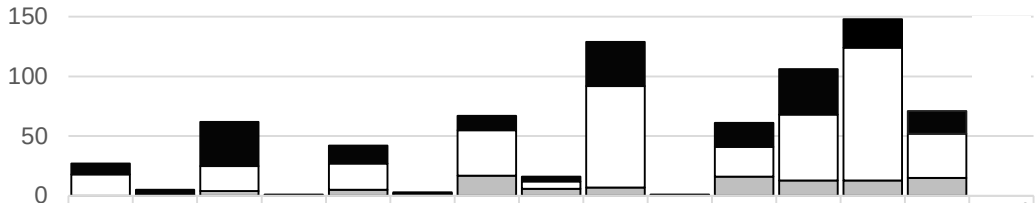
- Attorney-participation Panel Voir Dire identifies those empanelments where there was attorney-participation (or self-represented party) voir dire of a group of jurors at some time during the empanelment process. Empanelments were assigned to panel voir dire even if there was some individual voir dire of jurors at some point during the process.

In the first year following implementation of Chapter 254, a total of 968 Superior Court jury empanelments occurred. Supplemental data collection forms were submitted for 76% (or 739) of these empanelments. During the study period, there was substantial use of attorney-participation voir dire. Of the 739 empanelments where a supplemental data form was submitted, traditional judge-conducted voir dire occurred in 30% (or 220) of these empanelments. Attorney-participation voir dire occurred in 70% of the empanelments: 57% (or 420) were individual voir dire and 13% (or 99) were panel voir dire.

Regional Use of Attorney-participation Voir Dire

The new attorney-participation voir dire was used in all but one county (Dukes). The panel method was used in eleven counties and the individual method was used in twelve counties.

Figure 2 : Type of Voir Dire by County

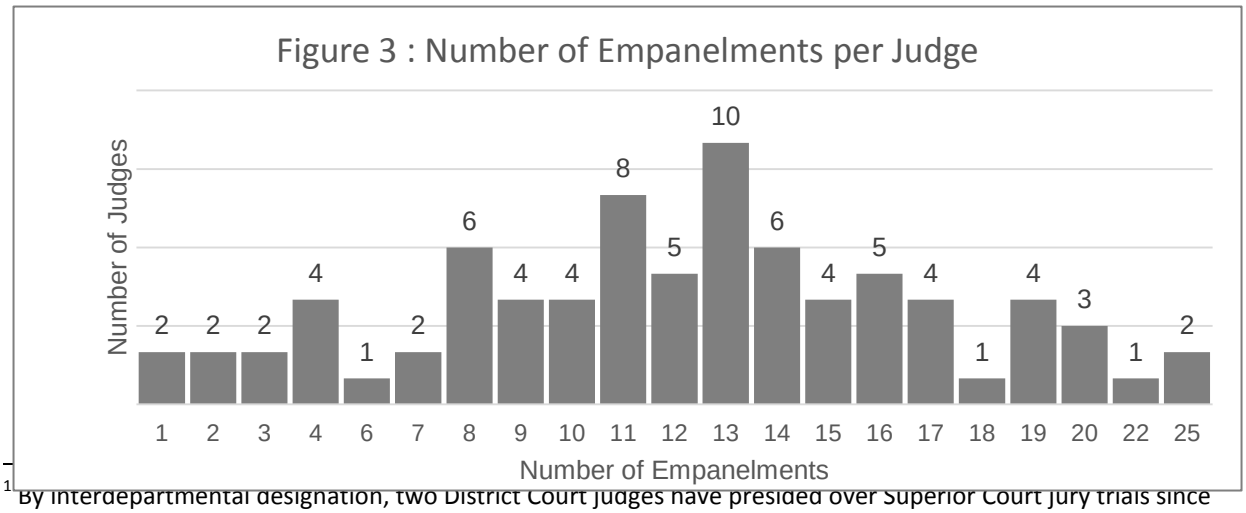


	BAR	BER	BRI	DUK	ESS	FRA	HMD	HMS	MID	NAN	NOR	PLY	SUF	WOR	Total
Judge	9	4	37	1	15	0	12	4	37	0	20	38	24	19	220
Individual	18	0	21	0	22	1	38	6	85	1	25	55	111	37	420
Panel	0	1	4	0	5	2	17	6	7	0	16	13	13	15	99
Sub-Total APVD	18	1	25	0	27	3	55	12	92	1	41	68	124	52	519
Grand Total	27	5	62	1	42	3	67	16	129	1	61	106	148	71	739

Judicial Involvement in Voir Dire

During the first year of implementation, a total of 80 judges participated in one or more empanelments.[1] The number of empanelments per judge ranged from one to 25 during this time period and the median number of empanelments per judge was twelve.[2]

Figure 3 : Number of Empanelments per Judge

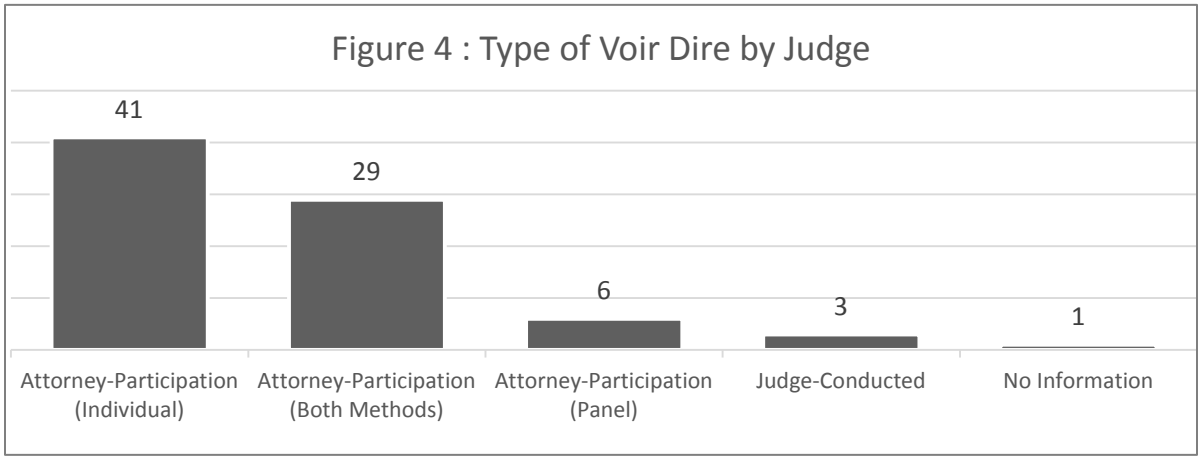


[1] By interdepartmental designation, two District Court judges have presided over Superior Court jury trials since February 2, 2015.

[2] The **mean** is what is most commonly thought of as the 'average.' It is found by adding all the numbers of the set and dividing by the number of terms. The **median** is the middle number in a group of numbers. It can be the best 'average' to use when you have a set of data that contains outliers.

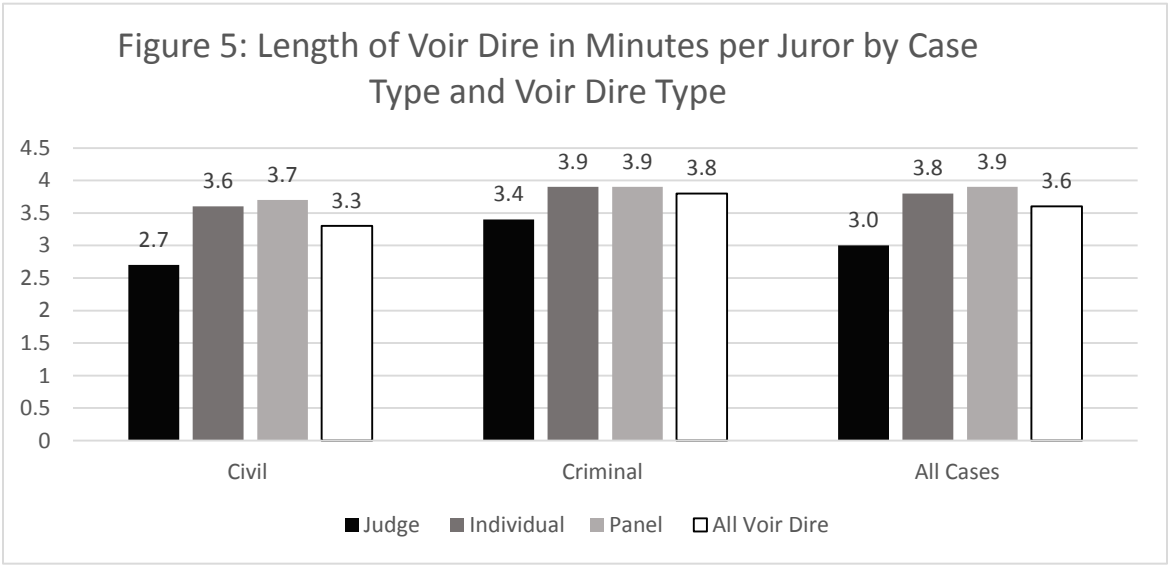
Of the 80 judges in the sample, 76 (or 95%) presided over one or more attorney-participation voir dire:

- 70 judges presided over one or more attorney-participation individual voir dire cases (including 29 who also did panel voir dire); and
- 35 judges presided over one or more attorney-participation panel voir dire cases (including 29 who also did individual voir dire).



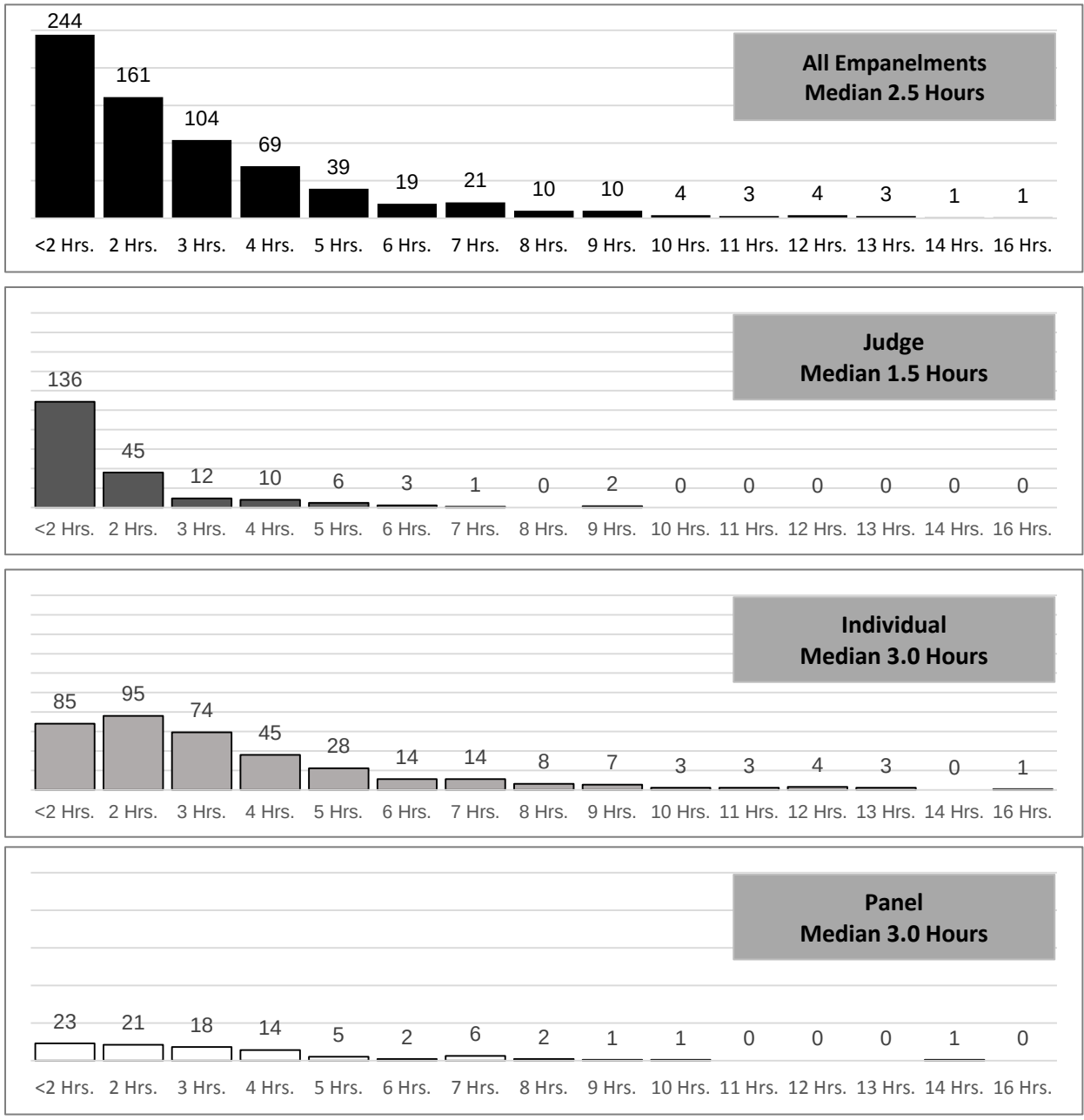
Length of Voir Dire

For all empanelments, the length of voir dire ranged from under 2 hours to 16 hours. The length of voir dire is related to the type of case and the number of jurors in the venire. The following chart shows the average number of minutes per juror questioned during the empanelment. In general, criminal empanelments took about ½ minute longer per juror than civil empanelments (3.8 minutes for criminal empanelments and 3.3 minutes for civil empanelments). Both individual (3.8 minutes) and panel (3.9 minutes) voir dire took less than one minute longer per juror than judge-only (3.0 minutes) voir dire.



The median length of voir dire was 2.5 hours and the mean was 3.1 hours. In some cases voir dire encompassed multiple days. The length of voir dire was longer in the attorney-participation voir dire cases (which also tended to be the more complex or cases with serious charges or claims) although there was no difference between individual voir dire (median of 3.0 hours) and panel voir dire (median of 3.0 hours). As can be seen in the following figure, judge-only voir dire was associated with a large proportion of empanelments that were relatively short (under 2 hours), which is most likely due to the fact that judge-only voir dire was more likely to be chosen by the parties in cases with less serious charges.

Figure 6: Length of Voir Dire by Voir Dire Type



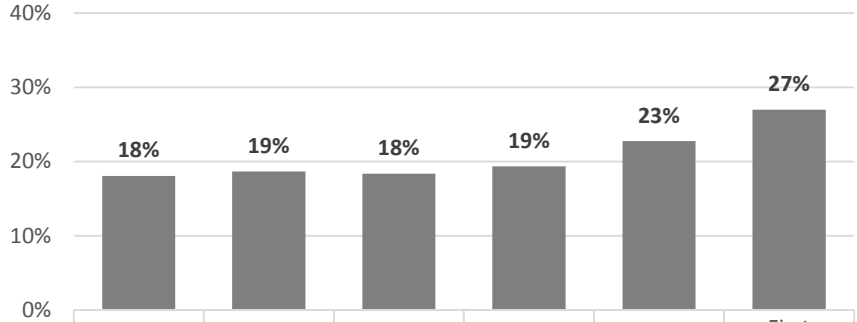
Multi-Day Empanelments

Empanelments can last more than one day. As shown in the following figure, since 2012, the number of empanelments has decreased at the same time that the proportion of multi-day empanelments has increased.

The number of multi-day empanelments in the first year of implementation of Chapter 254 is

consistent with this trend.[3]

Figure 7: Multi-day Empanelments, 2010 through 2015

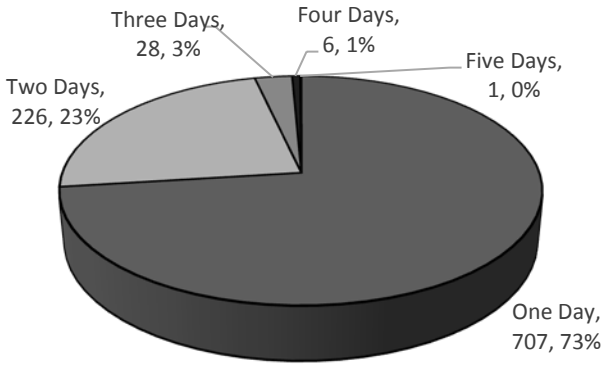


	2010	2011	2012	2013	2014	First Year Ch. 254
% Multi-day Empanelments	18%	19%	18%	19%	23%	27%
Single Day Empanelments	1,086	967	876	900	832	707
Multi-day Empanelments	239	222	197	216	245	261
Total Impanelments	1,325	1,189	1,073	1,116	1,077	968

Looking at empanelments in the first year of Chapter 254 implementation, the length of empanelments ranged from one day to five days; 73% of all empanelments were one day and 27% of all empanelments were multi-day.

The proportion of multi-day empanelments varied by the type of case. Criminal cases had much more extensive use of multi-day empanelments: 37% of criminal cases and 14% of civil cases had multi-day empanelments.

Figure 8: Length of Empanelments

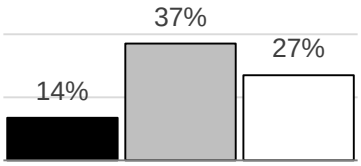


Attorney-participation voir dire had much more extensive use of multi-day empanelments: 36% of the individual voir dire and 29% of the panel voir dire required a multi-day empanelment process, but again,

[3] The "first year of Chapter 254 encompasses the period February 2, 2015 through January 29, 2016.

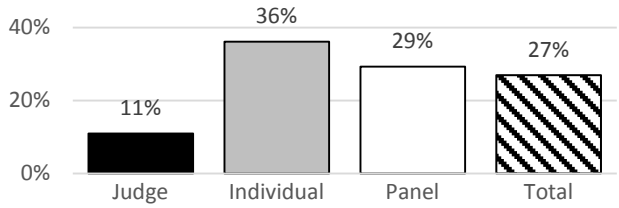
this is likely related to the fact that attorneys elected to participate in cases with more serious charges or claims, which have always been associated with multi-day empanelments.[4]

Figure 9 : Multi-Day Empanelments by Case Type



	Civil	Criminal	Total
% Multi-Day	14%	37%	27%
One Day	358	349	707
Multi-Day	56	205	261
Total	414	554	968

Figure 10: Multi-Day Empanelments by Voir Type

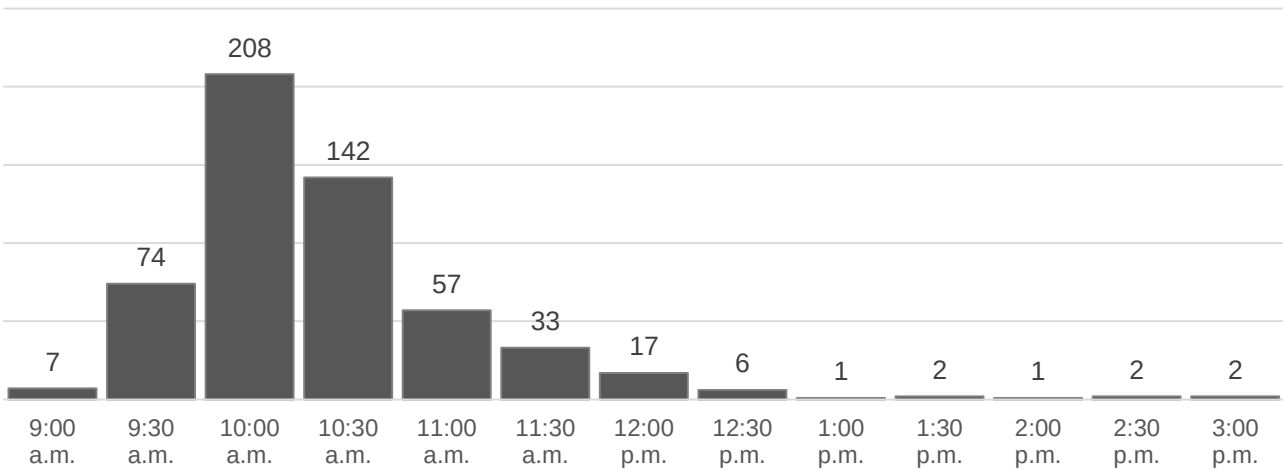


	Judge	Individual	Panel	Total
% Multi-Day	11%	36%	29%	27%
One Day	196	268	70	707
Multi-Day	24	152	29	261
Total	220	420	99	968

Empanelment Start Time

The start time of all empanelments was available for 552 cases (57%). Empanelments started as early as 9:00 a.m. and as late as 3:00 p.m. Of these empanelments, 52% started by 10 a.m. [5]

Figure 11 : Empanelment Start Time



[4] Figure 10 does not display the results for the 229 empanelments for which voir dire type was not available. Those cases are included in the total.

[5] In 135 of 150 multi-day empanelments, voir dire started at the same time or earlier on day 2 than on day 1. All start times reflect the latest time in the interval (e.g. 11:30 a.m. means 11:01 a.m. to 11:30 a.m.)

Challenges for Cause

Challenges for cause could occur during either phase of the voir dire.[6]

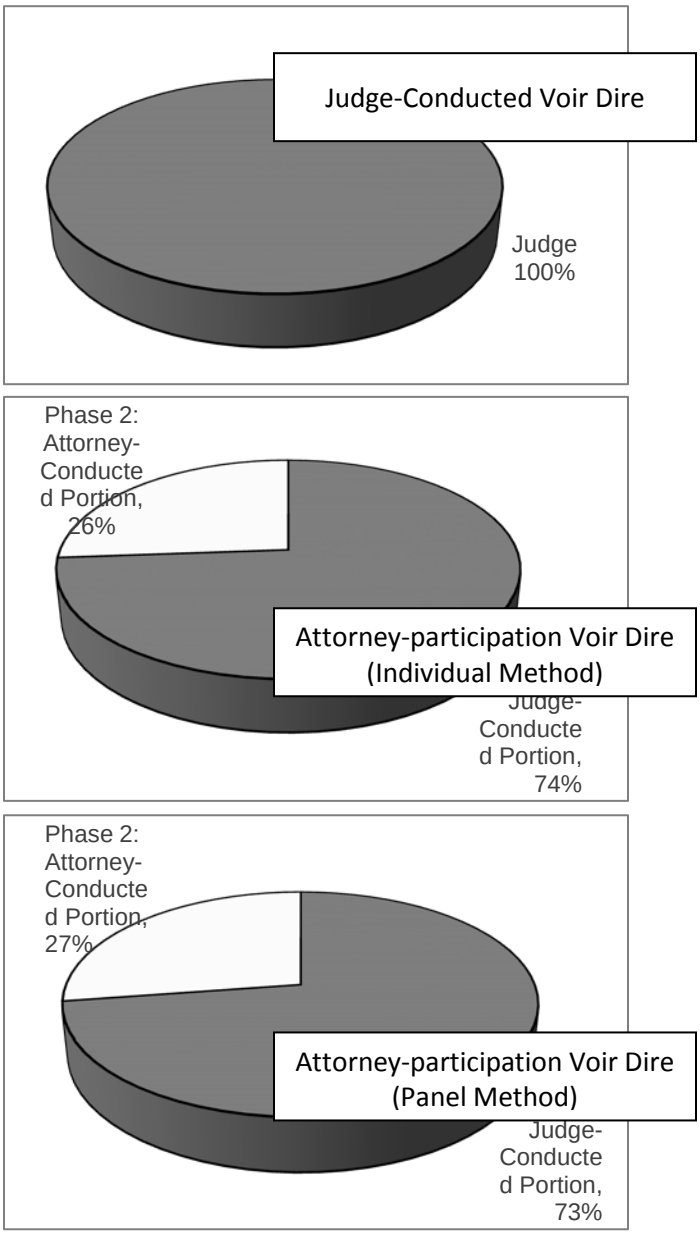
- By definition, in the judge-conducted voir dire, 100% of the challenges occurred during the first phase of voir dire;

- In the attorney-participation voir dire, 74% of the challenges for cause allowed occurred during the first phase of the voir dire (judge-conducted) and 26% occurred during the second phase of the voir dire (attorney-participation);

    - For the attorney-participation voir dire using the **individual** method, 74% of the challenges for cause allowed occurred during the first phase of the voir dire and 26% of the challenges for cause allowed occurred during the second phase;

    - For the attorney-participation voir dire using the **panel** method, 73% of the challenges for cause allowed occurred during the first phase of the voir dire and 27% of the challenges for cause allowed occurred during the second phase.

Figure 12: % Challenges Allowed by Phase and Type of Voir Dire

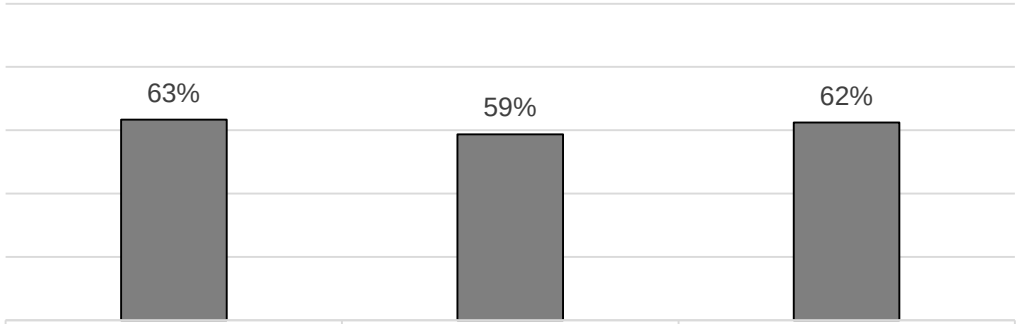


[6] Information on challenges for cause was available in 725 empanelments. A total of 5,601 jurors were challenged for cause in this sample.

Data was collected on jurors challenged for cause during both phases of the voir dire: during the judge-conducted portion of the voir dire, data was collected on challenges for cause allowed; during the attorney-participation portion of the voir dire, data was collected on challenges asserted and challenges allowed. This information was available for all reported cases with the exception of 12 individual and two panel voir dire.

In the 408 attorney-participation individual voir dire empanelments, 63% of the challenges asserted during the second phase of the voir dire were allowed. In the 97 attorney-participation panel voir dire empanelments, 59% of the challenges asserted were allowed.

Figure 13 : Total Challenges Asserted and Allowed During Attorney-participation Portion of Voir Dire

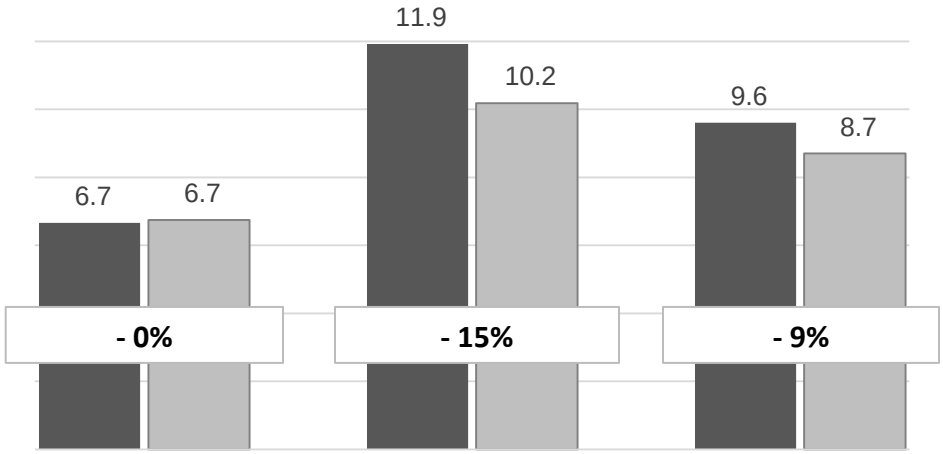


	Attorney-Conducted Individual	Attorney-Conducted Panel	Attorney-Conducted Total
% Allowed	63%	59%	62%
Asserted	1,485	376	1,861
Allowed	941	221	1,162

Peremptory Challenges

The Office of Jury Commissioner also collected information for the data collection working group on the number of peremptory challenges over the past two years (which is roughly the one year period before and after the implementation of attorney-participation voir dire). The average number of peremptory challenges decreased from 9.6 in 2014 to 8.7 in 2015. There was no change for civil case empanelments and a decrease in the use of peremptory challenges in criminal case empanelments from 11.9 to 10.2 peremptory challenges per empanelment.

Figure 14: Peremptory Challenges by Case Type, 2014 and 2015



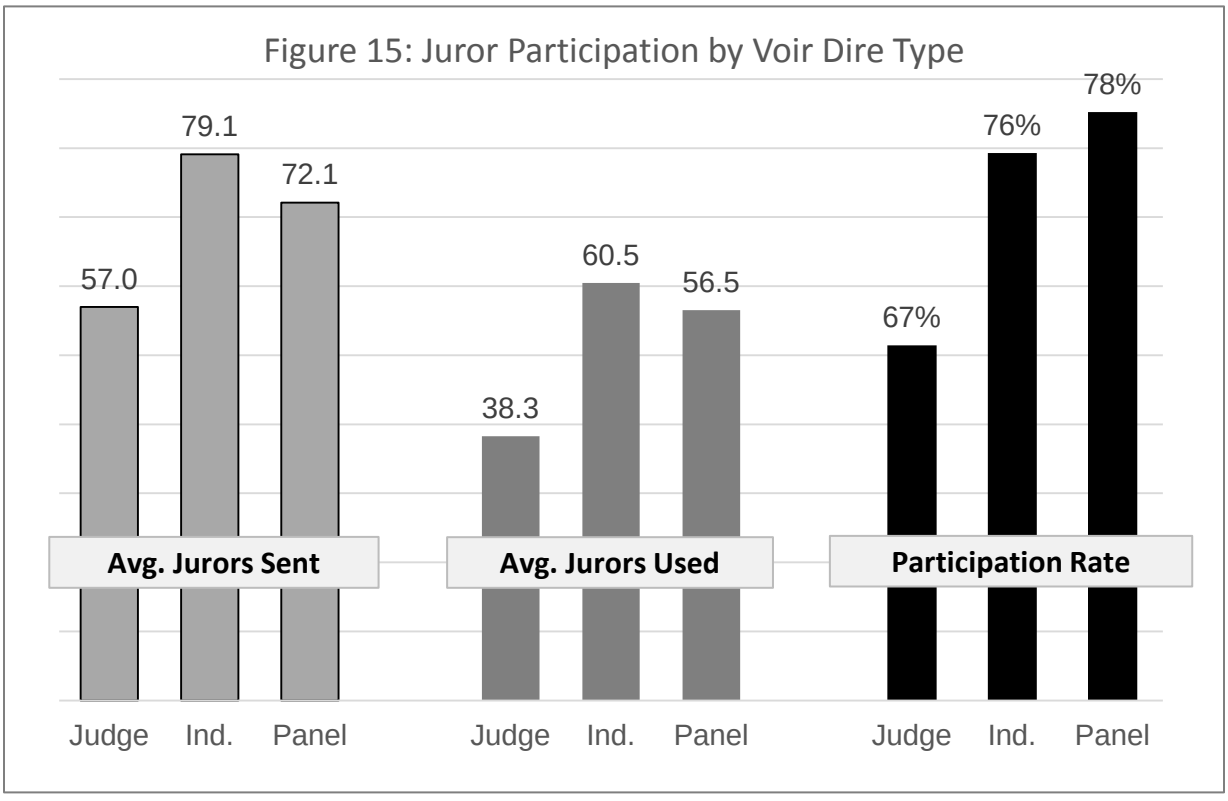
	Civil (2014)	Civil (2015)	Criminal (2014)	Criminal (2015)	All Cases (2014)	All Cases (2015)
Average Peremptories	6.7	6.7	11.9	10.2	9.6	8.7
Defense	1,520	1,204	4,205	2,931	5,725	4,135
Plaintiff / Prosecution	1,645	1,338	2,974	2,159	4,619	3,497
Total	3,165	2,542	7,179	5,090	10,344	7,632

Juror Participation

During the first year of the new voir dire, 40,374 jurors were sent to courtrooms using attorney-participation voir dire and 30,998 participated in voir dire questioning by judges and attorneys.

As has always been the case, more serious matters (murders and other life offense cases) require larger numbers of jurors to empanel. Attorneys also elected to participate in voir dire in these cases more often, while less serious matters were more likely to use judge-only voir dire. As a result, the data show that more jurors were sent to cases with attorney-participation voir dire, and more jurors were used on average, than in judge-conducted voir dire. Therefore, the juror participation rate was higher in attorney-participation voir dire (more serious cases) than in judge-conducted voir dire (less serious cases). The determining factor in number of jurors sent and number participating in the empanelment is more likely associated with the type of case (causation) than the type of voir dire employed (correlation).

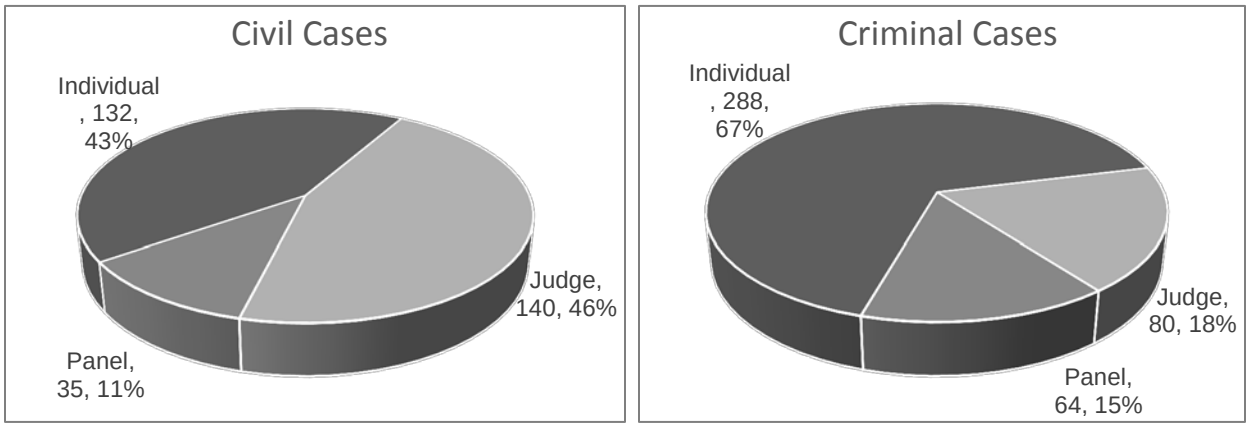
During the Attorney Participation in Voir Dire data collection period for all Superior Court cases, the average number of jurors sent to the courtroom was 70.8 jurors per empanelment and the average number of jurors participating in voir dire was 52.8. In 2014, the last full year before the implementation of Attorney Participation in Voir Dire, 70.5 jurors per empanelment were sent to the courtroom and 52.5 jurors participated in voir dire.



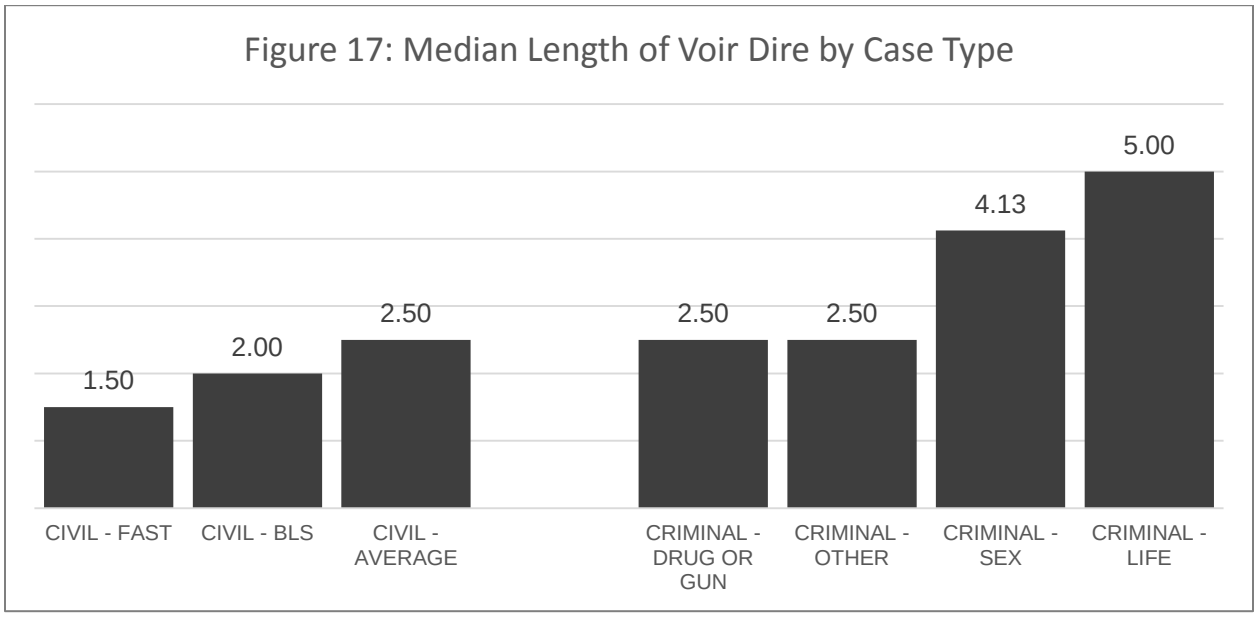
Type of Case

Of the 968 empanelments in this year long period, 554 (57%) were criminal and 414 (43%) were civil. Attorney-participation voir dire occurred in 54% of the civil empanelments and 82% of the criminal empanelments. Civil cases were assigned to a case type based on the track assignment, while criminal cases were assigned a case type based on the main charge. SDP empanelments were included with other "Criminal-Sex" empanelments for the purpose of this analysis. Life cases included murder, robbery, and home invasion cases.

Figure 16: Voir Dire Type by Case Type



The length of voir dire varied by case type. Among civil cases, those cases assigned to the Civil – Average track had the longest median time of voir dire. Among criminal cases, life offense cases (including murder and other life felony cases) had the longest median time of voir dire.



Summary

In summary, this analysis of the first year of implementation suggests the following:

- The attorney-participation voir dire process has been widely accepted, and is being used by most courts, many attorneys, and virtually all Superior Court judges;

- The attorney-participation voir dire process is associated with slightly longer empanelment times (25%, or slightly less than one minute per juror) as compared with the judge-conducted voir dire; and

- With respect to impact on court resources, the new attorney-participation voir dire process needs to continue to be evaluated. In the first year of the new procedures, there was no change in the average number of jurors sent to empanelments overall, although the parties elected to use attorney-participation voir dire more often in more complex cases that require more jurors to be sent to the courtroom.

Appendix 4

Analysis of Attorney, Clerk, Judge and Juror Voir Dire Surveys Pertaining to the Implementation of Chapter 254 of the Acts of 2014 "An Act Relative to Certain Judicial Procedures in Superior Court"

Submitted to the
Supreme Judicial Court Voir Dire Committee

Data Collection Working Group

Chair
Honorable Robert C. Rufo

Members:
Honorable Maynard M. Kirpalani, Superior Court
Honorable Jennifer L. Ginsburg, District Court
Michael Anthony Sullivan, Clerk, Middlesex County Superior Court
Attorney Douglas Sheff
Professor Jordan Singer, New England Law
Paula Hannaford-Agor, National Center for State Courts
Pamela J. Wood, Office of Jury Commissioner
John W. Cavanaugh, Office of Jury Commissioner
Jeff Travers, Judicial Information Services Department
Linda K. Holt, Department of Research and Planning
Lee Kavanagh, Department of Research and Planning
Kevin T. Riley, Department of Research and Planning

June 1, 2016

Introduction

In a concerted effort to monitor and measure the implementation of Chapter 254 of the Acts 2014, An Act Relative to Certain Judicial Procedures in the Superior Court, the data collection working group solicited feedback from attorneys, clerks, judges and jurors pertaining to the voir dire process. The following represents an analysis of the responses to the Supreme Judicial Court Voir Dire Committee Survey of attorneys, clerks, judges and jurors.

Analysis of respondent data is suggestive of three very positive underlying themes pertaining to the voir dire process:

- **High-Quality Jury Selection**: An abundance of favorable data with respect to juror experience, challenges for cause, peremptory challenges and attorney topics, indicates all three voir dire formats as demonstrating significant utility in selecting a quality jury;
- **Juror Experience**: The experience of jurors was very positive, exceeding the perceptions of attorney, clerk and judge respondents;
- **Timeliness**: Although timeliness in selecting a jury remains a key area of continuous improvement, it is abundantly clear that selecting a fair and impartial jury is the first priority of attorneys, clerks and judges involved in the voir dire process.

Part 1: Data Collection Protocol

The survey data collection process began on 10/05/2015 and concluded at the close of business on 02/19/2016. In an effort to achieve a satisfactory response rate, data collection protocols differed by respondent type:

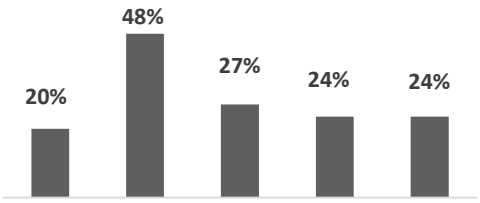
- **Attorneys**: At the conclusion of each trial, judges requested that each attorney participate in this survey and court officers then provided all attorneys with a detailed instruction sheet on accessing and completing the survey. A reminder e-mail with a link to the survey was also forwarded to each attorney involved in that case. Attorneys are included in the sample more than once if they were involved in multiple empanelments throughout the data collection time frame;
- **Clerks**: All clerk magistrates and assistant clerks received an initial e-mail on 01/12/2016 with detailed instructions on how to access and complete this survey. A reminder e-mail was forwarded to all clerk magistrates and assistant clerks on 01/20/2016;
- **Judges**: All superior court judges received an e-mail from Chief Justice Judith Fabricant requesting participation in the survey. This e-mail request contained a link to the survey instrument. Individual judges received a reminder e-mail at the conclusion of each trial. Judges are included in the sample more than once if they were involved in multiple empanelments throughout the data collection time frame;
- **Jurors**: At the beginning of the voir dire process, judges requested that jurors participate in this survey. Upon completion of service in that courtroom, court officers provided all jurors, regardless of whether they were utilized, discharged, or empaneled, with a detailed instruction sheet on accessing and completing the survey. Jurors providing e-mail addresses to the Office of Jury Commissioner were e-mailed instructions on how to access and complete this survey.

Jurors are included in the sample more than once if they were in multiple courtrooms over the course of their jury service.

Survey Respondents & Response Rates

In total, 12,777 requests were issued for participation in this survey, resulting in 3,030 completed surveys for analysis (a total response rate of 24%). Of the 3,030 survey responses, 2,722 (90%), were from juror respondents, 175 (6%), were from attorney respondents, 77 (2%), were from judge respondents, and 56 (2%) were from clerk respondents. Of the 171 attorney respondents identifying their role, 36% identified as prosecutor/plaintiff's counsel while 64% identified as defense counsel. Response rates varied by respondent type.

Figure 1: Response Rate by Respondent Type

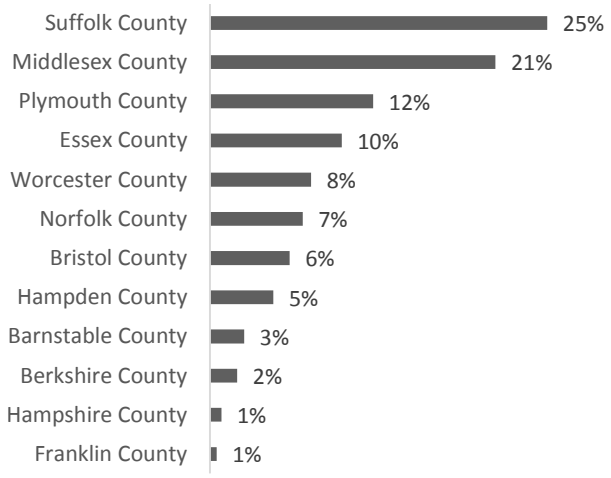


	Attorney	Clerk	Judge	Juror	Total
Response Rate	20%	48%	27%	24%	24%
Sent	838	115	284	11,540	12,777
Completed	175	56	77	2,722	3,030

Part 2: Respondent Locality

To determine respondent locality, attorney and judge respondents were asked to provide the docket number of the case for which they were completing the survey. Juror respondents identified either the courthouse or city/town in which they completed jury service. Respondent locality was determined in 95% of survey responses. Clerk respondents were not asked to provide a docket number or indicate their location. Approximately 70% of respondents for which locality could be determined were from Suffolk, Middlesex, Plymouth and Essex counties.

Figure 2: Locality of Attorney, Judge and Juror Survey Respondents

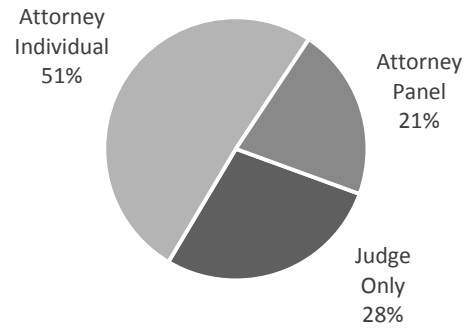


Part 3: Type of Voir Dire

Attorney and judge respondents indicated the type of voir dire for each empanelment. Attorney participation voir dire was utilized in 72% of empanelments (51% individual and 21% panel). The remaining 28% of empanelments were traditional judge-only voir dire.

Of empanelments utilizing attorney voir dire, 61% of respondents indicated attorney voir dire

Figure 3: Type of Voir Dire



being requested by both prosecutors/plaintiffs and defense counsel.

Clerk respondents indicated how many of each voir dire type they observed. Of clerk respondents, 42% observed both attorney individual and attorney panel voir dire, 45% observed attorney individual voir dire only, and 13% did not observe attorney participation voir dire.

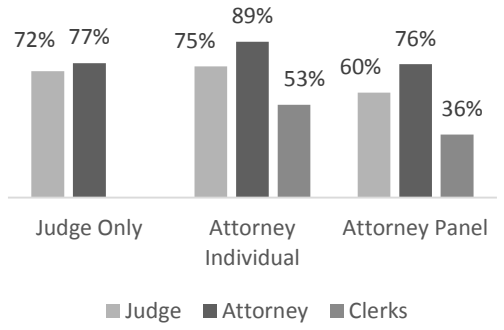
Part 4: Role of Voir Dire in Selecting a Quality Jury

Attorney, clerk and judge respondents were asked a series of questions designed to measure the utility of the voir dire process in soliciting relevant juror information as a basis for asserting challenges for cause and exercising peremptory challenges. Attorney, clerk and judge respondents indicated all three voir dire formats as having produced useful juror information. Of juror respondents, 91% indicated that all or most of the questions asked by judges were useful in deciding who should be seated on the jury, 73% indicated that all or most of the questions asked by prosecutors/plaintiffs were useful in deciding who should be seated on a jury, and 72% indicated that all or most of the questions asked by defense counsel were useful in deciding who should be seated on the jury.

Challenges for Cause

In empanelments utilizing attorney individual voir dire, attorney (89%) and judge (75%) respondents indicated this format was useful in soliciting relevant juror information on which to assert challenges for cause. 53% of clerks observing attorney individual voir dire considered this format useful in eliciting information for the judge to decide challenges for cause. 36% of clerks who observed attorney panel voir dire considered this format useful in eliciting information for the judge to decide challenges for cause.

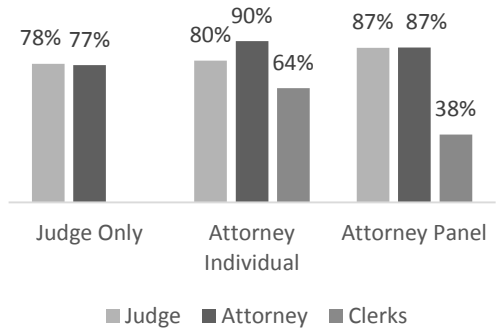
Figure 4: Utility of Information Solicited by Voir Dire Format for Asserting Challenges for Cause as Rated by Attorney, Clerk and Judge Respondents



Peremptory Challenges

In empanelments utilizing attorney individual voir dire, attorney (90%) and judge (80%) respondents indicated this format as being useful in soliciting relevant juror information on which to exercise peremptory challenges. Of clerk respondents observing attorney individual voir dire, 64% considered this format useful in providing information for attorneys to exercise peremptory challenges, while only 38% of clerks who observed attorney panel voir dire considered this format useful in providing information for attorneys to exercise peremptory challenges.

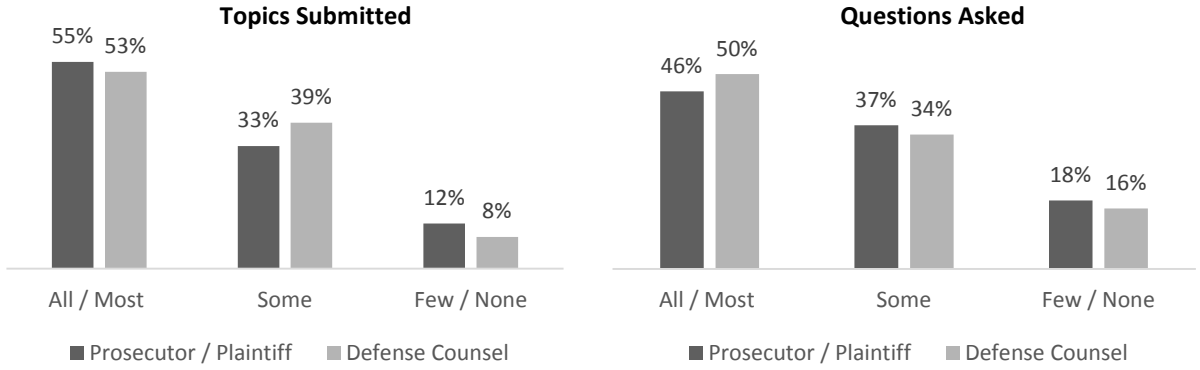
Figure 5: Utility of Information Solicited by Voir Dire Format for Exercising Peremptory Challenges as Rated by Attorney, Clerk and Judge Respondents



Judge Respondents Rated the Quality of Attorney Topics and Questioning of Jurors

Judge respondents were asked a series of questions designed to gauge the quality of topics submitted by attorneys and the questions attorneys asked of jurors, with respect to the likelihood of eliciting relevant juror information necessary to select a jury. Judge respondents indicated that the topics submitted by attorneys had a slightly higher likelihood of eliciting relevant juror information necessary to select a jury than did the questions attorneys asked of jurors directly. It was also the perception of judge respondents that while prosecutor/plaintiff attorneys submitted higher quality topics, defense counsel asked higher quality questions to jurors.

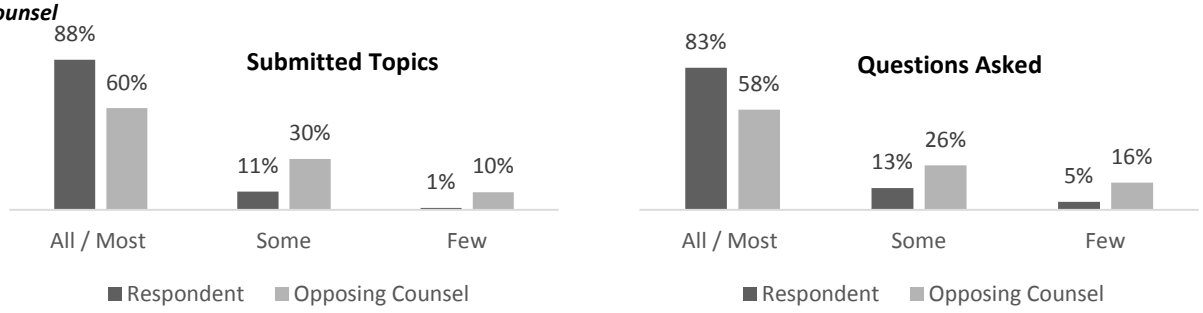
Figure 6: Judge Respondents Rated the Quality of Topics Submitted by Attorneys and the Questions Attorneys Asked of Jurors With Respect to the Likelihood of Eliciting Relevant Juror Information Necessary to Select a Jury



Attorney Respondents Rated the Quality of Attorney Topics and Questioning of Jurors

Attorney respondents were asked a series of questions designed to rate the quality of topics they submitted to judges and the questions they asked of the jurors, with respect to the likelihood of eliciting relevant juror information to select a jury. Respondents were also asked to rate the same of opposing counsel. Overall, attorney respondents perceived that the majority of topics submitted to judges and the majority of questions asked of jurors were likely to elicit relevant juror information to select a jury, regardless of which attorney submitted the topics and questions. Further, it was the perception of the respondent attorney that the topics submitted by them and the questions asked of jurors by them, were of higher quality than those of opposing counsel.

Figure 7: Attorney Respondent Perception of the Quality of the Their Topics and Questions Compared With That of Opposing Counsel

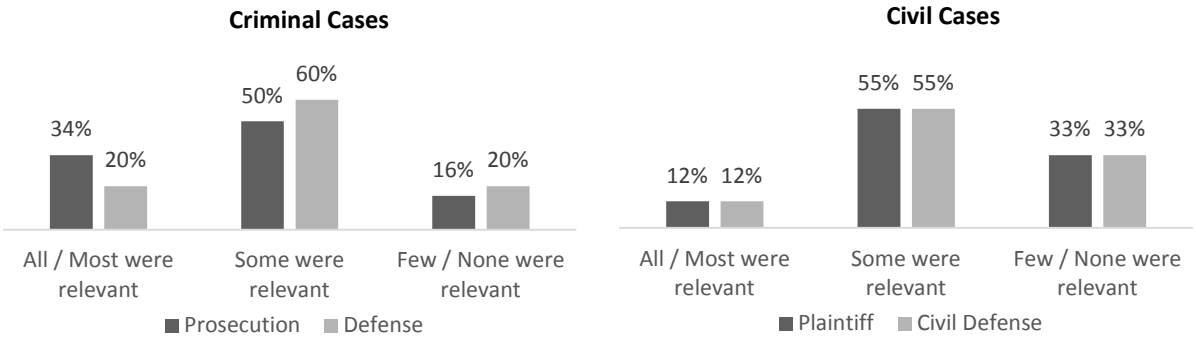


Relevance of Attorney Questioning as Indicated by Clerk Respondents

Clerk respondents were asked a series of questions to gauge the relevance of questions being asked of jurors by the attorneys in both criminal and civil empanelments. Data indicates that clerk respondents held the perception that in criminal cases a higher proportion of questions being asked of jurors by attorneys were relevant in empanelments than in civil cases:

- **Criminal Case Empanelments:** 34% of clerk respondents indicated that all or most of the questions asked of jurors by the prosecution were relevant to the case at hand, while only 20% of the questions asked of jurors by defense counsel were relevant to the case at hand;
- **Civil Case Empanelments:** Clerk respondent data indicated no variation in the relevance of questioning in civil cases between plaintiff attorneys and civil defense counsel. 12% of clerks indicated that all or most of the questions asked of jurors in civil cases were relevant to the case at hand, while 33% of clerk respondents indicated that few or none of the questions asked of jurors in civil cases were relevant to the case at hand.

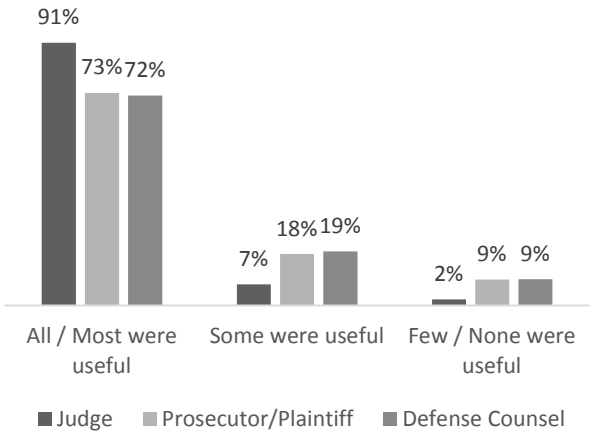
Figure 8: Clerk Respondents' Perception of the Relevance of Questions Being Asked of Jurors in Empanelments for Criminal and Civil Cases



Utility of Judge and Attorney Questioning as Indicated by Juror Respondents

Juror respondents were asked a series of questions designed to gauge the utility of questions, asked of them by judges and attorneys, in deciding who should be seated on the jury. Responses were very positive, as juror respondents perceived 91% of the questions asked of them by judges as all or mostly useful in deciding who should be seated on the jury. Further, juror respondents who were asked questions by attorneys perceived the majority of their questions to be useful in deciding who should be on the jury. A possible explanation of jurors' lower rating of attorney questioning is that judges have the first opportunity to ask questions of jurors, including asking all of the legally mandated questions. The attorney questions, therefore, are follow-up to judge questions, and may or may not be as on point, or may be into less obviously germane topics.

Figure 9: Juror Respondents' Perception of the Utility of Questions Asked of Them by Judges and Attorneys



Attorney Topics Allowed by the Judge

Attorney respondents were asked if there were any topics they wanted to address with jurors that were disallowed. Of attorney respondents submitting topics for questioning as part of attorney participation voir dire, 18% indicated having topics disallowed by the judge. Open-ended commentary pertaining to these topics was provided by attorney respondents and analyzed for underlying themes:

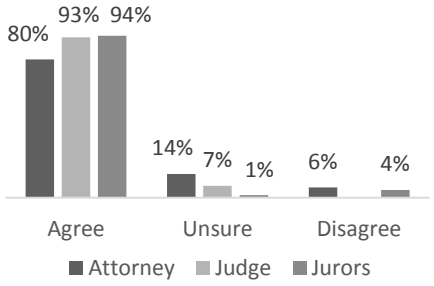
- Underlying Themes: Questions concerning legal topics that were disallowed, burden of proof, presumption of innocence, juror's opinions, and details of juror's prior jury service.
- Sample Responses:
    - "Questions related to legal topics, such as the Burden of Proof and Presumption of Innocence. While preventing me from asking such questions, the court however did ask the whole panel related questions."
    - "A variety of topics including views on the "insanity defense", how prospective jurors might be affected by the nature of a grisly sexual homicide, and views on the treatment of juveniles in the criminal justice system."
    - "Attitudes and perceptions regarding identification evidence. Topics regarding lies."
    - "Verdict from prior criminal trial in which the individual was a deliberating juror."

Part 5: The Juror Experience

Juror Experience with Judges

Respondents were asked a series of questions designed to gauge the perceptions of judge and juror interactions during the voir dire process. According to juror responses, 78% of jurors indicated being questioned beyond the standard preliminary questioning conducted by the judge. Responses indicate that juror understanding of reason(s) for judges asking questions (94%) was similar to or at a higher rate than perceived levels of juror understanding as reported by attorney (80%) and judge (93%) respondents. Further, 67% of clerk respondents felt that jurors understood most of the reasons for questions being asked of them by the judge.

Figure 10: Respondents Indicated Whether Jurors Understood the Reason(s) for the Judge Asking Them Questions

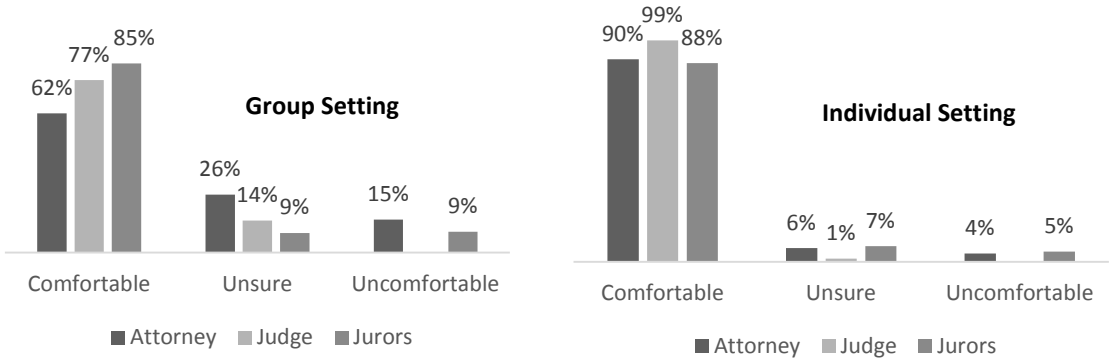


Respondents were asked a series of questions designed to measure the perception of whether jurors felt comfortable responding to questions from judges in both group and individual settings. Overall, responses were very positive.

- **Group Setting**: Responses indicate that 85% of jurors felt comfortable responding to questions from the judge in a group setting. This was higher than the juror comfort level that was percieved by attorney (62%), judge (77%) and clerk (70%) respondents;
- **Individual Setting**: Responses indicate that 88% of jurors felt comfortable responding to questions from the judge in an individual setting. This was lower than the juror comfort level that was perceived by attorneys (90%) and judges (99%). Further, 83% of clerk respondents

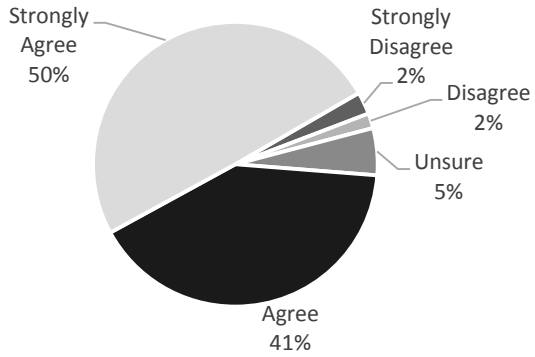
believed that jurors felt comfortable answering questions from the judge in an individual setting.

Figure 11: Attorney, Judge, and Juror Respondents Indicated Juror Comfort in Responding to Questions from Judges in Group and Individual Settings



Juror respondents were asked a series of questions designed to gauge their perceptions of whether or not judges took steps to protect juror dignity and privacy. Responses were very positive, as 91% of juror respondents indicated the judge took steps to protect juror dignity and privacy during questioning.

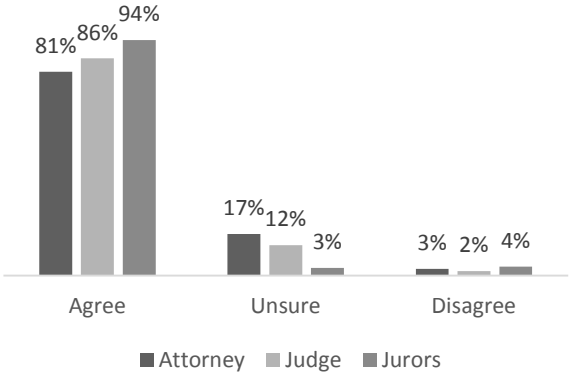
Figure 12: Jurors' Perception of Judges Protecting Juror Dignity and Privacy through the Implementation of Protocols



Juror Experience with Attorneys

Respondents were asked a series of questions designed to gauge the perceptions of attorney and juror interactions during the voir dire process. According to juror responses, 42% indicated having been questioned by attorneys. Responses indicate that actual juror understanding of the reason(s) for attorneys asking questions (94%) surpassed perceived levels of juror understanding as reported by attorney (81%) and judge (86%) respondents. Further, 63% of clerk respondents felt that jurors understood the reasons for most

Figure 13: Respondents Indicated Whether Jurors Understood the Reason(s) for the Attorneys Asking Them Questions

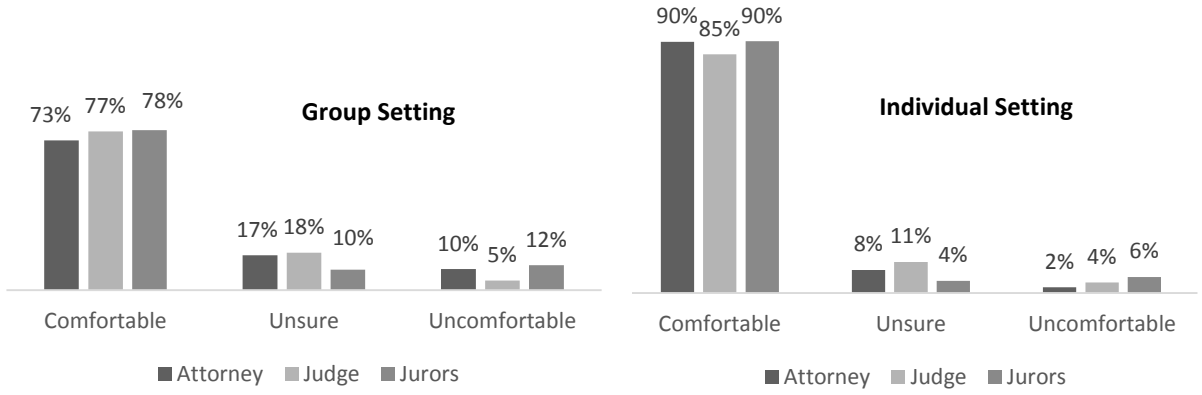


of the questions being asked of them by the attorneys.

Respondents were asked a series of questions designed to measure the perception of whether jurors felt comfortable responding to questions from attorneys in both group and individual settings. Further, 31% of juror respondents indicated having been questioned by attorneys in a group setting while 36% of juror respondents indicated having been questioned by attorneys in an individual setting. Overall, responses were very positive, with a higher percentage of jurors being more comfortable responding to questions asked of them by attorneys in an individual setting:

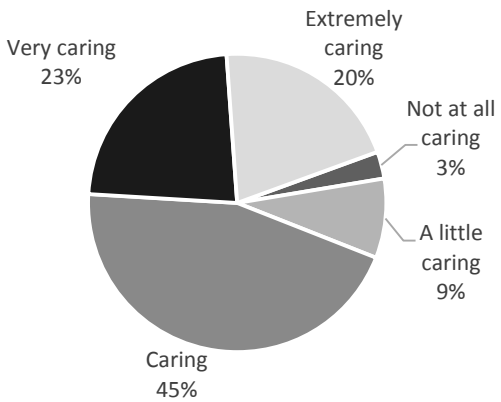
- **Group Setting**: Responses indicate that 78% of jurors questioned by attorneys in a group setting felt comfortable responding to questions asked of them. This was higher than what was the perception of attorney (73%), judge (77%) and clerk (35%) respondents.
- **Individual Setting**: Responses indicate that 90% of jurors questioned by attorneys in an individual setting felt comfortable responding to questions asked of them. This was similar to what was the perception of attorney respondents (90%) and slightly higher than that of judge (85%) and clerk (74%) respondents.

Figure 14: Attorney, Judge, and Juror Respondents Indicated Juror Comfort in Responding to Questions from Attorneys in Group and Individual Settings



Jurors were asked a series of questions to gauge their perceptions of whether or not attorneys cared about the preservation of their dignity and privacy during the voir dire process. Responses were very positive, as 88% of juror respondents indicated attorneys as being caring when it came to protecting the personal privacy of jurors.

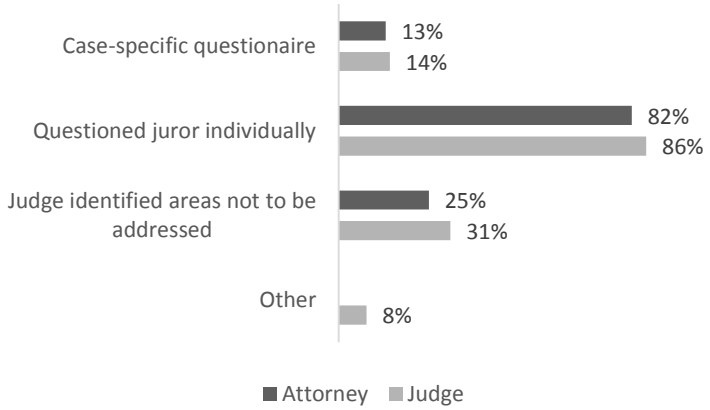
Figure 15: Jurors' Perception of How Much Attorneys Seemed to Care About Protecting Juror Privacy



Procedures Implemented to Protect Juror Dignity and Privacy

Attorney and judge respondents were asked a series of questions designed to provide a better understanding of any procedures implemented to protect juror dignity and privacy throughout the voir dire process. Attorney (94%) and judge (88%) respondents agreed that the procedures employed during the voir dire process were adequate to protect jurors' dignity and privacy. Questioning jurors individually was identified by attorney (82%) and judge (86%) respondents as the most prevalent procedure utilized to protect juror dignity and privacy.

Figure 16: Attorney and Judge Respondents Identified Procedures Implemented to Protect Juror Dignity and Privacy



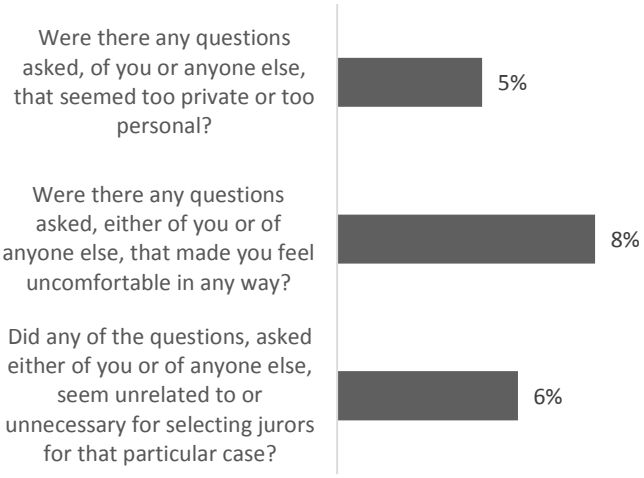
Judge respondents (8%) identified "other" procedures implemented to protect juror dignity and privacy. Open-ended commentary pertaining to these procedures was provided by attorney and judge respondents and analyzed for underlying themes:

- Underlying Themes: Conducting questioning at side bar or in private, referring to jurors by juror number rather than by name, prescreening questions prior to trial and declaring specific topics off limits.
- Sample Responses:
    - "The judge informed the jurors that if they did not feel comfortable answering questions from attorneys in a group setting, they could ask to approach sidebar." (Attorney response)
    - "After an introduction and being asked the usual questions, the jurors were brought into the courtroom one by one to be asked case specific and juror specific questions." (Attorney response)
    - "Jurors were referred to by juror number and seat number in the panel but not by name." (Attorney response)
    - "Required attorneys to submit all proposed questions in writing a week before the trial. I emphasized to the attorneys that the only permissible purpose for the questions is to learn whether the juror has an unfair prejudice." (Judge response)
    - "Judge identified areas that were not to be addressed during panel portion of voir dire." (Judge response)

Juror Discomfort in Responding to Uncomfortable Questions

Juror respondents were asked a series of questions designed to gauge their perception of whether they considered questions being asked of them as too personal, irrelevant, or making them feel uncomfortable answering. Responses were very positive: only 12% of juror respondents identified being asked questions they considered too personal, irrelevant, or which made them feel uncomfortable answering. Open-ended commentary pertaining to the nature of these questions was provided by juror respondents and analyzed for underlying themes:

Figure 17: Percentage of Juror Respondents Indicating They Were Asked Questions They Considered Personal, Irrelevant, or Which Made Them Feel Uncomfortable Answering

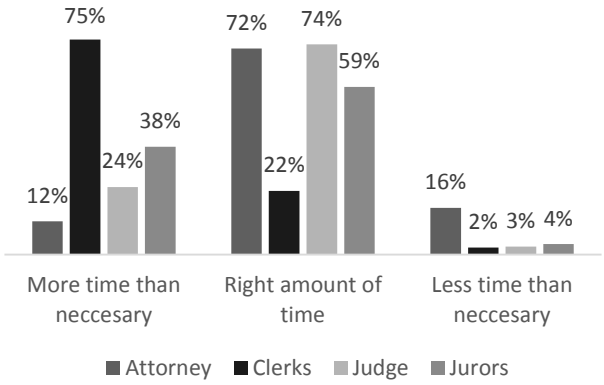


- Underlying Themes: Questions pertaining to being a victim of sexual abuse, police vs civilian credibility, racial bias, and personal criminal history and that of family members.
- Sample Responses:
    - "Questions on whether I/or family members were a victim of sexual assault or violence. This is always a sensitive question. Especially with defendant 2 feet away, listening."
    - "Would you be more or less likely to believe the testimony of a police officer or other law enforcement agent compared to an ordinary citizen?"
    - "When the judge asked if any jury member held some sort of prejudice against a certain race that would get in the way of making decisions. The part that made me uncomfortable was that some people raised their cards."
    - "They asked if I or anyone in my immediate family had been arrested."

Part 6: Timeliness in Selecting a Jury

Respondents were asked a series of questions designed to gauge perceptions of the amount of time the voir dire process takes. While the majority of responses indicate perceptions of a voir dire process that takes the right amount of time, variation across respondent type was evident:

Figure 18: Respondents Indicated Their Perception of the Amount of Time the Voir Dire Process Took



- **Attorney and Judge Respondents**: The majority of attorney (72%) and judge (74%) respondents reported that voir dire took the right amount of time. Interestingly, some attorney respondents (16%) perceived the voir process as taking less time than reasonably necessary, while some judge respondents (24%) perceived the voir dire process as taking more time than reasonably

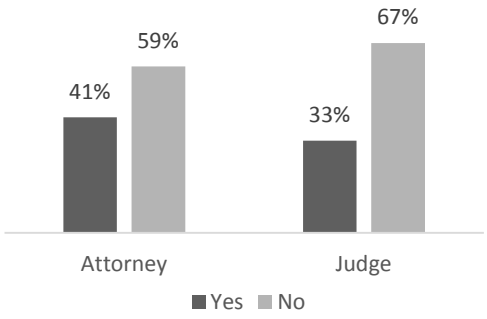
necessary;

- **Clerk Respondents**: The majority of clerk respondents (75%) perceived the voir dire process as taking more time than reasonably necessary;
- **Juror Respondents:** While the majority of juror respondents (59%) perceived the voir dire process as taking the right amount of time, some juror respondents (38%) perceived the voir process as taking more time than reasonably necessary.

Some attorney (41%) and judge (33%) respondents indicated participating in an empanelment where a judge imposed time limitation on the voir dire process. Open-ended commentary pertaining to judge-imposed time limitations was provided by attorney and judge respondents and analyzed for underlying themes:

- Underlying Themes: Time limitations progressively diminished with each panel or round, a standard time limitation was imposed, and some judges imposed a limitation on the number of questions rather than amount of time.
- Sample Responses:
    - "1st Round: 15 minutes, 2nd Round: 10 minutes, 3rd Round and Subsequent: 5 minutes." (Attorney response)
    - "I believe a 10 minute was imposed." (Attorney response)
    - "My practice is to allow each lawyer (or me on his or her behalf, if the lawyer chooses -- and one did in this case) to ask five yes-or-no questions, which I vet, to the jury pool as a whole. That is a form of time limit, in my view. I did not impose time limits on attorney follow-up at sidebar." (Judge response)
    - Interestingly, in some instances it was noted that although no limitations were placed on the amount of time or number of questions, judges frequently monitored that forward progress was being made.

Figure 19: Attorney and Judge Respondents Indicated if the Judge Imposed a Time Limitation on Voir Dire



Part 7: Analysis of Open-Ended Additional Feedback

All respondents were given the opportunity to provide any additional feedback or observations based on their experience.

- Underlying Themes: Generally positive experiences, continuous improvement, and the professionalism of courthouse staff.
- Sample Responses:
    - "This was the first time in 27 years of practicing law where I felt that we 'choose' a jury instead of scrambling madly to get rid of jurors whom we did not believe we could live with…" (Attorney response)

- "I believe that, with time, the process will improve. The issues I witness result from all parties involved learning the process and refining the issues. Overall, I believe the process provides for a better jury in each case." (Clerk response)
- "Woburn Superior Court jury selection and conduct of the trial by all parties was extremely professional and respectful. I am very proud to have been a part of the process. Thank you for doing such a fabulous job protecting the rights of citizens in the commonwealth." (Juror response)
- "My experience so far, with attorneys asking the individual voir dire questions instead of the judge doing so, has been very positive. The process seems to go faster, and the quality of information received has been high." (Judge response)

Part 8: Summary

The Supreme Judicial Court Voir Dire Committee Survey of attorneys, clerks, judges and jurors highlighted many strengths and potential areas of continuous improvement evidenced throughout the pilot implementation of Chapter 254 of the Acts 2014, An Act Relative to Certain Judicial Procedures in the Superior Court. In summation, this analysis suggests the following.

- Attorneys and judges are deeply committed to the **preservation of juror dignity and privacy**, as evidenced by the overwhelming majority of juror respondents perceiving attorneys (88%) as caring and judges (91%) as having implemented protocols to protect their dignity and privacy. This notion is further supported through analysis of juror responses to open-ended commentary, which is indicative of a high-level of respect and professionalism by all parties involved in the jury selection process. The possibility should not be overlooked that the preservation of juror privacy and dignity leads to a higher level of juror understanding of, and comfort responding to, questions being asked of them by attorneys and judges.

- 94% of juror respondents reported **understanding the reason for questions being asked of them by judges and attorneys**, a slightly higher level of understanding than what was perceived by attorney, clerk and judge respondents. Juror respondent data indicates no significant difference in **juror comfort responding to questions asked of them** by judges in an individual or group setting. However, data does indicate more jurors being comfortable responding to questions asked of them by attorneys in an individual setting rather than a group setting. Since juror respondent data indicates a minimal percentage of jurors having been asked questions that made them uncomfortable, further analysis may be required to understand why fewer jurors felt comfortable responding to questions asked of them by attorneys in group setting.

- Analysis of data and open-ended commentary provided by respondents indicate that attorneys, clerks, and judges operate with a **high degree of professionalism and respect** for jurors, while facilitating a jury selection process committed to fairness and impartiality. Building upon the many strengths identified throughout the initial implementation period, those directly involved in the jury selection process should continue to engage in continuous improvement efforts, including increased collaboration and communication between all parties involved in the jury selection process.

Appendix 5

SUPREME JUDICIAL COURT

VOIR DIRE COMMITTEE:

WORKING GROUP ON OTHER COURTS

REPORT AND RECOMMENDATIONS ON BEST PRACTICES IN JURY SELECTION

Respectfully Submitted,

June 1, 2016

Supreme Judicial Court Voir Dire Committee: Working Group on Other Courts

Members

Hon. Jennifer L. Ginsburg, Chair, Associate Justice, District Court Department

Hon. David J. Breen, Associate Justice, Boston Municipal Court Department

Prof. R. Michael Cassidy, Boston College Law School

Hon. Serge Georges, Jr., Associate Justice, Boston Municipal Court Department

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Carolyn I. McGowan, Esq., Committee for Public Counsel Services

Hon. Lawrence Moniz, Associate Justice, Juvenile Court Department

Radha Natarajan, Esq., New England Innocence Project

Dana Pierce, Esq., Chief of the BMC, Central Division and Deputy Chief of District Courts, Suffolk County District Attorney's Office (formerly)

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Hon. Jeffrey M. Winik, First Justice, Housing Court Department, Boston Division

Maureen McGee, Esq., Supreme Judicial Court

INTRODUCTION

The Working Group on Other Courts of the Supreme Judicial Court Voir Dire Committee (Working Group) was formed in December 2014 to recommend Best Practices in jury selection in all Trial Court departments other than the Superior Court. The Working Group included judges and attorneys with a range of experience in the Boston Municipal Court, District Court, Juvenile Court, and Housing Court Departments in civil and criminal cases, and in different geographic areas of the Commonwealth. While members contributed varied perspectives on jury selection, they shared the common goal of ensuring that juries selected to decide cases in all courts of the Commonwealth are fair and impartial. The Working Group sought methods to enhance the effectiveness of jury selection, while promoting the fundamental principles of judicial discretion, juror dignity and respect, and efficiency.

Members of the Working Group met regularly in 2015 and 2016 to gather perspectives and data, and to educate each other about jury selection issues facing the trial court departments. The group identified issues of special concern to each court as well as issues of shared concern, surveyed judges about current empanelment practices, and gathered information about the lengths of empanelments and the nature and complexity of commonly tried cases.[1] It considered practical issues in those courts, such as high-volume caseloads in trial sessions, the press of other business, the varying length and complexity of cases brought to trial, the participation of self-represented litigants, and varying experience levels of attorneys with respect to participation in juror voir dire. Attached hereto as an Addendum is a brief summary of issues relevant to empanelment in each of the individual Court Departments studied by the Working Group.

The Working Group combined those practical considerations with an ongoing effort to learn from the judges, attorneys, and jurors who have participated since February 2015 in

[1] The Working Group notes with appreciation the significant assistance provided by the Office of Jury Commissioner, which provided extensive information about the numbers, types, and lengths of jury trials in the four courts, as well as juror availability, and juror utilization.

Superior Court trials involving attorney voir dire. While Chapter 254 of the Acts of 2014 mandates attorney participation in voir dire, when requested, only in the Superior Court, General Laws chapter 234A, § 67A permits a judge in any trial court to allow such participation. As more learning emerges from the Superior Court and is shared across the Trial Court departments, as attorneys become increasingly adept at voir dire, and as local law schools adjust curricula with respect to this practice, judges and attorneys can expect to see increased interest in such voir dire in all trial courts. This Report is intended to provide guidance and recommendations for consideration by the legal community as attorney participation in voir dire increases and as all members of the legal community continue to consider ways to promote fairness, effectiveness, and efficiency in jury selection.

While this Report focuses on attorney participation in jury empanelment, the principles and Best Practices identified herein apply in theory to jury empanelment where at least one party is self-represented. In practice, however, self-represented litigants will likely lack the courtroom skill expected of attorneys. Self-represented litigants with limited training in jury selection will present judges with significant practical and procedural challenges during empanelment. Therefore a judge must have broad flexibility and discretion to modify or deviate from these recommended principles and Best Practices when necessary to ensure the empanelment of a fair and impartial jury. This discretion is important in all cases, but deserves particular mention with respect to those involving self-represented parties.

EXECUTIVE SUMMARY

This Report identifies and recommends several procedures and practices for jury selection in the Trial Court departments. While members of the Working Group brought varying concerns and perspectives to the development of these recommendations, the following list of Best Practices, discussed more fully in the Report below, reflects a high level of consensus within the Group:

1. *Meaningful Pretrial Communications between Judge and Parties as to Empanelment*

2. *Written Motion Practice as to Empanelment*
3. *Clarity with Respect to the Number of Peremptory Challenges*
4. *Consideration of Supplemental Juror Questionnaires in Appropriate Cases*
5. *Individual Voir Dire of Each Prospective Juror*
6. *Allowance of Attorney Participation in Voir Dire*
7. *Voir Dire Directed at Explicit and Implicit Bias*
8. *Meaningful Instructions to the Venire*
9. *Allowance of Time for Meaningful Consideration of Juror Responses to Voir Dire*
10. *Consideration of Alternatives to Individual Voir Dire at Sidebar*

The consensus of the Working Group was due in large part to agreement by its members as to the principles necessary to guide the Group's considerations. This Report first highlights these principles, and then provides a more thorough exploration of the recommendations for Best Practices. Some of the selected Best Practices are simple in nature and call for little explanation, while others are more substantive or consequential. The Report concludes with the recommendation that members of the legal community continue to seek and discuss ways to empanel fair and impartial juries.

GUIDING PRINCIPLES

The Working Group's analysis was guided by four principles of fundamental importance:

- Judicial discretion must be respected and supported.
- Juror privacy and dignity must be respected and maintained.
- The system of identifying potential bias must be fair and effective.
- Any system of jury selection must be consistent with efforts to preserve and foster efficiencies in trial sessions.

BEST PRACTICES

1. Meaningful Pretrial Communications as to Empanelment: In the Superior Court's experience, providing an opportunity for judges and the parties to discuss empanelment in depth before trial can result in an efficient and effective process. The Working Group recognizes the difficulty of adhering to a principle of meaningful pretrial conferencing in all trial court departments, especially where judges and prosecutors are often not assigned to trial cases until the last minute.

   A judge's intended empanelment procedures should be communicated to the parties in each case. If possible, a pretrial conference should be scheduled close in time to the trial date, or in any event prior to empanelment. At that conference, the judge and the attorneys should be prepared to discuss the procedures the judge will employ, including: the details of the case description that will be provided to the venire; the extent to which the judge will give a pre-charge on significant legal principles; the nature of the judge's intended voir dire of jurors; the nature of any attorney participation in voir dire; the number of alternates to be seated; the number of peremptories to be allowed; and, the order and timing of the parties' assertions of challenges for cause and peremptory challenges in relation to the seating of venire members in the jury box. Judges should encourage attorneys to attempt to reach agreement before trial, if possible, regarding the above matters.

   Judges are encouraged to set forth in writing their standard empanelment practices, particularly with respect to attorney participation in voir dire, and to provide that guidance to the parties before trial.

   In more complicated cases where attorneys anticipate requesting substantial participation in voir dire, it could be helpful if the trial judge were specially assigned, where feasible, before trial, so a conference concerning empanelment could be held before the trial date.

2. Written Motion Practice as to Empanelment: Parties wishing to make proposals regarding empanelment procedures, including as to attorney participation in voir dire, should make such proposals by written motion *in limine* filed prior to trial. Written motions should be filed with respect to voir dire topics and legal-principle instructions which the party seeks the court to approve. Such motions should alert the judge to any areas where the parties agree. If proposed instructions to the venire are lengthy, the moving party is encouraged to provide the judge with an electronic version of its proposals. Where the parties do not reach agreement, the judge should consider motions and proposals filed by any party.

3. Clarity with respect to the Number of Peremptory Challenges: Rules of procedure govern the number of peremptory challenges to which each party is entitled. If requested by a party, a judge should consider exercising discretion to grant additional peremptory challenges in cases that are complex or that involve highly sensitive issues. A judge should always state on the record prior to empanelment the number of peremptory challenges that will be available to each party.

4. Consideration of Supplemental Juror Questionnaires in Appropriate Cases: In complex cases, cases involving highly charged or sensitive issues, and other appropriate cases, a judge may consider the use of written supplemental juror questionnaires. In appropriate cases, the judge should invite the parties to propose such questionnaires well before the trial date. Attorneys seeking approval of supplemental questionnaires should file a motion *in limine* proposing procedures for the dissemination, completion, collection, and use of the questionnaires. If possible, the moving party should provide the judge an electronic version of its proposals. A judge considering use of a supplemental questionnaire should discuss the mechanics with the court officers assigned to the jury assembly room.

5. Individual Voir Dire of Each Prospective Juror: Speaking individually to each potential juror at least once is critical to a judge's threshold inquiry into qualifications and excuses

for cause. The Working Group's surveys demonstrated that most judges already conduct some individual voir dire with each potential juror – either always or often. As required by statute, inquiry about responses to Confidential Juror Questionnaires must be done on an individual basis. G. L. c. 234A, § 23. Jurors answering affirmatively to any question of the full venire have long been brought to sidebar for follow-up. Case law requires individual voir dire in certain criminal trials, depending on the race of defendants and alleged victims and the nature of the charges. From these experiences, judges and attorneys have recognized that such voir dire, even if limited in length and scope, frequently reveals important issues concerning language ability, mental health status, comprehension, or other impediments to jury service that would not have been observed without personal contact with the juror. That contact also permits jurors to raise private or embarrassing concerns that they otherwise might not disclose.

6. Allowance of Attorney Participation in Voir Dire: If one or more of the parties request attorney participation in voir dire, some form of attorney voir dire should ordinarily be allowed. Attorneys often have information about the facts and potential legal issues in a case which have not been disclosed to the judge before trial. Therefore, attorney participation may be necessary to reveal potential bias.[2] Research suggests that potential jurors may respond more candidly to questions posed by attorneys than those posed by judges, because of the vast social-status difference often felt by jurors facing judicial questioning.[3] Judges also maintain discretion to impose reasonable restrictions on the

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[2] See, e.g., Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole L. Waters, Ph.D., for the National Center for State Courts and the State Justice Institute, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, April 2007, at 28 ("[A]ttorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges.") (last accessed April 11, 2016: http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx)

[3] Id. ("The balance between judge-conducted and attorney-conducted voir dire is important for several reasons. Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable answers.") (citing Susan E. Jones, *Judge versus*

conduct, length, and subject matters of such voir dire. A judge should ordinarily permit attorneys, subject to the judge's supervision, to question jurors directly, either individually or by a "panel" or other group method.[4] Attorney participation should include at least a reasonable and meaningful opportunity for the attorneys to ask follow-up questions concerning juror responses to written questionnaires and the judge's questions. Voir dire should be "sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."[5]

7. Voir Dire Directed at Bias: Trial judges should recognize the importance of identifying bias – explicit and implicit - in all cases where a party, a significant witness, or an attorney may be subject to such bias. Where requested by a party, a judge should

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Attorney-Conducted Voir Dire, 11 L. & HUMAN BEHAV. 131 (1987)).

[4] The Working Group considered whether to recommend a particular form of attorney voir dire. In particular, it considered whether to recommend the use of exclusively individual voir dire by attorneys, or the Pilot Project model of "panel" voir dire, or some other form of group voir dire. The consensus was that individual trial judges should have the benefit of the Superior Court judges' experiences, which have been wide-ranging in terms of mechanics, and that it is a best practice, in effect, to consider carefully the two forms widely used now in the Superior Court, in light of the particulars of the case to be tried, the requests of the attorneys involved, the experience level of the attorneys involved, and the time and jurors available for empanelment. The two methods most commonly used in the Superior Court since February 2015 have been, consistent with that court's Standing Order 1-15: (a) attorney-conducted individual voir dire that follows the judge's own questioning of each individual juror, and (b) panel voir dire, which involves questioning after the jury box is full of jurors seated upon the conclusion of the judge's own individual voir dire, and any attorney voir dire that has been deemed by the court necessary to conduct individually. In the latter context, the size of the "panel" questioned in group format is the size of the jury box. In jury-of-six trials (in the District Court, the BMC, and delinquency proceedings in the Juvenile Court), where venire size tends to be small (e.g., 15 to 18 jurors), some form of expanded panel voir dire might be appropriate and efficient. As the Superior Court protocol recognizes the ability of attorneys to conduct effective panel voir dire with groups of 14 to 16 jurors, it would make sense for a judge seating a jury of six to effectively and efficiently employ a similar protocol to that used in the Pilot Project, but expand the "panel" to similar size. This would require consultation with court personnel and counsel and might not be possible if juror responses made from outside the bar area cannot be properly recorded.

[5] ABA Principle for Juries and Jury Trials 11(B)(3) (2005).

conduct or permit attorneys to conduct voir dire directed at identifying such bias. Jurors, like all members of society, may have biases –explicit or implicit - towards persons whom they identify as having characteristics or group associations that are different from their own, or about which they otherwise have prejudicial beliefs.[6] While such bias may be difficult to uncover, judges and attorneys can and should make efforts to do so in all cases where an identifiable bias will potentially impact juror reactions to a significant participant or issue in the trial. Of special note is that while individual voir dire has long been required by case law in a discrete subset of particularly serious "interracial" criminal cases, bias may impact the fairness of *any* trial in which potential bias is implicated.

8. Meaningful Instructions to the Venire: Jurors should be provided instructions by the judge that promote fair and effective voir dire and contribute to the judge's and the attorneys' efforts to identify potential bias. The judge should explain the role and purpose of voir dire, emphasizing the importance of candor and honesty. Jurors should be advised of the purpose of the Confidential Juror Questionnaire, how it will be used, and who will have access to the information. Further, the judge should consider giving a "pre-charge" at the beginning of empanelment that provides venire members a

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[6] This topic, for example with respect to implicit racial bias, has been the subject of extensive research and analysis. See, e.g., Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 345 (2007) (judges and jurors); Jerry Kang et. al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124 (2012); Justin D. Levinson et. al., Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test, 8 Ohio St. J. Crim. L. 187 (2010) (study confirmed hypothesis that study participants held strong associations between "black" and "guilty," relative to "white" and "guilty," and implicit associations predicted the way mock jurors evaluated ambiguous evidence); Samuel R. Sommers, Race and the Decision-Making of Juries, 12 Legal & Criminological Psychol. 171, 177-78 (2007) (archival and observational studies using behavioral measures generally find that race does influence jury decision-making); Tara Mitchell, et al., Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment, 29 Law and Hum. Behav. 621, 627-28 (2005) (meta-analysis of thirty-four mock jury studies involving over 7,000 participants revealed a statistically significant association between defendants' race and verdicts, with mock jurors less likely to vote to convict a same-race defendant than a defendant of a different race); Jennifer L. Eberhardt et al., Looking Deathworthy:Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, 17 Psychol. Sci. 383 (2006).

meaningful description of the case and, where requested, brief instruction on the most significant claims, charges or legal principles to the extent such instruction is necessary for relevant voir dire. The judge should consult with the attorneys as to a neutral way to frame these issues. The parties should assist in this process by proposing pre-charge language prior to trial.

9. Allowance of Time for Meaningful Participation in Jury Selection: All empanelment participants should have sufficient time to reflect with care on juror responses to voir dire. The process should be neither unnecessarily lengthy nor unreasonably expedited. Attention to juror dignity and respect requires that jurors have a meaningful opportunity to reflect before responding to voir dire, including the judge's questions of the full venire. Before questioning the venire, the judge should encourage jurors to take time to think carefully about the questions and their responses, and questions should be posed slowly enough for jurors to have time to do so.

   Attorneys should be given sufficient time to reflect with care on the juror responses to voir dire. The judge should ensure that parties receive the Confidential Juror Questionnaires and any supplemental questionnaires in time to permit adequate review of the materials before empanelment. Following voir dire, the judge should allow sufficient time for attorneys to have meaningful communications with their clients and co-counsel regarding the information obtained during the process, including potential for-cause issues that may have arisen and the potential exercise of peremptory challenges.

10. Consideration of Alternatives to Individual Voir Dire at Sidebar: When practicable, the judge should conduct individual voir dire of the prospective jurors at a location comfortable for the jurors and conducive to candor and confidentiality, such as with each juror and all participants sitting at counsel table, or with the juror on the witness stand, and with other jurors out of the courtroom. In making this determination, the judge may consider, among other factors, the nature of the case, the anticipated length of individual

voir dire, any physical impediments to the parties or attorneys standing at length at sidebar, security issues, and the configuration of the courtroom and the courthouse.

CONCLUSIONS

The principal objective of the Working Group was to identify recommendations for judges and attorneys to consider as the practice of attorney participation in voir dire expands beyond Superior Court. It is anticipated, based on the positive experiences in the Superior Court since the enactment of Chapter 254, that interest in attorneys participating in voir dire in other courts will increase in the near future. The recommendations set forth above as Best Practices are intended to provide judges and attorneys with ideas and guidelines about how to allow attorney participation in voir dire or other jury selection practices in a manner that best supports empanelment of a fair and impartial jury.

The Working Group recognizes the need to tailor the length and nature of voir dire to the length and nature of cases. But the consequences of even a short trial can be quite significant to the parties involved, and therefore a fair and impartial jury is critical in all cases irrespective of the anticipated length of evidence or complexity. Not all trials involve legal or factual issues that require extensive juror voir dire, by judge or attorney. While the Working Group recommends that judges in Boston Municipal Court, District Court, Juvenile Court, and Housing Court allow attorney participation in voir dire in some fashion, the precise form of participation is left to the discretion of the trial judge.

Members of the Working Group hope that these Best Practices are useful to the judiciary in exercising its discretion in a thoughtful manner. It is expected that this will be the beginning of fruitful and ongoing discussions among judges and attorneys about the best ways to incorporate these practices into the work on our Trial Courts.

ADDENDUM A

THE INDIVIDUAL COURT DEPARTMENTS

DISTRICT COURT

There are forty-eight District Court jury sessions throughout the state. In sixteen multi-use courthouses, the District Court shares a jury pool with all other jury trial courts present. This results in competition for jurors, most often with the Superior Court. In stand-alone District Courts, depending on the location, average juror attendance over the past five years has ranged between fifteen and twenty-two jurors. All District Court trials, criminal or civil, are before juries of six, with the vast majority involving the seating of one alternate juror. Over the past five years, the Court has conducted an average of over 2,600 jury trials per year throughout the state. Approximately 88% of those were trials of criminal cases. Approximately 70% of all trials, criminal or civil, were one-day trials. Considering the heavy caseloads in most if not all trial sessions, a significant concern is the Court's capacity to continue to try the majority of cases in a single day.

A large portion of District Court jury trials involve charges of operating under the influence of alcohol (OUI), and a large portion of those are one-day trials. The Court does see, however, large numbers of other sorts of criminal trials, including cases with allegations of domestic violence, other crimes against the person including sexual assaults, and drug and firearm offenses. Criminal defendants in District Court face a maximum penalty of five years in jail and various significant collateral consequences. District Court civil jury trials frequently involve claims of motor vehicle negligence and breach of contract. Jury trials in District Court vary in terms of the complexity and sensitivity of the issues involved. Of course, notwithstanding the length of the trial, the cases are important to the people involved.

In August 2015, the District Court judges were asked to complete a survey concerning their voir dire practices generally, and also to report specifically on various aspects of each respondent's most recent jury empanelment. Of the 145 District Court judges surveyed, 106 responded. Asked about empanelment practices, approximately half of the judges responded that they always talk to each juror individually during empanelment, and most others reported that they sometimes did so. Approximately half indicated that they allow some form of attorney participation in voir dire. Of those, 72% allow attorneys to ask individual jurors follow-up to responses to the judge's own questions, and 40% allow attorneys to ask questions other than simply follow-up questions directly to individual jurors. The judges reported that the average length of jury selection in their most recent trial was approximately thirty minutes.

There are challenges to attorney participation in voir dire in the District Court. Many sessions are busy with multiple cases scheduled for trial every day. Trial sessions have non-trial cases that need to be addressed before the jury trial for the day can begin. In multi-use courthouses the District Court is often not sent jurors from the shared pool until the Superior Court has utilized the jurors. These circumstances can delay the start of trials to well past the start of the court day. There is concern among judges that if the length of voir dire were significantly extended, it would not be commensurate to the length of the evidence in the case, and it could interfere with the court docket if too many trials run into a second day. There is further concern in some sessions about getting sufficient numbers of venire members from which to seat juries. Also, many District Court prosecutors and defense attorneys have heavy caseloads and are inexperienced with respect to juror voir dire. Perhaps most significantly, while most District Court judges who responded to the survey reported that they always discuss empanelment before the commencement of trial, most frequently a trial judge is not assigned to a case until the morning of trial. Accordingly, there is no opportunity prior to that day for the judge and the attorneys to discuss requests to modify ordinary empanelment procedures or for the attorneys to request participation in voir dire. This may make it difficult for District

Court judges to adopt the practice which has proven important in the Superior Court, where implementation of attorney participation has strongly encouraged meaningful pretrial conferencing about what the parties are seeking, and what the trial judge will approve or disapprove, and such conferencing has benefitted the process, particularly as most judges and attorneys are inexperienced in this practice area.

BOSTON MUNICIPAL COURT

Eight court divisions within the city of Boston comprise the BMC: Central (Edward Brooke Courthouse), Brighton, Charlestown, Dorchester, East Boston, Roxbury, South Boston, and West Roxbury. At present, jury trials are routinely conducted in five of those divisions. Over the five-year period of 2011 through 2015, the BMC conducted an average of 465 trials per year. The average for each BMC division with one or more jury sessions was 93 jury trials per year. Of the 2,323 jury trials that were conducted during that five-year period, approximately 86% were of criminal matters, with 14% civil. All BMC trials are before juries of six, with most juries including one alternate.

In late 2015, the BMC judges were asked to complete a survey concerning jury selection, including voir dire practices. They were also asked to provide specifics concerning each judge's most recent jury empanelment. Approximately 66% of the judges assigned to the Court at the time responded to the survey. The great majority of respondents indicated that they speak with potential jurors individually during the empanelment process: approximately 65% reported that they always conduct at least some portion of juror voir dire individually, and an additional 25% reported that they sometimes conduct individual voir dire. Ten percent reported that they usually do not conduct any individual voir dire.

Of respondents, 90% indicated that they do, or would if asked, permit attorneys to participate in juror voir dire in both criminal and civil trials. With respect to criminal matters, 72% of judges reported that they permit attorneys to propose in writing questions

to be asked by the judge to the venire, 78% permit attorneys to propose follow-up questions for the judge to ask individual jurors at sidebar, 17% permit attorneys to ask follow-up questions of jurors at sidebar, and 17% permit the attorneys to ask a broader array of questions of jurors at sidebar. With respect to civil matters, 67% reported that they permit attorneys to propose in writing questions to be asked by the judge to the venire, 72% permit attorneys to propose follow-up questions for the judge to ask individual jurors at sidebar, 11% permit the attorneys to ask follow-up questions at sidebar, and 6% permit the attorneys to ask a broader array of questions at sidebar.

A wide variety of case types go to trial in the BMC. Of the most recent trials reported on in the respondents' survey, all but one was of a criminal case. Of the criminal matters reported, charges ranged from offenses against a person (37%), domestic violence (21%), firearms violations (16%), sex offenses (11%), OUI's (5%), and crimes against property (5%). The complexity of all of these jury trials were described by BMC judges as ranging from "substantial" (10%), to "moderate" (55%), to "low" (35%). The average or mean time that it took to empanel the jury in the twenty trials reported on was 63 minutes, with a median of 45 minutes.

As in the District Court, there are challenges to increased attorney participation in voir dire in the BMC. Some judges have expressed concerns about further expanding the amount of time it takes to select a jury. From 2011 through 2015, the percent of one-day trials in the BMC was 56%, with 37% of the trials requiring a second day, and the remainder requiring three or more days. All of the BMC jury sessions are busy with multiple cases of varying levels of complexity being scheduled for trial each day. While some courts see a number of OUI cases, for which empanelment generally takes less time than the average discussed above, the sessions all see a large number of trials involving charges of crimes against persons, including a significant number of allegations of domestic violence. In some of the BMC divisions, complex civil matters are also scheduled in the same sessions as the criminal matters. Further, the Central Division jury pool is shared with the Boston Juvenile Court and the Boston Housing Court.

Similar to District Court judges, judges in the BMC are generally not assigned to cases for trial in advance, which results in motions *in limine* and requests for voir dire being heard on the morning of trial. On occasion, due to circumstances such as the complexity or anticipated duration of a trial, a judge will be specially assigned to a case for trial, allowing for a pretrial conference prior to the day of empanelment. In the vast majority of trials, however, the presiding judge is not known until the morning of trial, or even later morning, as cases may be sent out to other sessions. In many BMC trial sessions there are large numbers of other cases that need to be addressed before the empanelment for the case to be tried that day can commence, which potentially impacts whether a trial can be completed in a single day. Also, many BMC prosecutors and defense attorneys carry heavy caseloads, and in some instances are inexperienced relative to the majority of practitioners active in the Superior Court.

JUVENILE COURT

In the Juvenile Court, criminal cases are categorized as either delinquency or youthful offender cases. In all delinquency and youthful offender proceedings, the child is entitled to a jury trial. Delinquency matters are tried before a jury of six (with one alternate, ordinarily) and youthful offender cases are tried before a jury of twelve (with one or two alternates, depending on the anticipated length of trial and other special issues.) With the exception of a need to make a determination as to whether a child is a youthful offender, the punishments that can be imposed, and the fact that delinquency proceedings are closed to the public, the procedures involved in a jury trial in the Juvenile Court are largely analogous to those of the District and Superior Court departments. Consequently, many of the same issues that arise in those courts as to obtaining fair and impartial juries are applicable in the Juvenile Court. Additional concerns in the Juvenile Court are predicated upon the age of the accused child and the often young age of the alleged victim(s), in that many potential jurors have strong feelings about the involvement of these children in the judicial process, with many potential jurors expressing concerns

that those age factors may well interfere with his or her ability to be fair and impartial to one side or the other. Consequently, there is significant value to the use of attorney voir dire practices in the Juvenile Court to explore these issues and their impact on impartiality.

When the statutory mandate as to allowance of requests for attorney participation in voir dire was implemented in the Superior Court, it was not explicitly extended to the Juvenile Court, even though many of the jury cases in the Juvenile Court, especially the youthful offender cases, would be tried in the Superior Court if the accused child were an adult. A survey conducted in Fall 2015 has nonetheless revealed that almost all Juvenile Court judges conducting jury trials allow for some form of attorney input into the voir dire process. There is no uniformity as to how attorney participation is accomplished. By way of example, 62% of the judges responding to the survey indicated that they do not allow attorneys to put questions directly to the jurors, but 25% said that they do allow such questions at sidebar, and an additional 13% indicated that they will allow attorney questioning at sidebar in the form of follow-up to the judge's own questions of individual jurors. In addition, some judges allow for the written submission by attorneys of proposed questions to be posed by the judge. Only one judge reported not permitting any form of attorney input or participation in the voir dire process.

Weighed against the implementation of a process to allow for greater attorney participation in voir dire are the time constraints that are implicit in the Juvenile Court system as it is currently structured. In many counties, there is only one Juvenile jury session, which serves multiple Juvenile courts, and some counties do not have a full-time jury session. Over the five- year period of 2011 through 2015, the Juvenile Court conducted an average of 57 jury trials state-wide per year. Given the number of delinquency and youthful offender proceedings that go to trial, there is a time sensitivity in moving the cases fairly and efficiently through the system. This concern is enhanced by the fact that, unlike an adult in custody pre-trial, a child held at the Department of Youth Services (DYS) awaiting trial gets no credit for the pre-commitment period toward

the period of loss of liberty associated with a post-trial commitment to DYS (although the child would get credit for such time if an adult sentence were imposed in a youthful offender case). The matter is further complicated by the fact that often Juvenile Courts are not stand-alone courts, and the number of potential jurors available to the Juvenile trial session can be impacted by the demands of other courts in the same building. This issue can become particularly acute in cases of alleged sexual assault, in that almost invariably the alleged victim of a sexual assault case in the Juvenile Court is a child, again creating difficulties in seating a jury. Often such cases require empaneling from two or even three different venires over the course of multiple days, especially in the context of selecting youthful offender juries of twelve (where there may be one or two alternates seated).

Among the special circumstances faced by the Juvenile Courts are the varied levels of experience among attorneys who practice juvenile law regularly. Those who represent children in youthful offender proceedings often maintain simultaneous Superior Court practices and consequently are becoming increasingly experienced with various forms of attorney conducted voir dire. Many of the attorneys representing children charged in delinquency proceedings do not have that correlative experience and are less familiar with the process. It is hoped that application of Best Practices, including with respect to attorney participation in voir dire, will assist in the Juvenile Court by the exposure of all attorneys and judges to those practitioners who have conducted voir dire in the Superior Court.

The implementation of these Best Practices is anticipated to support uniform practices in the courts by providing guidance for judges and counsel, while striking a balance between the time constraints and other special considerations faced by the Juvenile Courts, and the enhancement of the jury selection process.

<u>HOUSING COURT</u>

The Housing Court Department has superior and general jurisdiction over all cases and matters within its subject matter jurisdiction. Gen. L. ch. 185C, §2. Further, the Court has common law and statutory jurisdiction concurrent with the District Court and the Superior Court of all crimes and civil actions that are concerned directly or indirectly with the health, safety, or welfare of occupants of property intended for use as a place of human habitation. Gen. L. ch. 185C, §3. This includes criminal and civil enforcement of sanitation, building, fire, health, and environmental codes, landlord-tenant disputes including summary process actions, quiet enjoyment actions, security deposit actions, real property title disputes, personal injury actions, contract actions, discrimination and civil rights actions, consumer protection actions, and zoning appeals.

Litigants in the Housing Court have a right to a jury trial on all claims where a right to jury existed when the Massachusetts Constitution was promulgated. This includes summary process, tort, quiet enjoyment, contract, discrimination, and small claims appeals. Defendants have a right to a jury trial in criminal code enforcement actions. Because the Court is one of superior jurisdiction, juries of twelve are required in all trials.

The Housing Court conducts jury trials in Boston, Lawrence, Salem, Taunton, Springfield and Worcester. The general practice has been that the trial judge conducts the voir dire, but allows litigants to propose questions before empanelment begins, and to request follow-up questions during voir dire, to be asked by the judge. One Housing Court judge routinely allows attorneys to question prospective jurors themselves, during individual voir dire at side bar.

In almost all instances the Housing Court sits in shared or multi-use courthouse facilities (typically sharing the facility and courtrooms with the District Court, the BMC, the Probate and Family Court and the Juvenile Court). The Housing Court shares courtrooms with the Superior Court at the courthouses in Lowell and Pittsfield. The Court has experienced significant challenges to empanelling juries where there are limited numbers of prospective jurors available in multi-use courthouses. In response, Housing

Court judges rarely select alternate jurors.

The Housing Court has a significant number of self-represented litigants. In almost all contract and tort trials, all parties are represented by counsel. However, in summary process actions more than 92% of tenants and approximately 38% of landlords are self-represented. A significant number of self-represented defendants in these actions exercise their right to demand jury trials. This presents unique challenges to the empanelment of fair and impartial juries. Self-represented litigants often have limited knowledge of substantive law, evidentiary and procedural rules, and of jury selection in particular. A Housing Court judge must balance the need to empanel a jury efficiently with the right of a self-represented litigant to participate meaningfully in jury selection. This report recognizes the unique challenge facing the Housing Court in terms of the implementation of Best Practices concerning attorney participation in voir dire in cases where one or more litigant is self-represented. To address this reality a Housing Court judge has, of course, broad discretion to use jury empanelment procedures that in the judge's best judgment will be fair, practical, efficient and effective, taking into account this particular challenge. The Housing Court will benefit from the experiences of the Superior Court in this regard, as implementation of the new law there has consistently considered the special considerations that arise with self-represented litigants.

Appendix 6

Report of Pilot Project Working Group and Analysis of Panel Pilot Working Group Surveys Pertaining to the Implementation of Chapter 254 of the Acts of 2014 "An Act Relative to Certain Judicial Procedures in Superior Court"

Submitted to the Supreme Judicial Court Voir Dire Committee

Panel Pilot Working Group

Chair
Honorable Bertha Josephson, Superior Court

Members
Honorable Raymond Brassard, Superior Court
Honorable Kenneth Fisherman, Superior Court
Carolyn I. McGowan, Esq. Attorney-in-Charge
Committee for Public Counsel Services
Mark Lee, Esq.
Suffolk County District Attorney's Office

Volunteer Pilot Panel Voir Dire Judges
Honorable John Agostini, Superior Court
Honorable Kenneth Desmond, Superior Court
Honorable Renee Dupuis, Superior Court
Honorable Angel Kelly Brown, Superior Court
Honorable Janet Kenton Walker, Superior Court
Honorable Peter Krupp, Superior Court
Honorable Peter Lauriat, Superior Court
Honorable Edward McDonough, Superior Court
Honorable David Ricciardone, Superior Court
Honorable Mary-Lou Rup, Superior Court
Honorable Joshua Wall, Superior Court
Honorable Douglas Wilkins, Superior Court

Data Compilation and Analysis
Linda Holt, Director of Research and Planning, Executive Office of the Trial Court
Kevin Riley, Research Analyst, Executive Office of the Trial Court

May 2, 2016

PREFACE:

The introduction of the panel method of jury voir dire in Massachusetts Superior Court marks a dramatic departure from previous methods utilized in the Commonwealth. Because the method has no history in Massachusetts, all aspects of the procedure are without statutory or case law guidance. In some instances, such as statutorily or case law mandated questions to be asked in specific cases, the current law is inapposite to aspects of empanelment by the panel method. Further, the majority of Massachusetts judges and attorneys have no experience or familiarity with the panel method. These reasons alone would make any judicial reluctance to venturing into these uncharted waters understandable. Without the willingness of the judges who volunteered to participate in the pilot project, a robust and measurable experience with the panel method may not have been achieved. However, beyond their willingness to participate, the commitment each demonstrated to the pilot project throughout the course of it is beyond measure. The contribution of the fifteen judges who volunteered to participate in the pilot project and the debt of gratitude to them cannot be overstated.

INTRODUCTION:

Prior to implementation of Chapter 254 of the Acts of 2014 ("An Act Relative to Certain Judicial Procedures in the Superior Court") the Superior Court promulgated Standing Order 1-15 which set forth procedures for judges and attorneys to use when conducting voir dire. As indicated in Standing Order 1-15, ". . . after the judge has found an individual juror indifferent and able to serve, the judge shall permit questioning by attorneys or self-represented litigants . . . "[1] Standing Order 1-15 established two methods by which attorney participation voir dire could be conducted: first, attorneys could question jurors individually outside of the presence of other jurors; and second, the judge could allow attorneys to question jurors as a group using the panel voir dire procedure. In using the panel voir dire procedure, it was envisioned that certain sensitive personal questions, and questions required by statute or case law to be posed individually, would still be asked of jurors using the individual method.

Further, as part of the standing order, the Superior Court established a pilot project to focus on the use of "panel voir dire":

> The Court will establish a pilot project, in which judges who volunteer to do so will conduct so-called "panel voir dire," according to a consistent procedure to be determined and described in a separate document. During the course of the pilot project, the Court will compile data regarding identified measures. Upon completion of the pilot project, the Court will issue a public report of such data.[2]

This document reports on the experience of the volunteer judges in the pilot panel void dire project. The experience that was gained by this group of judges will continue to inform the further implementation of attorney participation voir dire.

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[1] Superior Court Standing Order 1-15: Participation in Juror Voir Dire by Attorneys and Self-Represented Parties, section C(6).

[2] Op. cit, section C(9).

DESCRIPTION:

The pilot project's objective was to use a largely uniform method of panel voir dire in an effort to gain experience and data regarding the benefits and effectiveness of the panel method to compared it to attorney participation voir dire by individual questioning of jurors. The panel method selected to be utilized for the project was the "rounds" method and a protocol for implementation was established.

Fifteen Superior Court judges volunteered to participate in the year-long pilot project. At the inception of the project and throughout, public notice was provided through the court's website and by notice to major bar associations to identify the sessions designated as pilot project sessions for the coming year.

Educational programs to familiarize judges, attorneys and court staff were conducted. The majority are reported in the Report of the Education Working Group. Additional trainings regarding the pilot project and the panel method utilized were conducted as well throughout the year.[3]

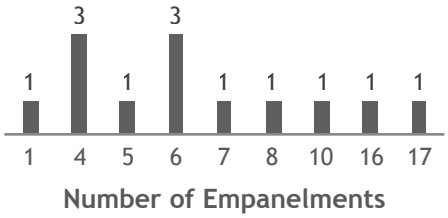
At the end of the yearlong pilot project, between 11 and 14 pilot project sessions were in operation each month. The project was conducted in 11 counties and included criminal, civil and hybrid sessions, as well as both single sittings and multi-session sittings. The judicial experience of the pilot project judges ranged from less than one year to over twenty-five years on the bench. All judges involved in the pilot project were also members of the focus groups conducted by Paula Hannaford-Agor of the National Center for State Courts throughout the year.

Data concerning the use of the panel method by judges participating in the pilot project and those outside of the pilot was collected and is contained in the Report of Data Collection Working Group. The data reported here was obtained from the pilot project judges only.

PART 1: UTILIZATION OF THE PANEL VOIR DIRE METHOD

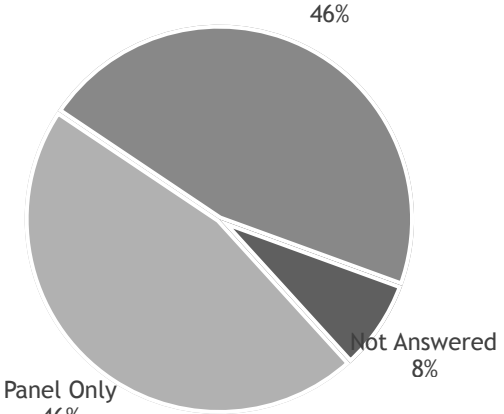
In total, 15 requests were issued for participation in the Attorney Participation Voir Dire Panel Survey, resulting in 13 completed surveys for analysis, a response rate of 87%. It is estimated that respondents conducted a cumulative total of 94 impanelments utilizing the panel method, only one of which involved a single self-represented litigant. The reported number of empanelments conducted using the panel method varied among respondents with a minimum of one, a maximum of 17 and a mean of 7.2.

Figure 1: Frequency of Panel Voir Dire Method



As indicated in Figure 2, some respondents (46%) indicated not conducting panel voir dire for all empanelments throughout the study time frame, rather incorporating an alternative voir dire method in 24

Figure2: Respondents Used Standard and Panel



[3] Working group member Carolyn McGowan deve
and widely used in acquainting attorneys and ju

empanelments.[4] These respondents provided feedback regarding the good cause(s) shown for not utilizing the panel voir dire method in some empanelments:

- "One or both sides objected and were not prepared."
- "A civil trial in which both attorneys requested that they not conduct any voir dire (panel or otherwise) of jurors."
- "Only because the nature of the criminal cases, required individual voir dire."
- "Both sides wanted strictly individual or judge-conducted voir dire."
- "I presided over six months of the pilot project, all in a criminal session. Only four of the eleven trials I presided over involved non-life felonies, therefore, only four qualified to be part of the pilot project, although I offered to conduct panel voir dire in every trial. In two of the four that qualified, the attorneys did not want to conduct panel voir dire. I did not require them to participate. In the other two cases that qualified, counsel wanted to participate. The other seven trials were all life felonies. In two of those cases, both murder cases, counsel wanted to participate in panel conducted voir dire. Out of the remaining five cases, three of which were murder cases, only one defense attorney asked to participate. That case was a baby murder case. Given the length of time it took to empanel the other murder cases in which panel voir dire was utilized, coupled with the nature of the case, I denied his request."

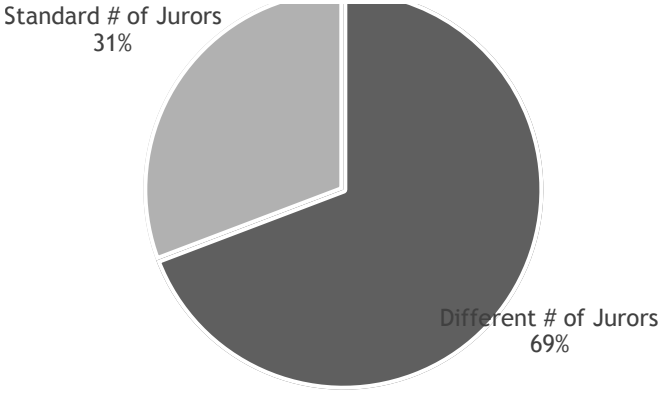
PART 2: EMPANELMENT PROCEDURE

Some respondents (31%) indicated utilizing a standard number of jurors between 14 and 20 on each panel throughout the pilot project. Of these respondents utilizing a standard number of jurors, the mean number of jurors on each panel was 15.7.

Further, the majority of respondents (69%) indicated not utilizing a standard number of jurors on each of their panels, and provided feedback as to what considerations led them to using different numbers of jurors in different empanelments:

- "It was an evolving process of my determining how to most efficiently and effectively empanel with panel voir dire."
- "how many jurors remain after the first 14 are placed in the box"

Figure 3: Juror Utilization in Panel Voir Dire



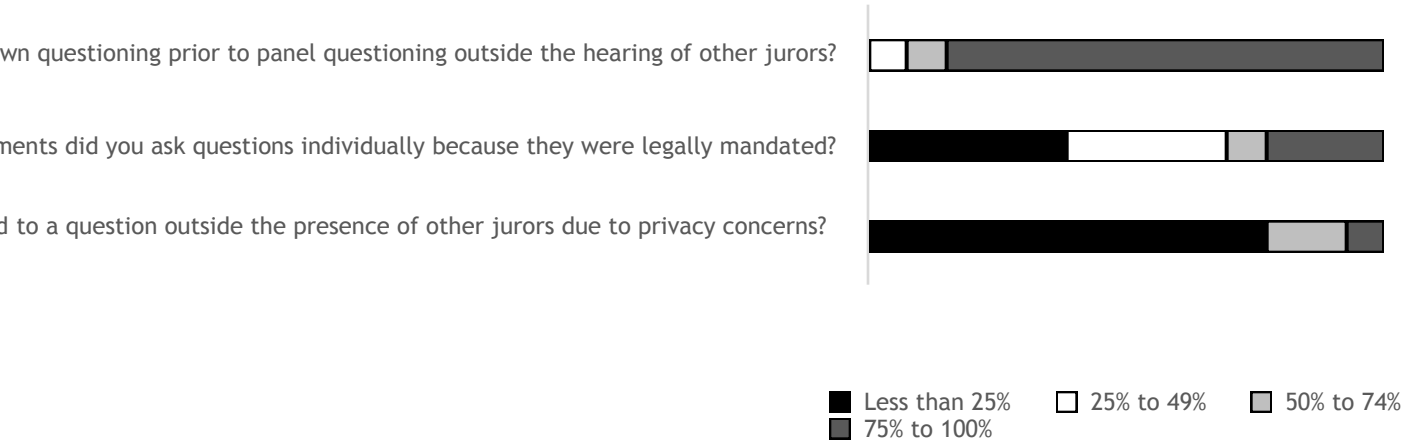
[4] The term "standard" employed in Figure 2 refers to any method Attorney Participation Voir Dire under S.O. 1-15 that is not panel voir dire.

- "To ensure that we considered all the jurors in the fewest panels."
- "Number of jurors seated from the first panel."
- "Sometimes we were using second or third panels to select a small number of jurors which made it unnecessary to seat a panel of 14."
- "Generally, the second panel would be smaller if less jurors were needed to complete the process."

Respondents were asked a series of questions designed to gauge the prevalence of individual questioning prior to panel voir dire. All respondents indicated, to varying extents, using individual questioning prior to panel voir dire:

- 92% of respondents indicated that in greater than 50% of empanelments they conducted their own questioning, prior to panel questioning, outside the hearing of other jurors;
- 31% of respondents indicated that in greater than 50% of empanelments they asked questions individually because they were legally mandated;
- 23% of respondents indicated that in greater than 50% of empanelments a juror asked to respond to a question outside the presence of other jurors due to privacy concerns.

Figure 4: Use of Individual Questioning During Panel Voir Dire



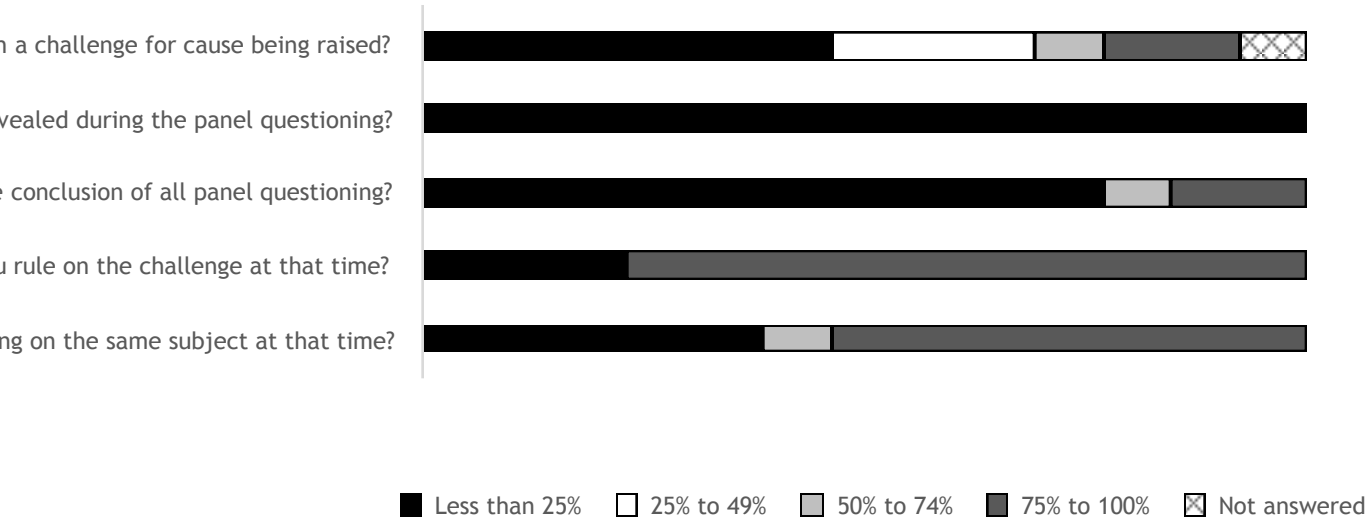
PART 3: SIDEBAR QUESTIONING DURING THE PANEL SEGMENT OF THE PROCESS

Respondents were asked a series of questions designed to gauge the prevalence of sidebar questioning during panel voir dire and the manner in which resulting challenges for cause were ruled upon:

- 23% of respondents indicated that in greater than 50% of empanelments sidebar questioning resulted in a challenge for cause being raised;
- 100% of respondents indicated that in less than 25% of empanelments they brought a juror to sidebar to pursue their own concerns about potential bias revealed during the panel questioning;

- 23% of respondents indicated that in greater than 50% of empanelments if a juror's response to questioning at sidebar resulted in a challenge for cause they ruled on that challenge at the conclusion of panel questioning;
- 77% of respondents indicated that in greater than 75% of empanelments if a juror's response to questioning at sidebar resulted in a challenge for cause they ruled on that challenge at that time;
- 62% of respondents indicated that in greater than 50% of empanelments that when a juror was brought to sidebar before panel questioning all parties were directed to conduct their own questioning, on the same subject, at that time.

Figure 5: Use of Sidebar Questioning During Panel Voir Dire



PART 4: TOPICS AND QUESTIONS

The majority of respondents, 77%, approved less than 25% of topics and questions proposed for use at sidebar only. Respondents provided feedback pertaining to the themes of the topics and questions they approved for use at sidebar only:

- "Publicity of case, view of charges of sexual assault, prior experience of juror with work related complaints, medical treatment or other topics of a highly personal nature."
- "Themes of a personal nature, those directed toward racial, ethnic or gender preference, and themes that might confuse jurors if directed toward a panel"
- "Privacy, court contact questions"
- "Racial bias, sexual victimization, specific questions related to confidential questionnaire"
- "Personal history with medical conditions, employment discrimination or crime victimization; racial/ethnic/religious bias"
- "Most often legally required ones and personal questions as to jurors' occupation"

- “Particularly sensitive issues such as being a victim of crime, or suffering from a medical condition”

Further, respondents also provided feedback pertaining to the types of topics and questions commonly proposed and approved throughout the entire pilot project:

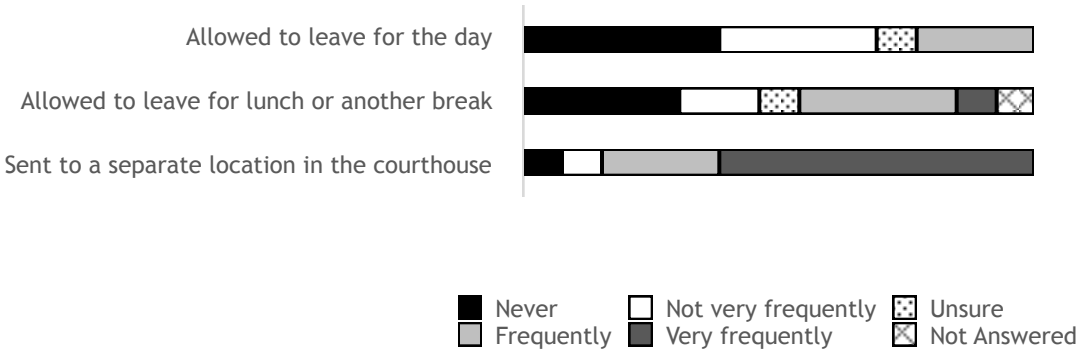
- “Views of issues that are likely to come up during the trial, like problems with neighbors in a land dispute or work place problems in an employment dispute and views on underage drinking and casual sex in a campus rape case.”
- “In criminal cases: expectation that D would testify; reasons why a D might not testify; juror's ability to make an independent judgment and not just "go along" with the majority. In civil cases - understanding of preponderance of the evidence.”
- “General questions on subject of litigation (i.e., in med mal case); attitudes toward awarding damages, frivolous law suits.”
- “Race, constitutional rights of the defendant, defendant failing to testify, DNA and scientific evidence or lack thereof, bias, drug offenses, domestic abuse.”
- “Questions related to the specific issues in the case, general concepts regarding burden of proof.”
- “Exploring whether a juror had an experience somewhat similar to the injured plaintiff's or had connections to the medical field in a med mal case.”
- “CRIM: understanding of presumption of innocence, reasonable doubt, defendant right not to testify CIVIL: understanding of burden of proof, willingness to grant non-monetary damages, attitudes toward civil lawsuits for damages.”
- “Civil: attitudes towards law suits and awarding damages. Criminal - understanding the burden of proof and the defendant's failure to testify.”
- “1. Personal experience with addiction. 2. Racial bias/prejudice. 3. Feelings about firearms. 4. Whether the juror accepts the burden of proof/will juror hold it against defendant for not testifying. 5. CSI effect.”

PART 5: LOGISTICS

Respondents were asked a series of questions designed to measure the frequency of practices used to manage jurors subsequent to the conclusion of panel questioning and challenges being exercised:

- 69% of respondents indicated never or not very

Figure 6: Frequency of Practices Used to Manage Jurors



frequently allowing jurors to leave for the day;

- 46% of respondents indicated never or not very frequently allowing jurors to leave for lunch or take another break;
- 85% of respondents indicated frequently or very frequently sending jurors to a separate location in the courthouse.

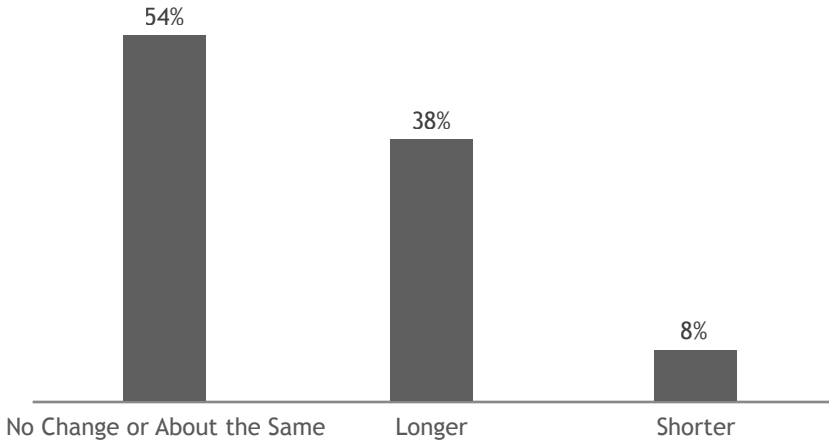
The majority of respondents (92%) did not encounter any problems with panel voir dire procedures, however practical concerns were raised regarding panel questioning in sessions employing an electronic audio-recording system:

- “The recording device in the courtroom was not close enough or sensitive enough. Also, recordings malfunctioned at sidebars resulting in the only options being not recording or amplifying.”
- “Attorneys and jurors giving non-verbal responses. Attorneys not stating jurors' #s when asking questions or indicating which jurors had responded in a particular way. Where the procedure became more conversational, Attorneys & jurors might not speak loudly enough to be recorded (or even heard by the judge, clerk and/or other attorneys).”
- “When and how to identify for the record potential jurors responding to questions.”
- “I only used electronic audio-recording in civil cases (JAVS), and am not sure how much was actually recorded. In all criminal cases, a court reporter was used. Although there was new electronic recording (FTR) in one courtroom, we could not rely on it as sometimes it would record, sometimes not. There were significant issues over the difficulty counsel had in being able to mute the amplification/recording of conversations at counsel table. Defense counsel wanted it turned off, but there was no mechanism to do so. It had to be unplugged.”
- “Once lawyers got used to stating the jurors seat and juror number, there were few concerns”.
- “It is very difficult to be sure that the record accurately reflects the juror and seat number of the jurors who responded without the court reporters.”

PART 6: LENGTH OF EMPANELMENT

Respondents were asked a series of questions designed to gauge any fluctuation in the length of the empanelment process attributable to panel voir dire. Respondents (54%) indicated that the length of empanelment did not change or remained about the same, while 38% of respondents indicated the empanelment process as taking longer.

Figure 7: Change in Length of the Empanelment Process with use of Panel Voir Dire



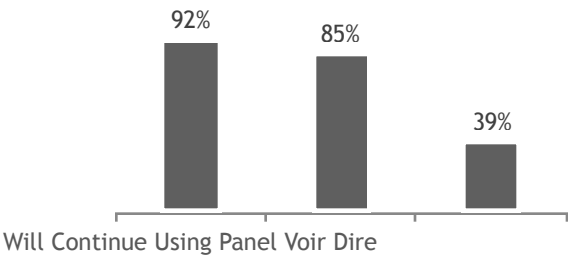
Respondents indicating that the length of the process changed with the utilization of panel voir dire provided feedback on precisely how the process changed:

- "It approximately doubled the time for what would previously have been short empanelments."
- "2x to 3x longer than judge-conducted voir dire."
- "I found that the empanelment process increased the time to empanel a jury by a few hours at most."
- "It probably took us slightly longer as it was a new process for all involved, including the clerk."
- "it takes longer to do both my individual voir dire and then attorney panel voir dire"
- "In some cases it took somewhat longer, but not significantly. In other cases, there was no difference in the time to empanel."
- "Compared to individual voir dire by judge it increases time by about 1/3 (15 jurors per hour instead of 20); about equal to attorney voir dire at side bar."
- "The empanelment process was much longer than in trials where no panel voir dire was conducted."

PART 6: FEEDBACK

Respondents were asked a series of questions designed to gauge their overall level of satisfaction with attorney participation voir dire empanelment procedures. While some respondents (39%) indicated they would recommend changes to the attorney participation voir dire process, the majority of respondents (85%) were either satisfied or very satisfied with the panel voir dire process. Further, some

Figure 8: Satisfaction With APVD Empanelment



respondents (31%) indicated utilizing prepared remarks or other materials during panel voir dire.

PART 7: CONCLUSIONS AND RECOMMENDATIONS

The survey data and experience reported highlighted many strengths and potential areas of continuous improvement evidenced throughout the pilot project.

Most significantly, respondent data suggest that panel voir dire conducted according to the pilot protocol has been embraced by the judges involved and has functioned well in the jury empanelment process. The overwhelming majority of respondents (92%) identified that they will continue using the pilot's panel method voir dire.

Respondent feedback illustrated several practical concerns regarding panel questioning and the use of electronic audio-recording systems such as JAVS and FTR. Accordingly, it may be beneficial to request that the Superior Court review the audio-recording systems in place in Superior Court courtroom to assess the utility of each for panel voir dire, arrive at suggestions to address these practical concerns, and recommend mechanisms to reinforce to bench and bar the importance of identifying each juror by number during the panel impanelment process.

Respondent feedback and corroborating empirical data gathered by the Data Collection Working Group suggest that panel voir dire may result in a lengthier empanelment process than alternative jury selection methods. Some comments suggest judges believe that as judges, attorneys and clerks become more familiar with panel voir dire protocols, the length of jury empanelment by panel method may improve. Further efforts should be made to continue to measure the length of panel empanelments to determine if familiarity with the process is having an effect.

Respondents varied the number of jurors per panel consistent with various considerations, including the type of case, the number of jurors available and the number of jurors left to be chosen. Accordingly, the comments and data suggest that in utilizing the panel method considerable flexibility should be afforded to the trial judge in determining the number of jurors in each panel and the manner the voir dire will proceed.

Given the range of procedures utilized even within the confines of the protocol, more experience and considerable judicial latitude in panel voir dire could provide a basis for identifying desirable features of the panel method and developing “best practices.” The experience of collaboration among the pilot judges appeared to be a positive factor in exploring methods and practices to improve the method of jury selection. A focus group of judges would be useful to provide more information on the experience. Those directly involved in the jury selection process should continue to engage in improvement efforts and foster an environment conducive of meaningful communication and collaboration.

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-

[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.

represented parties a fair and meaningful opportunity to participate in voir dire, supporting all 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

[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.

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 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.

Appendix 7

SUPREME JUDICIAL COURT
VOIR DIRE COMMITTEE

WORKING GROUP ON TRAINING AND EDUCATION REPORT

Judge Peter M. Lauriat (Chair)
Judge Bertha Josephson
Judge Maynard Kirpalani
Mark Lee, Esq.
Carolyn McGowan, Esq.
Doug Sheff, Esq.
Mark Smith, Esq.

June 1, 2016

Supreme Judicial Court Voir Dire Committee
Education and Training Working Group Report

The goal of this working group of the SJC Voir Dire Committee has been to educate and inform both the bench and bar of the Commonwealth about c. 254 of the Acts of 2014 (G.L. c. 234A, § 67D), which provides in part that the following procedures shall govern in all criminal and civil superior court jury trials:

> (1) In addition to whatever jury voir dire of the jury venire is conducted by the court, the court shall permit, upon the request of any party's attorney or a self represented party, the party's attorney or self represented party to conduct an oral examination of the prospective jurors at the discretion of the court;
>
> (2) The court may impose reasonable limitations upon the questions and the time allowed during such examination, including, but not limited to, requiring pre approval of the questions;
>
> (3) In criminal cases involving multiple defendants, the commonwealth shall be entitled to the same amount of time as that to which all defendants together are entitled;
>
> (4) The court may promulgate rules to implement this section, including, but not limited to, providing consistent policies, practices and procedures relating to the process of jury voir dire.

Pursuant to G.L. c. 234A, § 67D(4), a sub-committee of the SJC Committee, consisting of five Superior Court Judges and four practicing attorneys, drafted a proposed Superior Court Standing Order 1-15 ("S.O. 1-15") to provide for the implementation of the new law. The

sub-committee also developed a Panel Voir Dire pilot project to advance and assess the appropriateness and utility of this form of attorney-participation in voir dire examination of the jury venire. S.O. 1-15 was approved by the SJC Voir Dire Committee and then adopted by the Superior Court on December 5, 2014, effective February 2, 2015, coinciding with the effective date of the new law.

Work to Date

Given the sea change in the method and manner of jury selection in Superior Court civil and criminal trials, and the compressed period between the adoption of S.O. 1-15 and its effective date, the members of the sub-committee engaged with the Superior Court, the Flaschner Judicial Institute, Superior Court session clerks and court personnel, numerous bar associations, bar groups, continuing legal education organizations, District Attorneys' Offices and several Committee for Public Counsel Services Superior Court trial units over the following weeks and months to inform and educate them about the law, the Standing Order, and the protocol applicable in the Pilot Project sessions. A partial listing of education and training programs in which sub-committee members have been involved is attached as Appendix A to this Report.

The primary focus of the education programs has been to introduce and explicate S.O.1-15 and the techniques of individual and panel attorney-participation voir dire. The issues to be raised at the final trial conference include the desired voir dire approach, the nature and scope of the topics and specific questions to be addressed to the jury venire by counsel, the stages of the voir dire process, proposed preliminary instructions on the law by the court, and the timing and time allowed counsel to conduct individual or panel voir dire. The jury selection process itself includes discussion of the role and responsibilities of the judge and trial counsel, the appropriate use of the Confidential Juror Questionnaire, the need to respect juror dignity and

privacy, the mechanics of the jury selection process and of making a trial record of interactions between counsel and prospective jurors, the exercise of judicial control over the nature, scope and extent of attorney examination of individual and panel jurors, the attorneys' exercise of challenges for cause and peremptory challenges, and the ultimate determination by the court that the chosen jurors stand indifferent and impartial.

The educational techniques used in the programs included lectures, panel discussions, power-point presentations, and demonstrations, using hypothetical civil or criminal fact patterns, and involving attorney examination of mock jurors.

Future Work

While lawyer-participation voir dire has been successfully introduced in the Superior Court, it is still in its formative stage. Much remains to be done to inform, educate and train attorneys (and judges) about how to conduct voir dire examination of jurors, either individually or in a panel format, that is productive, efficient and effective.

Toward those ends, we recommend several different approaches:

1. Development and implementation of one or more programs, perhaps sponsored by the Flaschner Judicial Institute, which would address the education and training of BMC, District Court, Housing Court and Juvenile Court judges and court staff in best practices for allowing/encouraging lawyer-participation voir dire in their courts. Such programs would include demonstrations of lawyer-participation jury selection techniques that could be used in or adapted to trials in those courts, through the use of mock jurors and jury empanelments, and panel discussions of pitfalls, issues and solutions that have arisen and been addressed by the Superior Court and counsel in lawyer-participation jury selection since February 2015.

2. Lawyer participation voir dire programs could also be co-ordinated with the release of the third edition of the *Massachusetts Jury Trial Benchbook* (Flaschner Judicial Institute 2016), since jury selection methods and techniques will be part of anticipated Flaschner full-day programs for trial court judges on jury trial issues that will follow the release of this book. Similar programs, centered around the release of the *Benchbook*, will be planned for lawyers across the Commonwealth.

2. Teaching/learning/demonstrating the *art* of Lawyer Conducted Voir Dire:

   - identifying the purposes and goals of voir dire examination,
   - crafting questions that will identify bias in jurors,
   - developing good methods of conversing with jurors, and
   - encouraging jurors to discuss their concerns

3. Educating and training new Superior Court Judges

4. Educating and training new lawyers

5. Continuing training and education of lawyers who have not yet engaged in lawyer-participation voir dire

Appendix A

Voir Dire - Standing Order 1-15

CLE EDUCATION/TRAINING PROGRAMS

[As of June 1, 2016]

January 12, 2015	Suffolk County District Attorney's Office - Boston (Lauriat, J., Lee)
January 13, 2015	Massachusetts Defense Lawyers Association and Defense Research Institute - Boston (Kirpalani, J.)
January 14, 2015	Massachusetts Continuing Legal Education - Boston (Lauriat and Kirpalani, JJ., Sheff, Lee and McGowan)
January 21, 2015	Boston Bar Association - Boston (Lauriat and Rufo, JJ., McGowan, Sheff, Lee and Smith)
January 23, 2015	Massachusetts Superior Court Clerks' Association - Woburn (Rufo and Lauriat, J.J., and McGowan)
January 23, 2015	Flaschner Judicial Institute - Superior Court Judges - Waltham (Fabricant, Lauriat, Josephson, Rufo and Kirpalani, JJ., Lee, Sheff, Lee and McGowan)
January 27, 2015	Massachusetts Bar Association - Boston (Lauriat, Josephson, Kirpalani, and MacLeod, JJ., Sheff and McGowan) [postponed to March 16, 2015 due to weather]
January 28, 2015	Boston Bar Association - Boston (Gaziano, J. and Lee)
February 25, 2015	Boston Bar Association Bench/Bar Conference - Boston (Fabricant Kirpalani, JJ.)
March 12, 2015	Social Law Library Lawyer Voir Dire Training Program - Boston (Lauriat, Josephson and Kirpalani, JJ., Lee and McGowan

May 2, 2015	Superior Court Education Conference - Lenox (Lauriat, Rufo, Josephson and Kirpalani, JJ.)
May 12, 2015	Massachusetts Academy of Trial Attorneys - Voir Dire Training - Framingham (McGowan and Sheff).
May 29, 2015	Massachusetts Defense Lawyers Association Annual Conference - Boston (Lauriat, J.)
June 3, 2015	Norfolk County Superior Court Bench/Bar Training - Dedham (Lee and McGowan)
June 6, 2015	Cambridge, Arlington, Belmont Bar Association - Cambridge (Kirpalani, J.)
June 16, 2015	American Association for Justice/Massachusetts Bar Association/Massachusetts Academy of Trial Attorneys Program - Boston (Lauriat, J.)
June 25, 2015	Nixon Peabody Law Firm - Boston (Lauriat, J.)
Summer 2015	Numerous training programs for District Attorneys, Committee for Public Counsel Service attorneys, and private bar advocates - Suffolk, Norfolk, Worcester and Middlesex Counties (Lee and McGowan)
Summer/Fall 2015	Training programs for Judges and Lawyers - Panel Voir Dire Protocol - Hampden, Hampshire, Franklin and Berkshire Counties - (Josephson, J.)
November 6, 2015	Boston Municipal Court Annual Conference - Intro to Lawyer Voir Dire (Lauriat, J.)
November 13, 2015	MCLE Annual Criminal Law Conference - Demonstration Program - Lawyer/Panel Voir Dire - Boston (Lauriat, J.)
February 2, 2016	MBA Program - "Panel Voir Dire After A Year: Nothing to Fear" - Boston (Lauriat, Kirpalani, Fishman and Frison, JJ.)
February 3, 2016	MCLE Attorney Voir Dire Program - "Voir Dire: Watch and Learn" - Boston (Kenton-Walker and Mason, JJ.)
February 11, 2016	Boston Bar Association - "The State of Jury Voir Dire in Massachusetts" - Boston (Sanders, Kirpalani and Brieger,

JJ.)

April 30, 2016	Superior Court Spring Education Conference - "Attorney Voir Dire Revisited" - Lenox, MA
May 6, 2016	MCLE Annual Personal Injury Law Conference - "Point/Counterpoint on Jury Voir Dire" - Boston, MA (Lauriat, J.)
May 13, 2016	Juvenile Court Annual Spring Conference - Jury Trial Empanelment - Lenox, MA (Lauriat, J.)