

As Good As It Gets: Why Massachusetts Should Not Adopt an Attorney-Conducted Voir Dire Process for Civil Trials

“Is there a single person on this panel who doesn’t believe that a person who chooses to smoke should know the dangers?’ He waited, watching and tugging at the line a bit, and finally caught one. A hand was slowly raised from the fourth row.”¹

I. INTRODUCTION

A person’s right to a trial by an impartial jury is deeply embedded within the fabric of the American justice system.² An impartial jury safeguards Constitutional rights by deciding the fate of the parties in an unbiased manner.³

1. See JOHN GRISHAM, *THE RUNAWAY JURY* 51 (1995) (detailing defense attorney’s struggle with jury voir dire). In his novel, Grisham tells the story of a high-profile civil lawsuit filed against the tobacco industry by the widow of a cigarette smoker. See generally *id.* In the quoted scene, defense counsel begins his voir dire examination with a seemingly harmless question to connect with the prospective jurors. *Id.* at 51. In response to this innocuous question, however, a woman from the jury pool accuses the tobacco industry of intentionally hooking people on cigarettes and reveals her disdain for the tobacco industry. *Id.* at 51-52. When she sits in her seat, Grisham states that “she might as well have left the courtroom.” *Id.* at 52. This excerpt illustrates the need for a jury selection process because it reveals how the prejudices of a potential juror may affect that juror’s ability to be impartial. In Grisham’s fictitious courtroom, as well as in real courtrooms across the country, the justice system relies on the voir dire process to uncover a juror’s prejudices that would prevent a juror from remaining impartial; if a juror reveals a deeply rooted bias that would hinder a juror’s ability to be impartial during a trial, the juror will be dismissed. John T. Bibb, Comment, *Voir Dire: What Constitutes an Impermissible Attempt to Commit a Prospective Juror to a Particular Result*, 48 BAYLOR L. REV. 857, 857 (1996) (describing voir dire as significant stage of trial because it helps impanel impartial jury). This excerpt also reveals the extent to which parties to a lawsuit attempt to manipulate the voir dire process to impanel a jury more inclined to interpret the case from their perspective. See generally Janeen Kerper, *The Art and Ethics of Jury Selection*, 24 AM. J. TRIAL ADVOC. 1 (2000) (articulating various goals of attorneys during voir dire).

2. See NORBERT EHRENFREUND & LAWRENCE TREAT, *YOU’RE THE JURY* xiv (1992) (tracing evolution of jury system). The right to a trial by jury originated in England during the early thirteenth century. *Id.* See also V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* § 1.01, at 5-6 (3d ed. 2001) (discussing constitutional foundations of right to trial by jury in United States). American colonists revolted against England because they were deprived of a number of rights guaranteed to English citizens, including the right to trial by jury. JOHN GUINTEHER, *THE JURY IN AMERICA* 31 (1988). Several of the Founding Fathers refused to ratify the United States Constitution without explicit provisions that guaranteed the right to trial by jury for both civil litigants and criminal defendants. *Id.* Consequently, the United States Constitution provides parties appearing before the court the right to trial by an impartial jury. U.S. CONST. art. III, § 2, cl. 3 (requiring juries for criminal trials); U.S. CONST. amend. VI (declaring accused’s right to trial by impartial jury); U.S. CONST. amend. VII (preserving right to jury trial in common law suits).

3. See Walter Olson, *Rule of Law: The Jury-Selection Ordeal*, WALL ST. J., Dec. 7, 1994 at A15 (suggesting jury most significant feature of justice system). Olson describes the jury as the “Queen Bee of the American legal system, reputedly all-powerful but in practice immobilized, groomed and force-fed by a swarm of functionaries.” *Id.*

A jury trial, whether civil or criminal, begins with jury selection, which serves as the primary method for impaneling an impartial jury.⁴ In general, jury selection consists of three elements: voir dire, challenges for cause, and peremptory challenges.⁵

Voir dire is an essential part of jury selection because it enables judges and attorneys to discern prejudice or bias within a potential juror.⁶ From general questions directed at the entire jury pool to individual juror examination, voir dire exposes a potential juror's inability to be impartial towards a particular party or case and assists attorneys in making the best use of challenges for cause and peremptory challenges.⁷ Aside from these intended purposes, voir

4. See RALPH A. JONAKAIT, *THE AMERICAN JURY SYSTEM* 16, 128-29 (2003) (providing summary of jury trial and jury selection phase of trial, respectively); see also Lisa A. Blue, *Making the Most Out of Your Voir Dire*, 1 Ann.2003 ATLA-CLE 141 (July 2003) (asserting jury selection most significant element of trial).

5. See Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI-KENT L. REV. 1061, 1061-62 (2003) (explaining different parts of jury selection). Voir dire is "a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." BLACK'S LAW DICTIONARY 753 (8th ed. 2004). Literally defined, voir dire means "to speak the truth." *Id.* A challenge for cause is a party's challenge to a potential juror supported by a specific reason, such as bias or prejudice, that disqualifies the potential juror. *Id.* at 92. Peremptory challenges allow both sides to disqualify a potential juror without specifying a reason. *Id.* at 92-93. A party, however, cannot use peremptory challenges to discriminate on the basis of race, ethnicity, or gender. See BLACK'S LAW DICTIONARY, at 92.

6. See *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (noting right to impartial jury includes adequate voir dire to identify unqualified jurors); *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) (stating voir dire assists parties in selecting impartial jury); *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (assuring Sixth Amendment requires impartial jury); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (noting voir dire plays critical role in protecting constitutional right to impartial jury); *Dennis v. United States*, 339 U.S. 162, 171-72 (1950) (acknowledging party's right to impartial jury guaranteed by opportunity to prove bias of prospective jurors). But see *Lockhart v. McCree*, 476 U.S. 162, 178 (1986) (holding juror's impartiality not violated because of predisposition toward one result); *Wainwright v. Witt*, 469 U.S. 412, 423-24 (1985) (mandating exclusion of juror for cause only if opinions prohibit impartiality); *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (indicating due process requirement satisfied by juror's willingness to decide case based solely on evidence). In *Lockhart*, the Supreme Court emphasized that the Sixth Amendment only requires that jurors be capable of deciding a case based solely on the evidence. 476 U.S. at 178.

7. See *Mu'Min*, 500 U.S. at 431 (discussing vital link between voir dire, discovering juror bias, and proper exercise of peremptory challenges); DECISION BY TRIAL: A COLLECTION OF ARTICLES ON JURIES, JUROR RESEARCH & JUROR ATTITUDES 11-12 (Heather Z. Hutchins ed., 2002 ed., 2002) (explaining multiple purposes of voir dire); Valerie P. Hans and Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI-KENT L. REV. 1179, 1181 (2003) (stating extensive voir dire needed to expose juror bias); Kerper, *supra* note 1, at 5 (asserting voir dire crucial to effective exercise of peremptory challenges and challenges for cause); Bibb, *supra* note 1, at 857 (asserting voir dire uncovers prospective jurors' prejudices or biases). By uncovering information about a juror's opinions, past experiences, or personal interest in the case, voir dire assists judges and lawyers in determining if anything about the juror's background would prevent the juror from deciding the case in an unbiased manner. Kerper, *supra* note 1, at 3-4. Voir dire can be conducted in one of three ways: individual method, group method, or combined method. See JEFFREY T. FREDERICK, *MASTERING VOIR DIRE & JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY* 5 (1995) (defining different methods of voir dire). In the individual method, each juror is questioned independently of other jurors. *Id.* Most scholars perceive this method as the most effective because it increases a juror's willingness to be candid. *Id.* Individual examination also provides judges and attorneys an opportunity to ask specific follow-up questions based on the juror's individual response. *Id.* Using the group method, the attorneys or judge may question jurors in the presence of other

dire also serves many unauthorized purposes of the parties, such as establishing a relationship with the prospective jurors and eliciting early favoritism for one side of the dispute.⁸ Ultimately, the success of voir dire depends on a number of factors, including the system used by the jurisdiction, counsels' ability as advocates, and the extent of questioning directed at prospective jurors.⁹

Despite the significance of voir dire, no uniform procedural standard exists for this practice and the approach to voir dire varies by jurisdiction.¹⁰ In Massachusetts, the trial judge primarily conducts the questioning of the jury venire and attorneys have little or no opportunity to directly communicate with the jury panel during voir dire.¹¹ Massachusetts' voir dire process directly contrasts with the New York system, where the judge plays a limited role and the attorneys essentially control voir dire questioning.¹²

Currently, some members of the Massachusetts legal community are lobbying for legislation that would implement a voir dire process that is largely conducted by attorneys.¹³ Under the pilot program, the trial judge would retain substantial authority over the voir dire process but would be required to provide attorneys with the opportunity to question the venire directly.¹⁴ Although State Representative Eugene O'Flaherty originally filed the bill in 2003, it has yet to be enacted by the Massachusetts legislature.¹⁵ With the Juror Examination Act's re-filing in 2005, however, proponents remain hopeful that the legislature

jurors, whether it be the entire venire panel or a small group of selected jurors. *Id.* Finally, the combined method permits questioning of prospective jurors both individually and as a group. FREDERICK, at 6.

8. See FREDERICK, *supra* note 7, at 2-4 (explaining hidden goals of voir dire); GUNTHER, *supra* note 2, at 50-51 (stating voir dire teaches jurors about parties' differing views of case); Kerper, *supra* note 1, at 5-9 (articulating various objectives of counsel during voir dire); see also Frederick P. Hafetz, *Attorney Conducted Voir Dire*, 340 PLI/LIT 129, 131, 133-36 (1987) (listing education of jurors as one major goal of attorney conducted voir dire). Attorney-conducted voir dire gives rise to these unsanctioned objectives more frequently than judge-conducted voir dire because attorneys act as zealous advocates and, consequently, are motivated to obtain the best jury for his or her client. See Kerper, *supra* note 1, at 5-6.

9. See FREDERICK, *supra* note 7, at 4-5 (discussing required elements for effective voir dire).

10. See FREDERICK, *supra* note 7, at 5-7 (explaining jurisdictional variations of voir dire process). Who questions the venire directly affects jury impanelment. *Id.* While some jurisdictions permit only the trial judge to question the venire, others give attorneys the right to question jurors. *Id.*

11. See MASS. GEN. LAWS ch. 234, § 28 (2004) (outlining procedure for questioning jurors); see also *infra* notes 46-57 and accompanying text (explaining Massachusetts' voir dire system).

12. See N.Y. CT. RULES § 202.33 (McKinney 2004) (detailing conduct of voir dire in New York); see also *infra* notes 80-88 and accompanying text (summarizing New York's voir dire system).

13. See H.R. 775, 184th Gen. Ct., Reg. Sess. (Mass. 2005) (setting forth content of proposed legislation regarding examination of jurors). H.R. 775 is a re-file of H.R. 783, which was introduced in January, 2003. See H.R. 783, 183d Gen. Ct., Reg. Sess. (Mass. 2003). This proposed legislation would be applied in addition to chapter 234, § 28. *Id.* See also Carolyn Magnuson, *Massachusetts Lawyers Seek Voir Dire*, 37-FEB TRIAL 104 (2001) (reporting proposed legislation introduced because Massachusetts ranks among "worst states for plaintiffs"); Editorial, *New Wave in Voir Dire?*, MASS. LAW. WKLY., May 17, 2004 (covering judge's efforts to improve voir dire while Massachusetts' limited rules in effect).

14. See H.R. 775, 184th Gen. Ct., Reg. Sess. (Mass. 2005) (setting forth roles of judge and attorney under proposed voir dire program); see also *infra* notes 140-147 and accompanying text (evaluating implications of proposed bill).

15. See *infra* notes 63-69 and accompanying text (discussing current status of proposed bill).

will ratify the trial program in the future.¹⁶

This Note will address whether the benefits of attorney-conducted voir dire outweigh the drawbacks of this system, which include decreased judicial efficiency and economy.¹⁷ First, this Note will trace the development of voir dire as a central right within the civil justice system.¹⁸ This Note will then examine the evolution of the Massachusetts voir dire system, which is considered a rigid system as compared with other systems.¹⁹ This Note will also discuss the liberal voir dire system in New York.²⁰ Next, this Note will analyze the strengths and weaknesses of these diametrically opposed systems.²¹ Finally, this Note will suggest that Massachusetts adopt a modified approach to its voir dire practice so that it may balance the policy concerns for an impartial jury with judicial economy.²²

II. THE JURY: ITS SIGNIFICANCE & INTERPRETATION BY STATES

A. THE JURY: A WORK IN PROGRESS

Reform of the American justice system has been the subject of a century-long debate.²³ At the center of the reform effort is the jury: its members, their selection, and their treatment.²⁴ Throughout the 1960s, there was a nationwide effort to improve the jury system, focusing in part on lessening the burden imposed on citizens reporting for jury duty.²⁵ In 1983, the American Bar Association (ABA) adopted its Standards Relating to Juror Use and Management (ABA Standards) intended to assist the states in improving the use of juries; consequently, the ABA Standards facilitated and influenced a number of state reform efforts.²⁶ As a result of the national jury reform effort

16. See *infra* notes 63-69 and accompanying text (demonstrating continuous support for proposed legislation by some members of legal community in Massachusetts).

17. See *infra* Part III (evaluating costs and benefits of Massachusetts and New York voir dire systems).

18. See *infra* Part II (A) (examining historical significance and evolution of voir dire).

19. See *infra* Part II (B) (outlining development of current voir dire system in Massachusetts).

20. See *infra* Part II (C) (tracing progression of voir dire system in New York).

21. See *infra* Part III (comparing and evaluating Massachusetts' and New York's voir dire systems).

22. See *infra* Part III (advocating for combination of judge-conducted and attorney-led voir dire systems).

23. See generally STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES & THE POLITICS OF REFORM* (1995) (tracing judicial reform movements in United States); G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216 (1996) (discussing jury reform efforts by states during twentieth century).

24. See DANIELS & MARTIN, *supra* note 23, at 244 (stating jury focal point of ongoing debate regarding reform in civil justice system).

25. See Munsterman, *supra* note 23, at 216-17 (outlining reform movements in 1960s); see also Office of Jury Commissioner for the Commonwealth, *Introduction*, at <http://www.mass.gov/courts/jury/introduc.htm> (last visited Mar. 23, 2006) [hereinafter Office of Jury Commissioner] (describing inadequate former state of jury system in Massachusetts and reasons for reform).

26. See generally A.B.A., *STANDARDS RELATING TO JUROR USE AND MANAGEMENT* (1983) [hereinafter ABA STANDARDS] (addressing issues regarding management and use of juries in state courts). A number of organizations contributed to the ABA's study, including the National Center for State Courts, the Conference of

and the guidelines proposed by the ABA, a number of states implemented substantial changes to their respective justice systems.²⁷ In particular, both Massachusetts and New York extensively reformed their jury systems, including the jury selection process, over the next thirty years.²⁸

B. JURY REFORM & VOIR DIRE IN MASSACHUSETTS

1. Trial by Jury in Massachusetts

In addition to the guarantees of a right to trial by an impartial jury in the United States Constitution, the Massachusetts Declaration of Rights also preserves this right to a fair jury for persons before the court.²⁹ In Massachusetts, civil litigants, as well as defendants in criminal cases, are entitled to a jury that is not influenced by bias or prejudice.³⁰ Massachusetts law also mandates that an impartial jury can be attained only if the jury represents a cross section of the community.³¹

As a general rule, every person qualified to vote can serve as a juror in

State Court Administrators, the National Association for Court Administration, and the National Bar Association. *Id.* at iii. The ABA Standards encourage limiting voir dire to matters relevant to determining whether to remove a juror for cause and for exercising peremptory challenges. *Id.* at 68. In addition, the ABA Standards suggest that the judge conduct the preliminary voir dire examination and then subsequently permit counsel to question the prospective panel for a reasonable period of time. *Id.* The ABA Standards also recommend that counsel have access to prospective jurors' basic background information at the inception of jury selection in order to reduce the time required for voir dire. ABA STANDARDS, at 68. *See also infra* notes 35-38 and 79 and accompanying text (discussing relationship between jury questionnaires and voir dire process in Massachusetts and New York, respectively).

27. *See generally* Munsterman, *supra* note 23 (analyzing jury reform efforts throughout United States).

28. *See generally* Munsterman, *supra* note 23 (discussing jury reform in various states); *see also infra* Part II (B) and Part II (C) (examining reform efforts in Massachusetts and New York).

29. *See* MASS. CONST. Pt. 1, art. 15 (codifying right to trial by jury in civil suits); *see also* Parker v. Simpson, 62 N.E. 401, 408-09 (Mass. 1902) (preserving right to trial by jury in Massachusetts); Joseph R. Nolan & Laurie J. Sartorio, *Equitable Remedies*, 31 Mass. Prac. § 133 (2d ed. 2004) (tracing evolution of right to trial by jury in Massachusetts). Massachusetts citizens do not have the right to a jury trial in an action for equitable relief because this right was not recognized prior to the adoption of the Constitution in 1780. *Id.* *See also* Keville v. McKeever, 675 N.E.2d 417, 424 (Mass. App. Ct. 1997) (holding plaintiff seeking equitable relief not entitled to jury trial); Howard J. Alperin & Roland F. Chase, *Summary of Basic Law*, 14 Mass. Prac. § 3.191 (3d ed. 2004) (discussing absence of connection between right to jury trial and equitable relief).

30. *See* Anderson-Mole v. Univ. of Mass., 732 N.E.2d 351, 353 (Mass. App. Ct. 2000) (emphasizing civil litigants' and criminal defendants' similar right to impartial jury); *see also* 50A C.J.S. *Juries* § 462 (2004) (stating parties to civil and criminal proceedings retain right to examine jurors regarding impartiality); 50A C.J.S. *Juries* § 225 (2004) (asserting party to civil action enjoys right to unbiased jury).

31. *See* Holland v. Illinois, 493 U.S. 474, 477 (1990) (affirming Sixth Amendment entitles party to jury representing cross section of community); Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (holding jury selection from representative cross section of community essential element of Sixth Amendment guarantee); Commonwealth v. Soares, 387 N.E.2d 499, 510 (Mass. 1979) (affirming fair jury represents cross section of community). The *Soares* court, however, acknowledged that this provision does not mean that each jury must include a citizen from every group within the community because such a plan lacks practical implementation. *Soares*, 387 N.E.2d at 512-13.

Massachusetts.³² A number of persons, however, are exempt from jury duty, including the governor, lieutenant governor, judges, and teachers in public schools.³³ Massachusetts law also disqualifies a number of persons from serving on a jury, from convicted felons to persons solely responsible for the daily care of a handicapped individual.³⁴

Massachusetts courts utilize juror questionnaires to assist judges and attorneys with the voir dire process.³⁵ The information provided in the form must consist of facts “ordinarily raised” during the course of a voir dire examination.³⁶ Thus, the Massachusetts’ questionnaire is limited to basic background information regarding the juror, including his or her name, address, employment information, and marital status.³⁷ The questionnaire also provides a small space for jurors to describe past involvement in any civil or criminal case as well as any other information which “may be relevant to [his or her] ability to be impartial.”³⁸

2. History of Jury Reform in Massachusetts

In the 1970s and 1980s, Massachusetts undertook significant measures to reform its jury system.³⁹ In a concerted effort to make the jury system more convenient for its citizens, Massachusetts implemented the “one day/one trial” reform, which provides that jurors either serve for one day or one trial, if impaneled.⁴⁰ Massachusetts also began requiring employers to pay the wages

32. See MASS. GEN. LAWS ch. 234 § 1 (2004) (codifying persons qualified for and exempt from jury duty). Each year, the board of election commissioners, board of registrars and board of selectmen compile a list of persons qualified for jury service. *Id.* at § 4 (describing procedure for drawing juror lists). Once the list is created, it is delivered to the clerk of courts for use in juror selection. *Id.* at § 5.

33. See *id.* at § 1 (exempting certain individuals from jury duty). This Section also relieves members of the Senate and House of Representatives during a general court session, registered physicians and surgeons, and members of religious orders from jury service. *Id.*

34. See MASS. GEN. LAWS ch. 234A, § 4 (2004) (delineating grounds for disqualification from jury duty).

35. See MASS. GEN. LAWS ch. 234A, § 23 (2004) (outlining use of juror questionnaire during voir dire). The clerk provides the questionnaires to the judge and counsel for use during voir dire. *Id.* Juror information contained within the questionnaire is confidential and the court must destroy the questionnaires at the end of the voir dire process. *Id.* See also FREDERICK, *supra* note 7, at 122-47 (analyzing purpose and goals of juror questionnaires); STARR & MCCORMICK, *supra* note 2, §§11.01-11.05, at 343-88 (discussing relationship between juror questionnaires and voir dire).

36. See MASS. GEN. LAWS ch. 234A, § 22 (2004) (codifying guidelines for confidential questionnaire format).

37. See Office of Jury Commissioner for the Commonwealth, Confidential Juror Questionnaire, available at <http://www.mass.gov/courts/jury/images/CJQword.pdf> [hereinafter Massachusetts Juror Questionnaire] (last visited Mar. 3, 2006) (providing copy of Massachusetts Juror Questionnaire).

38. See *id.* (offering limited room for juror to explain general information). The questionnaire also allows jurors to indicate if the juror or an immediate family member is associated with any law enforcement agency. *Id.*

39. See Munsterman, *supra* note 23, at 217 (reporting Massachusetts’ reform efforts); see also Office of Jury Commissioner, *supra* note 25 (tracing development and implementation of jury reform in Massachusetts).

40. See MASS. GEN. LAWS ch. 234A, § 41 (2004) (stating length of service term for trial jurors); see also Office of Jury Commissioner, *supra* note 25 (explaining implications of “one day/one trial” reform). Prior to

of regularly employed jurors for the first three days of juror service, thereby lessening the financial burden borne by jurors.⁴¹ In 1982, the Massachusetts legislature created the Jury Management Advisory Committee (Advisory Committee).⁴² Among its responsibilities, the Advisory Committee is responsible for cultivating the study and improvement of Massachusetts' jury system.⁴³ The Advisory Committee also supervises the Office of the Jury Commissioner, which manages the jury system in Massachusetts.⁴⁴ All of these reform efforts contributed to a more efficient jury system in Massachusetts.⁴⁵

3. *Voir dire in Massachusetts*

Currently, Massachusetts adheres to the judge-conducted form of voir dire.⁴⁶ This model emphasizes the judge's role in voir dire because the judge controls all aspects of the process.⁴⁷ Attorneys utilize the information gleaned from the voir dire process to decide if a juror should be challenged for cause and to properly exercise peremptory challenges.⁴⁸

this reform, jurors served for one month, which increased the number of persons unable to serve for that period of time and thereby amplified the number of statutory exemptions. See Office of Jury Commissioner, *supra* note 25. Many state court systems now utilize the "one day/one trial" system. See Munsterman, *supra* note 23, at 216-17.

41. See MASS. GEN. LAWS ch. 234A, § 48 (2004) (codifying employer's obligation to pay employee's salary for first three days of jury service). The court may waive this requirement if the employer demonstrates that it will incur extreme financial hardship if required to pay the wages of its absent employee. MASS. GEN. LAWS ch. 234A, § 49 (2004) (describing justification for employer's excusal from payment). In this instance, the court must award the juror reasonable compensation for the first three days of service. *Id.*

42. See MASS. GEN. LAWS ch. 234A, § 6 (2004) (authorizing formation of Advisory Committee and defining its functions).

43. See *id.* (establishing Advisory Committee's obligation to improve Massachusetts' jury system).

44. See *id.* (articulating Advisory Committee's authority over Office of Jury Commissioner); see also MASS. GEN. LAWS ch. 234A, § 5 (2004) (describing role of office of jury commissioner); MASS. GEN. LAWS ch. 234A, § 7 (2004) (detailing member composition of office of jury commissioner).

45. See Office of Jury Commissioner, *supra* note 25 (praising improvements in jury system).

46. See MASS. GEN. LAWS ch. 234, § 28 (2004) (outlining procedure for examining potential jurors). Massachusetts' system of voir dire parallels the voir dire process in federal courts. See FED. R. CIV. P. 47 (2005) (stating federal judge must exercise substantial control over voir dire in federal system). In the federal courts, the trial judge conducts a group voir dire and seeks limited assistance, if any, from counsel in forming questions for the venire. See STARR & MCCORMICK, *supra* note 2, § 9.01, at 274 (explaining voir dire procedure used by federal courts); A HANDBOOK OF JURY RESEARCH § 1.03(e)(4) (Walter F. Abbott & John Batt, eds., 1999) (describing examination of prospective jurors in federal courts); see also Connors v. United States, 158 U.S. 408, 413 (1895) (emphasizing federal judge's discretion during voir dire); ABA STANDARDS, *supra* note 26, at 69 (noting difficulty in reconciling difference between theory and practice of voir dire in federal courts).

47. See MASS. GEN. LAWS ch. 234, § 28 (2004) (granting trial judge discretion in determining extent of voir dire examination); see generally Interview with Robert W. Healy, Junior Partner, Melick, Porter & Shea, LLP in Boston, Mass. (Feb. 11, 2005) (explaining voir dire process in Massachusetts from practicing attorney's perspective). As a former District Attorney and currently an attorney in the private sector, Attorney Healy has been involved in more than fifty voir dire processes in Massachusetts. *Id.*

48. See MASS. GEN. LAWS ch. 234, § 29 (2004) (granting civil parties peremptory challenges). Each civil litigant is entitled to four peremptory challenges during the jury selection phase. *Id.* Attorneys also may use

Although Massachusetts law grants the trial judge substantial latitude in determining the breadth of questioning in theory, trial judges often limit the examination to those questions proscribed by Rule 47(a) and section 28 in practice.⁴⁹ The judge may ask a question of the venire such as, “Are any of you aware or sensible of any bias or prejudice in relation to the defendant, the Commonwealth, or any of the possible witnesses in this case?”⁵⁰ Whether the judge’s voir dire of prospective jurors is limited or extensive, however, the Appeals Court reviews a judge’s voir dire examination only for an abuse of discretion because the applicable statute expressly permits trial judges to exercise discretion in conducting voir dire.⁵¹

Despite this grant of substantial discretion, Massachusetts’ rules require the trial judge to examine potential jurors using a minimum of six essential questions regarding prospective jurors’ knowledge of the case, the parties, and the attorneys.⁵² Rule 47(a) authorizes a trial judge to permit parties or their attorneys to question jurors after the judge’s preliminary examination; however, judges rarely allow such motions.⁵³ In order to counteract the narrow confines of this rule, many Massachusetts judges permit attorneys to submit questions to

the juror questionnaires to obtain relevant information about a juror’s background when exercising peremptory challenges and challenges for cause. See *supra* note 35 (explaining relationship between questionnaires and juror challenges).

49. See William C. Flanagan, *Trial Practice*, 43 MASS. PRAC. § 49.1 (2d ed. 2004) (reporting judge’s use of basic questions during majority of voir dire examinations).

50. See *id.* (describing typical voir dire questions asked by Massachusetts judges).

51. See *Commonwealth v. Lopes*, 802 N.E.2d 97, 102 (Mass. 2004) (ruling judge’s determination of juror impartiality overturned only upon clear showing of abuse of discretion); *Commonwealth v. Pope*, 467 N.E.2d 117, 125 (Mass. 1984) (affirming judge’s substantial discretion in deciding questions asked); *Commonwealth v. Dickerson*, 364 N.E.2d 1052, 1060 (Mass. 1977) (reaffirming trial judge’s discretionary powers in jury selection process); *Commonwealth v. Harrison*, 331 N.E.2d 873, 876 (Mass. 1975) (recognizing broad discretion granted judge during voir dire); *Commonwealth v. DiStasio*, 1 N.E.2d 189, 194 (Mass. 1936) (confirming judge’s discretion in determining whether to ask additional questions of venire); *Toney v. Zarynoff’s, Inc.*, 755 N.E.2d 301, 306 (Mass. App. Ct. 2001) (upholding judge’s discretion to refuse to ask questions beyond those required by law); *Blank v. Hubbuch*, 633 N.E.2d 439, 442 (Mass. App. Ct. 1994) (upholding trial judge’s discretion in deciding whether to conduct more extensive voir dire); *Commonwealth v. Burden*, 448 N.E.2d 387, 393 (Mass. App. Ct. 1983) (emphasizing broad discretion of judge during questioning); *Burke v. Gallison*, 389 N.E.2d 741, 743 (Mass. App. Ct. 1979) (granting judge discretion to use additional questions proposed by counsel during voir dire).

52. See MASS. R. CIV. P. 47(a) (outlining questions trial judge must ask during voir dire examination). In particular, the court must ask potential jurors the following:

- (1) whether any juror or any member of his family is related to any party or attorney therein; (2) whether any has any interest therein; (3) whether any has expressed any opinion on the case; (4) whether any has formed any opinion thereon; (5) whether any is sensible of any bias or prejudice therein; and (6) whether any knows of any reason why he cannot or does not stand indifferent in the case.

Id.

53. See *id.* (granting trial judge authority to permit attorney-conducted examination); see also Flanagan, *supra* note 49 (distinguishing between statutory grant of authority and authority actually used by judges during voir dire).

be asked of the venire prior to commencing the voir dire process.⁵⁴ Although attorneys increasingly assist judges in forming relevant voir dire questions, “[u]nder usual Massachusetts court procedures, judges are encouraged to question jurors quickly and in open court during . . . the voir dire”⁵⁵ Out of fifty-seven Superior Court justices polled by the Massachusetts Bar Association, however, no judge refused outright to ask voir dire questions suggested by counsel.⁵⁶ Instead, the majority of justices acknowledged that they would take attorneys’ questions into consideration if reasonable and appropriate, and would ask the substance, if not the form, of the suggested questions.⁵⁷

In January 2002, the Honorable Ralph D. Gants issued a Memorandum of Law Regarding Plaintiff’s Motion to Allow Attorney Voir Dire of Jury Venire, which reflects the growing divide in Massachusetts regarding who should conduct the voir dire examination.⁵⁸ Plaintiff, Joseph Sylva, requested that Judge Gants allow his attorney to directly question the venire, arguing that Massachusetts juries are hostile toward civil plaintiffs because ineffective voir dire fails to disclose persons biased against plaintiffs.⁵⁹ Judge Gants refuted

54. See Massachusetts Bar Association, *Judicial Preference Guide*, available at <http://www.massbar.org/resources/jpsc> [hereinafter *Judicial Preference Guide*] (last visited Mar. 26, 2006) (listing judges’ responses to trial practice questions).

55. Wade Lambert, *Abuse-Case Jurors*, WALL ST. J., Mar. 22, 1994, at B5 (reporting Massachusetts legal news regarding voir dire procedure); see also *Commonwealth v. DiStasio*, 1 N.E.2d 189, 194 (Mass. 1936) (stating judge typically conducts voir dire of prospective jurors); *Commonwealth v. Burden*, 448 N.E.2d 387, 393 (Mass. App. Ct. 1983) (affirming voir dire examination customarily conducted by judge).

56. See *Judicial Preference Guide*, *supra* note 54 (reporting Massachusetts’ judges overall positive response to using voir dire questions proposed by attorneys).

57. See *id.* (indicating majority of justices consider suggested questions during examination); see also John O. Cunningham, ‘Chats’ with Jurors: *The New Voir Dire?*, MASS. LAW. WKLY., Apr. 19, 2004 (reporting judges allow attorneys expanded access to prospective jurors by including questions proposed by counsel).

58. See generally *Sylva v. Anthony*, No. 95-4972, 2002 WL 202467 (Mass. Super. Ct. Jan. 31, 2002) (denying plaintiff’s motion to allow attorney voir dire). Judge Gants issued this Memorandum of Law to fully explain his decision to deny the plaintiff’s motion for attorney-conducted voir dire because of the “substantial controversy” in Massachusetts regarding the issue of who should be responsible for examining prospective jurors. *Id.* In this case, the plaintiff, Joseph Sylva, filed suit against the defendant, Douglas Anthony, M.D., alleging negligence for failure to properly diagnose Sylva’s brain tissue during surgery. *Id.* at *1. Although Judge Gants denied Sylva’s motion, he questioned prospective jurors beyond the questions required by Rule 47. *Id.*

59. See *id.* at *1 (explaining plaintiff’s support for attorney-conducted voir dire); see also CAROL J. DEFANCES & MARIKA F. X. LITRAS, U.S. DEP’T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES 21 (1996) (tracking outcomes of bench and jury trial verdicts in civil cases nationwide). In this national study, sample counties in Massachusetts ranked among the lowest percentile for number of plaintiff verdicts per the number of cases. *Id.* In Norfolk and Worcester county, plaintiffs won cases 23.4% and 22% of the time, respectively. *Id.* These results contrast to plaintiffs in New York who prevailed in 51.6% of the cases brought before the court. *Id.* Sylva attributed this low percentile to juror bias against civil plaintiffs, and argues that this bias was not uncovered during voir dire. *Sylva*, 2002 WL 202467, at *2. See generally Ralph Ranalli, *Juries Lag Nation in Lawsuit Awards: Lawyers Have Bill to Screen Panelists*, BOSTON GLOBE, Dec. 5, 2000, at B1 (reporting low number of plaintiff verdicts in Massachusetts); Steven H. Shafer, *The Reason Jury Awards are Low*, BOSTON GLOBE, Dec. 8, 2000 (Letters to the Editor), at A22 (arguing insurance industry poisoned citizens against tort plaintiffs).

this argument by noting a lack of evidence connecting the low number of plaintiff's verdicts to judge-conducted voir dire.⁶⁰ In particular, Judge Gants argued that plaintiffs would not gain any advantage from attorney-conducted voir dire because defense counsel would be afforded the same opportunity to examine jurors.⁶¹ Ultimately, Judge Gants denied Sylva's motion because he found that any potential benefits gained by plaintiffs through attorney-conducted voir dire would be undermined by the significant drawbacks imposed on society as a whole.⁶²

In order to combat the perceived deficiencies of Massachusetts' current voir dire system, Eugene O'Flaherty filed House Bill Number 783, otherwise known as *An Act Relative to the Examination of Jurors* (Juror Examination Act) in 2003.⁶³ Supporters believe that the Juror Examination Act will better enable a party to obtain an impartial jury by granting each party the opportunity to question the jury panel.⁶⁴ On January 1, 2003, the Massachusetts House of Representatives referred the Juror Examination Act to the Committee on The Judiciary; the State Senate concurred with this decision.⁶⁵ On March 10, 2004, the Bill was reported favorably by the Joint Committee on the Judiciary and was referred to the House Committee on Ways and Means (Ways and Means Committee).⁶⁶ By December 2004, however, the Juror Examination Act died in the Ways and Means Committee.⁶⁷ Undeterred by this setback, State Representative Eugene O'Flaherty re-filed the Juror Examination Act in January 2005 (Revised Juror Examination Act).⁶⁸ The Revised Juror Examination Act contains the same language as the original Juror Examination Act.⁶⁹

60. See *Sylva*, 2002 WL 202467, at *1-2 (asserting several variables contribute to plaintiffs' low success rate in Massachusetts).

61. See *id.* at *2 (providing limited circumstances where attorney voir dire may assist plaintiffs more than defendants). Specifically, Judge Gants stated that plaintiffs would benefit from attorney-conducted voir dire more than defendants in only three instances: if more prospective jurors were biased against the plaintiff than the defendant; voir dire examination more effectively revealed bias against the plaintiff; or if plaintiff's attorneys exercised peremptory challenges more effectively than defense counsel. *Id.*

62. See *Sylva*, 2002 WL 202467, at *5 (concluding purported benefits of attorney voir dire does not outweigh substantial costs of method).

63. See H.R. 783, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (indicating date Juror Examination Act filed with Massachusetts legislature); see also notes 68-70 and accompanying text (discussing re-filing of H.R. 783).

64. See H.R. 783 (delineating attorney conducted voir dire pilot program); see also Magnuson, *supra* note 13, at 104 (reporting purpose of Juror Examination Act); Shafer, *supra* note 59 (arguing for reform of voir dire system in Massachusetts to counteract perceived bias against civil plaintiffs).

65. See Bill History, H.R. 783, 183d Gen. Ct., Reg. Sess. (Mass. 2003) (on file with author) (reporting history of Juror Examination Act).

66. See *id.* (tracing legislative history of Juror Examination Act).

67. See Telephone Interview with Legal Department, Office of Eugene L. O'Flaherty, State Representative, Commonwealth of Massachusetts (Feb. 10, 2005) (discussing status of Juror Examination Act).

68. See *id.* (explaining decision to re-file Juror Examination Act); H.R. 775, 184th Gen. Ct., Reg. Sess. (Mass. 2005) (indicating Bill 775 re-file of Bill 783).

69. See H.R. 775 (proffering language of Revised Juror Examination Act identical to original Juror Examination Act).

Under the Revised Juror Examination Act, attorneys for either party may request the opportunity to examine the venire and the court must grant the motion.⁷⁰ The language of the Revised Juror Examination Act directly contrasts with the content of Massachusetts general laws, chapter 234A, section 28 and Massachusetts Rules of Civil Procedure 47(a), under which a judge exercises discretion in determining whether to grant attorneys the opportunity to examine prospective jurors.⁷¹ Under the Revised Juror Examination Act, however, the trial judge still retains supervision of the voir dire process in order to ensure its efficiency and legitimacy.⁷²

C. JURY SYSTEM IN NEW YORK

1. Trial by Jury in New York

Similar to the Massachusetts Declaration of Rights, the New York Constitution also guarantees the right to a trial by an impartial jury in both criminal and civil cases.⁷³ A trial begins with the calling and examination of the venire.⁷⁴ At this stage, a litigant is entitled to some form of voir dire.⁷⁵ The right to examine jurors is not absolute, but statutory; a citizen may assert this right so long as the statute remains in force.⁷⁶

New York established the Office of Commissioner of Jurors to manage and enforce the regulations related to jury service.⁷⁷ The Commissioner of Jurors (Commissioner) determines whether a citizen is qualified to serve on a jury.⁷⁸

70. See *id.* (requiring trial judge to grant parties opportunity to question voir dire).

71. Compare *id.* (mandating attorney-conducted voir dire if requested by party), with MASS. GEN. LAWS ch. 234 § 28 (2004) (emphasizing judge's discretion in allowing attorney-conducted voir dire), and MASS. R. CIV. P. 47(a) (requiring only six basic questions for voir dire).

72. See H.R. 775, 184th Gen. Ct., Reg. Sess. (Mass. 2005) (providing voir dire examination still conducted under direction of court).

73. See N.Y. CONST. art. I, § 2 (stating right to jury trial guaranteed by United States Constitution absolute); see also *Payne v. Burke*, 260 N.Y.S. 259, 260 (N.Y. App. Div. 1932) (affirming right to fair and impartial jury); *Fealy v. Bull*, 42 N.Y.S. 569, 571 (N.Y. App. Div. 1896) (confirming defendant's right to examine juror regarding potential bias).

74. See *Carlisle v. County of Nassau*, 408 N.Y.S.2d 114, 116 (N.Y. App. Div. 1978) (asserting trial commences with examination of prospective jurors); *Draves v. Chua*, 642 N.Y.S.2d 1022, 1024 (N.Y. Sup. Ct. 1996) (stating jury selection part of trial process and not pre-trial process).

75. See *Goerlich v. Ippolito*, 403 N.Y.S.2d 922, 923-24 (N.Y. App. Div. 1978) (confirming litigant entitled to some form of voir dire); see also Stephanie A. Giggetts, *Jury*, 73A N.Y. JUR. § 87 (2d ed. 2003) (explaining voir dire process).

76. See *N. Wagman & Co. v. Schafer Motor Freight Serv., Inc.*, 4 N.Y.S.2d 526, 529 (N.Y. Mun. Ct. 1938) (noting parties' statutory right to examine prospective jurors qualified).

77. See N.Y. JUDICIARY LAW § 502 (McKinney 2004) (creating office to manage jury selection process). In most instances, the county jury board appoints the Commissioner of Jurors for a four year term. N.Y. JUDICIARY LAW § 504 (McKinney 2004). This office is similar to the Advisory Committee in Massachusetts. See *supra* note 42 and accompanying text (discussing Massachusetts agency responsible for managing jury system).

78. See N.Y. JUDICIARY LAW § 509 (McKinney 2004) (outlining process to select qualified jurors).

Prior to reporting for jury duty, the New York court system requires that jurors complete a confidential questionnaire, which the Commissioner reviews in conjunction with the public record to ensure that persons are qualified for service.⁷⁹

2. New York Voir Dire System

New York courts adhere to a voir dire system where the attorneys conduct the entire examination of prospective jurors.⁸⁰ The system affords counsel with significant discretion in questioning the prospective jurors so that they may properly exercise peremptory challenges and challenges for cause.⁸¹ Although attorneys have broad latitude in questioning potential jurors, the questions must still be relevant.⁸²

The trial judge retains a number of duties during the voir dire process, but does not question the jury panel.⁸³ For instance, a judge must meet with counsel before beginning jury selection in an effort to settle the case.⁸⁴ If the parties cannot agree to a settlement, the trial judge then selects the method of jury selection.⁸⁵ The judge may choose either “White’s method” or “Struck method” of juror examination.⁸⁶ New York court rules also require that the

79. See *id.* (stating Commissioner’s obligation to set parameters for juror qualifications). The Commissioner determines the form of the questionnaire. N.Y. JUDICIARY LAW § 513 (McKinney 2004). See also Giggetts, *supra* note 75 (describing Commissioner’s procedure for evaluating citizen’s ability to serve on jury).

80. See N.Y. CT. R. § 202.33 (McKinney 2004) (outlining New York procedure for voir dire).

81. See N.Y. C.P.L.R. § 4109 (McKinney 2004) (codifying right to peremptory challenges). Section 4109 authorizes a court to grant additional peremptory challenges to both sides equally if the court deems them necessary. *Id.* See also Siriano v. Beth Israel Hosp. Ctr., 614 N.Y.S.2d 700, 703 (N.Y. Sup. Ct. 1994) (confirming peremptory challenges consist of “state-created means of achieving impartial jury”). Similarly, attorneys may challenge jurors for cause. N.Y. C.P.L.R. § 4110(a) (McKinney 2004) (outlining reasons for dismissal from juror service for cause). In particular, a prospective juror may be excused if she or he is “related within a sixth degree of consanguinity or affinity to a party.” *Id.* at §4110(b).

82. See *Fortune v. Trainor*, 19 N.Y.S. 598, 599 (N.Y. Sup. Ct. 1892) (limiting appropriate questions to those potentially disqualifying jurors); see also Giggetts, *supra* note 75 (explaining purpose of range of questioning permitted by attorneys and prohibition of irrelevant inquiries); see generally Hafetz, *supra* note 8 (suggesting ways to accomplish goals of attorney conducted voir dire).

83. See § 202.33 (outlining trial judge’s responsibilities in voir dire process); see also *Fortune*, 19 N.Y.S. at 599 (stating litigant’s right to interrogate jurors regarding impartiality).

84. See § 202.33(b) (mandating meeting with trial judge and parties to attempt pre-trial settlement).

85. See § 202.33(c) (requiring trial judge to choose method of jury selection).

86. See N.Y. CT. R. § 202.33(f) (McKinney 2004) (stating jury selection methods available to trial judge). Whether the judge selects “White’s Method” or the “Struck Method,” attorneys first must ask the jury pool general questions regarding jurors’ knowledge of the case, the parties, or the attorneys. §202.33, app. E. After attorneys conduct this initial questioning and exercise any challenges for cause, using “White’s Method,” the Court seats six prospective jurors in the jury box, questions them, and dismisses any, if necessary. *Id.* Parties then exercise peremptory challenges alternatively. *Id.* This process continues until there are a sufficient number of jurors to impanel a jury. *Id.* The most common method of jury selection in New York, however, is the “Struck Method.” §202.33, app. E. Using this form of questioning, twenty-five prospective jurors are seated and plaintiff’s counsel examines venire first followed by defense counsel. *Id.* Once both sides conduct their questioning, plaintiff and defendant exercise peremptory challenges alternatively. *Id.*

trial judge preside over the commencement of the voir dire process in order to ensure its efficiency and dignity.⁸⁷ Although the statute demands the trial judge's presence at the beginning of the voir dire examination, the remainder of the voir dire process typically lacks judicial supervision.⁸⁸ Either party may request, however, that the judge remain present throughout the entire examination of prospective jurors.⁸⁹

3. Jury Reform Efforts in New York

In the early 1990s, the Chief Judge of the State of New York, Judith S. Kaye, undertook a tremendous jury reform effort.⁹⁰ In 1993, Chief Judge Kaye founded The Jury Project, a program responsible for facilitating jury reform efforts.⁹¹ One of the most significant reforms prompted by The Jury Project was the removal of all automatic exemptions and disqualifications from jury service in 1996.⁹² As a result, a tremendous amount of New York's citizens became eligible to serve as jurors, including mayors, lawyers, and judges.⁹³ The Jury Project also proposed the use of juror questionnaires for civil jury

87. See § 202.33(e) (mandating judge's presence at beginning of voir dire examination); see also *infra* notes 116-19 and accompanying text (discussing harm caused by trial judge's absence during attorneys' conduct of voir dire).

88. See § 202.33(e) (giving trial judge discretion to preside over entire voir dire process).

89. See N.Y. C.P.L.R. § 4107 (McKinney 2004) (requiring judge's presence at voir dire upon request of either party); see also Giggetts, *supra* note 75 (discussing instances where judicial presence mandated by statute).

90. See COMM'N ON THE JURY, INTERIM REPORT OF COMMISSION ON THE JURY TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15-22 (2004) (tracing reform efforts in New York) [hereinafter INTERIM REPORT]; see also Gail Collins, Editorial, *Where a New York Minute Lasts for Hours*, N.Y. TIMES, Jan. 19, 1999, at A18 (critiquing her jury duty experiences); Susan Saulny, *Jury Duty? Prepare for Rejection; Though Many Are Called, Few Ever Deliberate*, N.Y. TIMES, Sept. 8, 2003, at B1 (reporting favorable response to Chief Judge Kaye's jury reform efforts); Editorial Desk, *Streamlining Jury Service, at Last*, N.Y. TIMES, Nov. 8, 1995, at A24 (discussing reform of New York court rules for juries).

91. See THE JURY PROJECT, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK i (1994) [hereinafter THE JURY PROJECT] (noting creation of The Jury Project in 1993); see also Rosalyn Richter, *Jury Reform Has Changed Voir Dire, But More Explanation is Needed Into The Types of Questions Asked*, 73 N.Y. ST. B.J. 19, 19 (2001) (stating 1990 reform efforts focused on reducing time spent on jury selection); Jan Hoffman, *Making Jury Duty Less Painful and More Efficient*, N.Y. TIMES, Apr. 7, 1994, at B1 (reporting purpose and goals of the Jury Project). The Jury Project articulated three goals for New York's jury system: juries that reflect a cross-section of the community; increased efficiency; and a more positive jury experience for citizens. See THE JURY PROJECT, at i.

92. See N.Y. JUDICIARY LAW § 510 (McKinney 2004) (outlining qualifications for jury service); N.Y. JUDICIARY LAW § 511 (repealed 1996) (providing automatic exemptions for majority of professionals); N.Y. JUDICIARY LAW § 512 (repealed 1996) (stating additional automatic exemptions); see also *Trial By Jury*, 1 N.Y. Civ. Prac. § 4105.02 (2004) (reporting history of juror qualification law in New York); *An Up Close & Personal Look at Jury Service*, JURY POOL NEWS, Fall 1997, at 2-3 (articulating positive impact of abolishing juror exemptions); *In New York, Jury Duty Isn't a Bad Joke Any More*, JURY POOL NEWS, Winter 2000, at 3 (discussing benefits of ending automatic exemptions from jury duty).

93. See *Trial By Jury*, *supra* note 92 (explaining repealed exemptions and impact on New York jury system); Robert D. McFadden, *Court Surprise: Giuliani Picked as Juror No. 1*, N.Y. TIMES, Aug. 31, 1999, at A1 (reporting on Mayor Giuliani's call to jury duty after removal of exemptions).

selection in order to speed the pace of the voir dire process.⁹⁴ Currently, New York courts also attempt to follow the “one day/one trial” approach in order to make jurors’ terms of service more uniform.⁹⁵ These reform efforts drastically decreased the average time spent on jury selection in New York, cutting the time spent on voir dire by more than half.⁹⁶

On April 9, 2003, Chief Judge Kaye furthered New York’s jury reform efforts by establishing the Commission on the Jury (Commission), which she entrusted with determining how to better use the time of New York citizens reporting for jury duty.⁹⁷ The Commission describes itself as a “special panel charged with finding ways to better utilize the time of citizens who report for jury service . . . the 28 member commission [is] composed of judges, prosecutors, defense attorneys, civil litigators and jury commissioners from across the state”⁹⁸ Over the course of approximately one year, the Commission researched New York’s jury system by holding seven public hearings throughout New York state to gather the testimony of judges, attorneys, court administrative personnel, and prospective jurors.⁹⁹

On June 17, 2004, the Commission issued an Interim Report that recounted its findings on the jury system in New York and provided recommendations for improvement.¹⁰⁰ Notably, the Commission focused much of its attention on improving the voir dire process.¹⁰¹ To combat the extensive time commitment still required by New York’s voir dire system, the Commission suggested that the court require attorneys to appear promptly at the inception of the voir dire process and remain in the voir dire room until the completion of the examination.¹⁰² Additionally, although New York Court Rules section 202.33

94. See THE JURY PROJECT, *supra* note 91, at 57 (arguing for use of juror questionnaires in civil proceedings). Prior to The Jury Project’s recommendations, New York utilized questionnaires only in criminal cases. *Id.* The Jury Project also proposed a format for the civil juror questionnaire, suggesting that it include questions regarding education, employment, history of jury duty, and any mental or physical condition preventing the citizen from serving on a jury. *Id.* at Appendix F.

95. See INTERIM REPORT, *supra* note 90, at 17 (discussing first decade of jury reform efforts including one day/one trial advancements); see also Saulny, *supra* note 90 (summarizing positive implications of one day/one trial reform in New York).

96. See Richter, *supra* note 91, at 20 (providing concrete example of reduced time spent on voir dire). The time spent on jury selection went from approximately eleven hours in 1995 to five hours in 2000. *Id.*

97. See Press Release, New York State Unified Court System, Chief Justice’s Appointment of New Commission Marks Start of Second Phase of Jury Reform in New York (Apr. 9, 2003) (announcing formation of commission). Chief Justice Kaye formed the Commission after discovering that eighty-two percent of New Yorkers called for jury duty never serve on trial. *Id.* See also *Jury Reform in New York Enters Second Decade*, JURY POOL NEWS, Fall 2004, at 1 (reporting reform goals of Commission); Saulny, *supra* note 90 (stating overwhelming number of citizens reporting for jury duty not proceeding past voir dire).

98. See Press Release, *supra* note 97 (defining nature and purpose of Commission).

99. See INTERIM REPORT, *supra* note 90, at 2 (reporting process of reviewing New York’s jury system).

100. See INTERIM REPORT, *supra* note 90, at 6-13 (summarizing recommendations for improved jury system).

101. See INTERIM REPORT, *supra* note 90, at 6 (evaluating current state of voir dire and ways to improve system).

102. See INTERIM REPORT, *supra* note 90, at 6 (attributing extensive time spent on voir dire to attorneys’

requires that a judicial officer have some involvement in the jury selection process, the Commission found that several New York courts do not comply with this rule.¹⁰³ In fact, some citizens reported for jury duty, endured voir dire examination, and were excused without ever seeing a judge or judicial officer.¹⁰⁴ In order to vest the voir dire process with dignity and efficiency, the Commission recommended requiring the presence of a judicial officer throughout the voir dire process.¹⁰⁵

The Commission also proposed reforming New York's current use of juror questionnaires to expedite the voir dire process.¹⁰⁶ It suggested creating a more extensive questionnaire and granting attorneys additional time to review questionnaires before beginning the voir dire examination.¹⁰⁷ The enhanced use of questionnaires before and during voir dire would reduce counsel's need to obtain juror's basic background information during the examination.¹⁰⁸ Thus, the questionnaire would direct the oral voir dire examination to case-specific questions more quickly.¹⁰⁹ Not only would a lengthier questionnaire reduce time spent on voir dire, but it would better protect a juror's privacy because a juror could note any personal concerns in confidence.¹¹⁰ New York's continued effort to improve the jury selection process indicates the significance of a trial's voir dire element while underscoring the necessity of a streamlined process.¹¹¹

absences through process). The Commission found that attorneys occasionally leave the voir dire examination room, leaving jurors unattended for extended periods of time. *Id.* at 41.

103. See INTERIM REPORT, *supra* note 90, at 8-10 (stating judicial officer's absence lessens efficiency and demeans voir dire process).

104. See INTERIM REPORT, *supra* note 90, at 53 (describing citizens' past experiences with jury system in New York). Since voir dire is a juror's first impression of the jury trial system, the Commission underscored the importance of creating an effective and efficient process. *Id.*

105. See INTERIM REPORT, *supra* note 90, at 53-58 (articulating judicial officer's duties during voir dire). Among the revised responsibilities proposed by the Commission, the judicial officer would be required to introduce the jurors to the lawyers and the case, explain the significance of voir dire to the jurors, make rulings relevant to jury selection, and resolve disputes about a prospective juror's ability to be impartial. *Id.* at 59. The Commission noted that this requirement would merely signify meaningful compliance with section 202.33; however, reaffirming the judicial officer's responsibilities would compel compliance with the rule. *Id.* at 57-60.

106. See INTERIM REPORT, *supra* note 90, at 11 (discussing effectiveness of expansive questionnaire).

107. See INTERIM REPORT, *supra* note 90, at 12 (articulating advantages of more extensive juror questionnaires).

108. See INTERIM REPORT, *supra* note 90, at 12, 70 (stating additional benefits of in-depth questionnaire).

109. See INTERIM REPORT, *supra* note 90, at 70 (emphasizing significant relationship between questionnaires and efficient voir dire process).

110. See INTERIM REPORT, *supra* note 90, at 70 (noting juror's reluctance to give private or embarrassing information in presence of other jurors).

111. See generally INTERIM REPORT, *supra* note 90 (discussing New York's efforts to balance efficiency with substantive voir dire).

III. ANALYSIS

A. Evaluation of Attorney-Conducted Voir Dire System in New York

In an attorney-conducted model of voir dire, attorneys preserve a client's constitutional right to an impartial jury.¹¹² An attorney's in-depth knowledge of issues relating to the case at bar improves their ability to hone in on potential juror bias.¹¹³ In their capacity as zealous advocates, attorneys are highly motivated to discern any reason that might prevent jurors from deciding a case in an impartial manner.¹¹⁴ In addition, several studies suggest that jurors are more likely to reveal personal information to attorneys, which bolsters the argument that attorneys are better positioned to select jurors who are willing and able to be impartial.¹¹⁵

Although attorneys have a heightened ability to ferret out prejudice in prospective jurors during voir dire, this system is not without drawbacks.¹¹⁶ Most significantly, attorney-conducted voir dire is extremely time consuming.¹¹⁷ In the past, the process of impaneling one civil jury in New York has lasted from several days to several weeks.¹¹⁸

Another inherent danger in a voir dire process primarily controlled by attorneys is that attorneys often present inappropriate trial arguments to the venire.¹¹⁹ Although voir dire technically revolves around gathering information from prospective jurors, most attorneys consider voir dire to be their first opportunity to garner support for their client and educate jurors on their perspective of the case.¹²⁰ In fact, one citizen described her voir dire

112. See FREDERICK, *supra* note 7, at 5 (highlighting attorney's significance when questioning prospective jury panel).

113. See FREDERICK, *supra* note 7, at 5 (attributing lawyers' detailed knowledge of case helpful in posing meaningful voir dire questions).

114. See STARR & MCCORMICK, *supra* note 2, §9.01, at 275 (discussing significance of attorney's role as advocate for client).

115. See STARR & MCCORMICK, *supra* note 2, §9.01, at 274-75 (outlining advantages to attorney conducted voir dire). Jurors often perceive the judge as the "supreme being" of the courtroom, which can be intimidating to prospective jurors. *Id.* at 274.

116. See STARR & MCCORMICK, *supra* note 2, §9.01, at 273-76 (evaluating benefits and disadvantages of attorney conducted voir dire); see also FREDERICK, *supra* note 7, at 4-6 (explaining attorneys' ability to find potential juror bias).

117. See STARR & MCCORMICK, *supra* note 2, §9.01, at 273-74 (stating inefficiency major disadvantage of attorney voir dire).

118. See INTERIM REPORT, *supra* note 90, at 18 (reporting extensive time spent on voir dire in past); see also Richter, *supra* note 90, at 20 (noting voir dire in New York still lasts approximately five hours even with recent improvements).

119. See THE JURY PROJECT, *supra* note 91, at 51 (attributing bulk of New York jury trial issues to lack of judicial supervision); INTERIM REPORT, *supra* note 90, at 54-55 (citing advantages of full supervision of jury selection proceedings); see also STARR & MCCORMICK, *supra* note 2, §9.01, at 273 (discussing over-zealous attorneys as major criticism of attorney-conducted voir dire).

120. See Kerper, *supra* note 1, at 5-9 (elaborating on two legitimate and three tacit purposes of attorney conducted voir dire). Kerper argues that advocates may ethically achieve these implied goals while pursuing

experience in New York as hearing attorneys' deliver "commercials posed in the form of questions."¹²¹ Although every citizen is guaranteed an impartial jury in civil matters, New York has effectively created a system where an attorney may select jurors predisposed to his or her interpretation of the facts.¹²² A court officer's absence during this proceeding exacerbates the risk of abuse because attorneys may freely steer questioning to slant the juror's perspective without risking censure.¹²³

B. Evaluation of Judge-Conducted Voir Dire System in Massachusetts

Proponents of judge-conducted voir dire underscore the efficiency in conducting the process in this manner.¹²⁴ Unlike attorneys, who may use voir dire to learn if prospective jurors support their client's perspective of the case, the judge uses the voir dire examination only to determine if jurors can decide the case at bar in a rational, unbiased manner.¹²⁵ A judge's focused, limited range of questioning drastically reduces time spent on voir dire and thereby increases the number of civil cases which can be resolved by the court.¹²⁶

Perhaps more significantly, a judge has an obligation to remain impartial throughout the trial, including the questioning of the venire.¹²⁷ Thus, a judge's role is unlike that of the attorney, who serves as an advocate and seeks a jury biased in favor of the client.¹²⁸ The judge's duty of impartiality, coupled with the broad discretionary authority granted by statute, enables the judge to determine the necessity of additional voir dire on a case-by-case basis.¹²⁹

the recognized objectives during attorney conducted voir dire. *Id.* at 5. See also Richter, *supra* note 91, at 22 (observing attorneys utilizing voir dire opportunity to persuade jurors of party's position).

121. See Collins, *supra* note 90 (describing her interpretation of attorneys' questioning tactics).

122. See Collins, *supra* note 90 (analogizing voir dire as attorneys choosing jurors as if favorite pieces of candy from box).

123. See INTERIM REPORT, *supra* note 90, at 54 (suggesting presence of court officer ensures ethical questioning). A judge or judicial officer prevents "any abusive or unnecessarily prolonged questioning, delay, or other improper conduct." See THE JURY PROJECT, *supra* note 91, at 51.

124. See STARR & MCCORMICK, *supra* note 2, § 9.01, at 273-74 (discussing advantages to judge-conducted voir dire).

125. Compare Kerper, *supra* note 1, at 4-8 (articulating various goals of attorneys when conducting voir dire), with *Sylva v. Anthony*, No. 95-4972-F, 2002 WL 202467, at *7 (Mass. Super. Ct. Jan. 31 2002) (stating judge focuses only on achieving justice). Although Kerper argues that attorneys can achieve these goals ethically, the nature of such in-depth questioning adds significant time to the voir dire process. See Richter, *supra* note 90, at 20 (indicating attorney-conducted voir dire in New York currently lasts approximately five hours).

126. See *Sylva*, 2002 WL 202467, at *7 (asserting attorney voir dire increases time required for each civil trial). As a result of the lengthened time spent on voir dire, the court system can hear fewer cases per year, which arguably reduces the number of persons who receive justice. *Id.*

127. See *Sylva*, 2002 WL 202467, at *7 (distinguishing between roles of judge and attorneys).

128. See *id.* (discussing motivations of attorney during voir dire). In contrast to the court, attorneys may seek to "tilt juries in their favor." *Id.*

129. See *Sylva*, 2002 WL 202467 at *5 (citing judge's ability to consider need for additional voir dire examination in unusual cases). Judge Gants distinguished between rare cases that require additional voir dire questioning and usual cases where a judge's standard voir dire examination suffices to ensure a fair trial. *Id.*

Through this statutory provision, Massachusetts protects its citizens' right to an impartial jury while maintaining an efficient voir dire system.¹³⁰

Despite a judge's tight control over the voir dire process in Massachusetts, attorneys still have several opportunities to meaningfully participate in the questioning of potential jurors.¹³¹ For example, if a prospective juror answers in the affirmative to any of the judge's standard or case-specific questions, the attorneys may question that juror individually at sidebar regarding his or her answer.¹³² Through this procedure, attorneys still retain the ability to impanel a fair jury that is capable of reaching a decision based on facts and not personal opinions.¹³³

Although judge-conducted voir dire increases expediency and eliminates potential abuses by attorneys, Massachusetts' model of voir dire often works to the disadvantage of the parties.¹³⁴ A judge typically possesses only a cursory knowledge of the case at bar and may question the venire regarding case specifics less effectively than the attorneys involved in the dispute.¹³⁵ Furthermore, Massachusetts' high regard for an expedient process erodes the judge's motivation to question prospective jurors beyond those inquiries required by statute.¹³⁶ The standardized questioning required by statute rarely, if ever, elicits a meaningful response from prospective jurors.¹³⁷ Even if the judge expands the questioning of the venire beyond the basic statutory requirements, research reveals that a judge can intimidate jurors because of the reverence traditionally accorded to the position; a judge's heightened stature may reduce the candidity of jurors' responses.¹³⁸ Consequently, some

130. See MASS. GEN. LAWS ch. 234, § 28 (2004) (granting trial judge discretion in determining latitude of voir dire questioning); *Sylva v. Anthony*, No. 95-4972-F, 2002 WL 202467, at *5 (Mass. Super. Ct. Jan. 31 2002) (underscoring judge's ability to make individualized determinations regarding voir dire).

131. See Interview with Robert W. Healy, *supra* note 47 (observing strong attorney involvement during voir dire within Massachusetts' current system).

132. See MASS. GEN. LAWS ch. 234, § 28 (2004) (providing opportunity to question juror specifically regarding attitudes or exposure to case); Interview with Robert W. Healy, *supra* note 47 (arguing judge-conducted voir dire involves attorney participation).

133. See Interview with Robert W. Healy, *supra* note 47 (discussing attorney involvement in voir dire sufficient to impanel impartial jury).

134. See STARR & MCCORMICK, *supra* note 2, §9.01, at 273-74 (evaluating cons of judge-conducted voir dire system).

135. See FREDERICK, *supra* note 7, at 5 (asserting attorney's extensive knowledge of case helpful to voir dire process). Attorneys work on a case for a longer period of time and are more likely to form questions that appropriately probe prospective jurors. *Id.*

136. See Flanagan, *supra* note 49 (stating trial judges limit questioning to achieve minimal compliance with statute).

137. See Cunningham, *supra* note 57 (reporting attorneys' complaints regarding Massachusetts' approach to voir dire). In this article, Cunningham quotes attorney Kimberly E. Winter as saying that "most judges just go through the boilerplate questions about fairness and people don't respond to that." *Id.*

138. See FREDERICK, *supra* note 7, at 5 (asserting jurors' reluctance to reveal personal information to judges). Jurors are more likely to be candid in their answers when responding to an attorney because jurors do not consider attorneys to be authority figures. *Id.* See also *supra* note 115 and accompanying text (noting juror's higher comfort level with attorneys than judges).

attorneys feel that they cannot select an impartial jury for their clients under Massachusetts' current voir dire system.¹³⁹

C. The Revised Juror Examination Act: A Purported Improvement to Massachusetts' Voir Dire System

Although its supporters argue that the Revised Juror Examination Act improves Massachusetts' current voir dire system, it does not address the potential for a substantial increase in time required to complete jury selection under the pilot program.¹⁴⁰ The Revised Juror Examination Act does not reference the impact of the program in cases where there are multiple plaintiffs or multiple defendants.¹⁴¹ In its current form, the Revised Juror Examination Act states that each party to a case may petition the court for a minimum of one hour to examine the jury venire, which does not appear to be overly burdensome at first glance.¹⁴² If there were five co-defendants, however, the judge would be required to grant each defendant's motion to examine the jury pool, increasing the time spent on voir dire to a minimum of five hours.¹⁴³ This ambiguous language fails to safeguard against the procedural inefficiency associated with attorney-conducted voir dire.¹⁴⁴ Although the court would still guide and direct the attorneys' examination of the jury panel, the judge would be required to grant this minimum time for questioning.¹⁴⁵ Otherwise, the attorneys could argue that the court violated their client's rights.¹⁴⁶

In addition, the Revised Juror Examination Act disregards the potential advantage of utilizing a more detailed questionnaire to facilitate and improve the voir dire process.¹⁴⁷ Massachusetts' use of a simplistic juror questionnaire hampers the efficiency of jury selection by increasing the time judges,

139. See Magnuson, *supra* note 13 (reporting on some attorneys perceived inability to discern juror bias under Massachusetts' current system). Thus, a party may be deprived of his or her right to a trial by an impartial jury. *Id.* See also Ranalli, *supra* note 59 (reporting low percentage of plaintiff awards in Massachusetts and impact of proposed Juror Examination Act).

140. See H.R. 775, 184th Gen. Ct., Reg. Sess. (Mass. 2005) (providing one hour of questioning per party in a case without any exceptions).

141. See *id.* (omitting guidelines for cases with multiple plaintiffs or defendants).

142. See *id.* (outlining guidelines for pilot program). In a basic case, this format would allot for two hours of voir dire examination by the attorneys. *Id.*

143. See *id.* (stating mandatory grant of attorney conducted questioning upon request); see also Interview with Robert W. Healy, *supra* note 48 (noting potential disadvantages of attorney conducted voir dire).

144. See Interview with Robert W. Healy, *supra* note 47 (critiquing pilot program).

145. See Interview with Robert W. Healy, *supra* note 47 (anticipating conflicts with proposed Juror Examination Act).

146. See Interview with Robert W. Healy, *supra* note 47 (predicting conflicts with proposed Juror Examination Act).

147. See H.R. 775, 184th Gen. Ct., Reg. Sess. (Mass. 2005) (excluding reference to increased use of juror questionnaires). Legal experts consistently acknowledge the ability of a comprehensive questionnaire to improve and expedite the jury selection process. See STARR & MCCORMICK, *supra* note 2, §§ 11.01-11.04, at 341-75 (emphasizing helpfulness of inclusive questionnaires).

attorneys, and citizens must spend on voir dire.¹⁴⁸ The current questionnaire only offers a cursory glimpse into a juror's background, which does not provide counsel with much useful information prior to the voir dire oral examination.¹⁴⁹ If the Massachusetts Juror Questionnaire included more extensive questions regarding the juror's background as well as the juror's opinions on case-specific issues, judges and attorneys could concentrate their oral questioning on issues pertinent to the case.¹⁵⁰ A more in-depth juror questionnaire, therefore, would improve the overall efficiency of the proposed voir dire system while still providing attorneys with an adequate opportunity to select an impartial jury.¹⁵¹

Finally, the Revised Juror Examination Act fails to propose a blended approach to voir dire that sufficiently addresses the opposing policy concerns of efficiency and equity.¹⁵² Just as the ABA suggests, the best voir dire system seems to be where the judge conducts a preliminary examination of jurors and, subsequently, the attorneys conduct a direct oral examination of the venire for a limited period of time.¹⁵³ By disregarding the numerous benefits afforded by judge-conducted voir dire, proponents of the Revised Juror Examination Act propose a system that fails to recognize the significance of the relationship between efficiency and justice.¹⁵⁴

IV. CONCLUSION

The concept of an impartial jury serves as the backbone of the American justice system. Although the Constitution and the legal community fiercely protect the role of the jury, the majority of criticism regarding the court system relates to the jury. In order to reform its jury selection process, Massachusetts must consider both efficiency of process and equity for all of its citizens before the court. Only when Massachusetts considers a number of factors, including juror questionnaires, judicial presence versus participation, and heightened attorney involvement, can it achieve equilibrium between these two policy considerations. By drawing from New York's progress in reforming its own flawed system, Massachusetts has a unique opportunity to create an improved

148. See Massachusetts Juror Questionnaire, *supra* note 37 (indicating basic background questions asked of potential jurors); see *infra* notes 149-151 and accompanying text (discussing weak relationship between current use of juror questionnaires and current voir dire system).

149. See Editorial, *New Wave in Voir Dire?*, MASS. LAW. WKLY., May 17, 2004 (discussing limited use of juror questionnaires for attorneys and judges); see also STARR & MCCORMICK, *supra* note 2, §§ 11.01-11.04, at 341-75 (explaining limitations of basic juror questionnaires during voir dire).

150. See INTERIM REPORT, *supra* note 90, at 69-72 (outlining benefits of questionnaires); see also Hans & Jehle, *supra* note 7, at 1198-99 (recommending use of supplemental questionnaires to improve voir dire).

151. See Hans & Jehle, *supra* note 7, at 1198-1201 (advocating benefits of supplemental questionnaires).

152. See *supra* notes 140-151 (evaluating pros and cons of proposed legislation in Massachusetts).

153. See *supra* note 26 and accompanying text (noting ABA guidelines for ideal jury selection system).

154. See Interview with Robert W. Healy, *supra* note 47 (noting Revised Juror Examination Act does not incorporate valuable elements of judge-conducted voir dire method).

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voir dire process that combines the best of both judge-conducted and attorney-conducted voir dire systems. Ultimately, the balance between judicial economy and the right to an impartial jury equalizes when both the judges and attorneys participate in the voir dire process in a meaningful manner.

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