

ARIZONA STATE COURT:

Background, Best Practices, Jury Selection Process



By Frances Lynch

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Peremptory strikes in jury trials originated in the United Kingdom in the 19th century. The U.K. and Canada no longer use peremptory challenges. As of January 1, 2023, Arizona became the first state in the United States to do away with peremptory challenges. Extensive analysis and significant research were conducted by the Arizona court system prior to this change being implemented. The Report and Recommendations of the Task Force on Jury Data Collection, Practices, and Procedures and the Statewide Jury Selection Workgroup Report and Recommendations can be found at <https://www.azcourts.gov/cscommittees/Task-Force-on-Jury-Data-Collection-Practices-and-Procedures> which is on the Arizona State Courts website. Both documents are easily accessible and provide

background information and best practice recommendations for implementing this rule change. The appendices contain sample forms, sample jury questionnaires, and sample *voir dire* scripts.

The reports and materials compiled by the Statewide Jury Selection Workgroup (SJSW) give directions on what the jury selection process should encompass going forward. Recommendations include employing written or online case-specific jury questionnaires. Such questionnaires can be broad in scope but can also be used to obtain answers to questions that may be more sensitive or private, such as information the juror may know about the case, a juror's opinions or attitudes regarding relevant issues, and prior pertinent life experiences.

The task force determined that it was important to provide jurors with information and instruction on the importance of disclosing and discussing attitudes, beliefs, opinions, and life experiences that may affect a juror's ability to be fair and impartial.

The Superior Court Jury Selection Process is explained in Rule 47, Ariz. R. Civ. P. and is also governed by statute. The County Jury Commissioner creates a master jury list pursuant to A.R.S. § 21-301(A) and uses a random selection procedure per A.R.S. § 21-313(C) to create a jury pool. There are comments to the new rule that are particularly useful. The comment to 2022 Amendment to Rule 47(c)(3) reads (in part) as follows:

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To allow the process of challenging jurors for cause to work effectively, Rule 47(c)(3) encourages the use of case-specific written questionnaires during voir dire.

All sitting judges (and opposing counsel) should be aware of the new rule and the comments encouraging juror questionnaires, but if for some reason that is not the situation, referencing this comment in the rule may prove to be more beneficial than referencing reports which are lengthy.

It is recommended in the reports that all attempts by the judge to rehabilitate a prospective juror through leading questions should be avoided. Additionally, a separate comment to Rule 47(c)(5) gives direction regarding rehabilitation of jurors:

When feasible, the court should permit...examination by the parties, refrain from imposing inflexible time limits, and...refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law.

Because judges have spent many years rehabilitating jurors, this may be a difficult habit for some judicial officers to break. A reference to the comment may prove helpful if rehabilitation begins to occur during the jury selection process.

Rule 47(d) gives a listing of challenges for cause, including:

(D) the prospective juror has-by words or actions-shown bias or prejudice for or against any party or otherwise demonstrated their unfitness to serve as a juror.

A.R.S. § 21-211 also covers reasons for disqualification of jurors, including:

Persons biased or prejudiced in favor of or against either of the parties.

A litigant can request that a juror who admits to bias or prejudice in favor of or against one of the parties be struck for cause, referencing both Rule 47 and A.R.S. § 21-211.

Rule 47 Ariz. R. Civ. P. discusses the use of Case-Specific Written Questionnaires. Under the provisions of Rule 47, each prospective juror completes a case-specific written questionnaire in a manner and form approved by the court. According to Rule 47, the questionnaire should include questions about the juror's qualifications to serve in the case, any hardships that would prevent the juror from serving, and questions about whether the juror could render a fair and impartial verdict. Practically, it makes sense to confer with opposing counsel and attempt to come to an agreement on at least some of the case-specific written questions. Those which cannot be agreed upon can be taken up with the judge.

The reports offer template questionnaires as samples, and while the reports indicate the primary benefit of the questionnaires is more complete information to exercise for-cause strikes, prospective jurors can complete a case-specific questionnaire before coming to court, allowing some strikes, such as for hardship or other agreed upon for-cause basis before a prospective juror has to travel to court.

With respect to juror hardship issues, the task force

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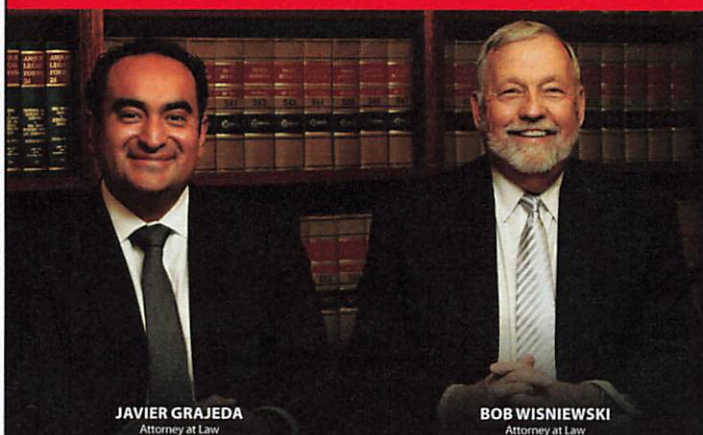


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recommendation was to allow jurors to pick a date within a specific timeframe for jury service to enable choice of service date and improve participation. A.R.S. § 21-336 provides that if a summoned juror is not available on the date scheduled, the person may postpone the date of service two times. A juror may postpone their service because they are traveling, have work conflicts, or simply prefer to serve at a more convenient time. The task force recommendation for allowing jurors to choose the date of their service during the postponement process aligns with promoting an 'ownership culture' and research shows an increase in the probability the juror will be able to serve while decreasing the number of failures to appear for service. The American Bar Association also advocates for this type of policy for jury service.

The questionnaires are also meant to provide parties with information to prepare more meaningful in-person voir dire. There is a recommendation in the reports that questionnaires should not exceed 60 questions,

although there is no direct limitation on the number of allowed questions in Rule 47 Ariz. R. Civ. P. Using a combination of open-and closed-ended questions in the questionnaire was also recommended.

Judges are encouraged to reduce the number of questions in a questionnaire to less than 60, which includes any subparts being counted as separate questions. The court is supposed to avoid re-asking the same questions in oral *voir dire* that were presented to the juror in written or online questionnaires. It is recommended that questions should also be worded simply, and compound questions should be avoided. The scope of these case-specific questionnaires can address jurors' backgrounds, contacts within law enforcement, case relevant education or job-related training, and can also include questions about Facebook Groups and other Social Media communities to which jurors may belong. Questions concerning the justice system, corporations, and awards for noneconomic damages are also considered appropriate.

Keep in mind that all juror-answered case-specific questionnaires are confidential. Rule 47 Ariz. R. Civ. P. requires that all completed case-specific written questionnaires be filed under seal in the case file. Those receiving completed case-specific written questionnaires must not disclose the responses to the public.

Research complied for the reports shows that juror questionnaires, including electronically administered questionnaires, increase prospective jurors' willingness to provide complete and candid answers to questions. Furthermore, studies indicated that the use of written and online questionnaires can provide prospective jurors with a greater sense of privacy and comfort than answering questions in open court.

A sample online questionnaire can be found in Appendix 4C of Report and Recommendations Statewide Jury Selection Workgroup: A Workgroup of the Task Force on Jury Data Collection, Practices, and Procedures: Online Questionnaire; General

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Civil (Long) <https://forms.office.com/g/kzGXCuFbQp>

Prior to the rule change, during jury selection, jurors would be asked to self-identify bias or prejudice and disclose it publicly. A juror may be less willing to discuss opinions, attitudes, and relevant personal life experiences, particularly when asked to discuss topics such as substance abuse, mental health, prior experiences as the victim of a crime, interactions with law enforcement, and relevant attitudes regarding race and ethnicity. The reports point out that for this reason the questionnaires may be welcomed by many jurors.

Based partially on expert recommendations, the best practices offered by the SJSW and which are set forth in draft *voir dire* scripts in the appendix discourage judicial attempts to rehabilitate jurors. See Appendix 2B (Civil Voir Dire) The SJSW recommends that judges and parties ask jurors questions in an effort to encourage prospective jurors to reflect upon their attitudes, opinions, feelings, and life experiences. Research suggests that helping prospective jurors identify potential bias may be necessary for a juror to reduce the impact of their predispositions.

According to research materials, in order to minimize the impact of potential bias, a prospective juror must be aware of the potential bias and be motivated to adjust their decision-making process. However, research bears out the saying "A juror convinced against his or her will, is of the same opinion still." A comment merely bringing potential bias to a juror's attention and asking the juror to commit to set the bias aside will likely fail to transform a biased juror into an unbiased one. The SJSW suggested Civil Voir Dire Script gives specific recommendations to judges:

Avoid attempting to rehabilitate jurors through leading questions to have individuals affirm they will set this belief aside. Also take opportunities to compliment prospective jurors who provide candid information regarding bias. Judges can consider asking open ended questions to explore the juror's attitudes, opinions, and feelings. For example, judges could consider asking an open-ended follow-up question like "What caused you to raise your card to the question I just asked?" During lawyer or party-conducted questioning of jurors, liberally permit questioning of jurors regarding topics addressed by the court.

Judges and attorneys are encouraged by the materials to avoid leading the juror to a socially acceptable answer. No one (including the trial judge) should be asking jurors questions like, "You agree to follow the law, right?" or "You agree to set that life experience aside and serve as a fair and impartial juror in this case, don't you?"

Although the questionnaire process seems time-consuming at first glance, it theoretically could be used to add efficiency to the jury selection process since information learned from written or online questionnaires can allow counsel to zero in on specific issues with pertinent follow up questions. The materials online produced by the Statewide Jury Selection Workgroup and by the Task Force on Jury Data Collection, Practices, and Procedures which are accessible at the Arizona State Courts website (link address in paragraph one of this article) can assist practitioners in navigating the recent Rule 47 Ariz. R. Civ. P. changes. ■

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