Task Force on Jury Data Collection, Practices and Procedures, Training Subgroup

MEMORANDUM

TO: Full Task Force

FROM: Training Subgroup

DATE: October 24, 2021

RE: Approaches to Training in Response to Elimination of Peremptory Challenges

This Memorandum presents thoughts and a framework for discussion for training in relation to the Arizona Supreme Court's decision to abolish peremptory challenges for all matters in which juries are selected in Arizona courts after January 1, 2022, as a basis for deciding what recommendations to make concerning training to the Task Force on Jury Data Collection, Practice and Procedures ("the Task Force").

I. Training Should Focus in Overview on the Change in Philosophy Represented by the New Rules – Toward Neutralism and Away From Seeking Advantage Through Voir Dire – to Help Participants Understand Why They Are Doing What They Are Doing.

We start with the premise that people carry out learning better if they aren't following process-based instructions in a rote way, but instead understand reasons and purposes behind what they do. So we recommend that training include some general, noncontentious overview of the purpose of the changes.

The elimination of peremptory challenges, as a matter of process, falls symmetrically on prosecution and defense; on plaintiff and on defendant. All are barred from peremptory strikes. That change unmistakably signals a move away from each side having a chance to pick the jury that is best for their case, as peremptory challenges allowed each side to seek through generally unreviewable strikes to veto those jurors thought most favorable for the other side. *See, e.g.*, "How Lawyers Pick Jurors, and Why It Matters," Eglet Adams Law Firm Blog ("When the plaintiff picks jurors, they're looking for those who are very sympathetic, who are willing to view the prosecution as the victim in the case…. The defense, on the other hand, wants the exact opposite. They're looking for jurors who will be predisposed against the prosecution.") https://www.egletlaw.com/how-lawyers-pick-jurors-and-why-it-matters/ (June 28, 2018) (last visited October 3, 2021).

Whether unwelcome or not to particular lawyers, the current reform isn't hard to understand. Like the change in 1993 when Arizona instituted mandatory, early-case disclosure of all relevant materials (both favorable and unfavorable) in civil matters under Arizona Rule of Civil Procedure 26.1, the Arizona Supreme Court has done it again. It has adopted a first-in-the-nation reform that destroys a traditional tool of adversarial justice (in 1993, discovery rules that allowed hiding relevant information, in 2022, rules allowing the tactically advantageous elimination of jurors), thus substituting a more neutral pursuit of truth in place of adversarial gaming behavior.

This is good to explain to people, as a way of promoting understanding and respect for the rule change, and seeking commitment to it.

This bedrock policy of neutrality is grounded in other provisions of law that merit mention. First, it is consistent with general notions of due process grounded in fundamental fairness. Second, it is consistent with Arizona Code of Judicial Conduct 2.3(C), which provides that "A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice… based on attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation…". By eliminating peremptories, the Court has made it much harder to use cultural markers as indications of sympathy for the government or corporations on one hand, or defendants or civil plaintiffs on the other hand, and that is roughly consistent with the content of 2.3(C). Third, to the extent the current rule changes are accompanied by any Comment explaining their purpose of rooting out bias, any such Comment should be discussed in the training in overview.

II. Training Should Help Judges and Lawyers Understand the Functions of Juror Questionnaires and Open-Ended Questioning, the Need to Avoid Rote Rehabilitations and Unnecessary Yes/No Questions, and Should Include Hands-On Exercises Led By Judges or Consultants to Help Judges Lead the New Voir Dire.

A. Training Should Help Judges and Lawyers Understand the Function and Use of Juror Questionnaires.

One of this Task Force's outputs appears likely to be suggesting the use of pre-trial questionnaires to elicit information about potential jurors, to allow more rapid exclusion of venirepersons who should not serve for easily identifiable reasons, and to focus voir dire more quickly. For this reason, training on the new changes should include a component concerning the various uses of pre-trial questionnaires, and the different ways in which they are used presently. The training could include template questionnaires that can be adapted by particular counties or judges. Additionally, the training could include samples of case-specific pre-trial questionnaires, as are utilized in Yavapai County, with a discussion of the procedures and potential advantages of doing so, to allow counties that summon jury pools by case to consider utilizing that procedure.

B. One of the Keys to Training Is to Communicate the Importance of Open-Ended Questioning, and to Impart Expertise in How to Conduct Open-Ended Questioning That Can Allow Examination of Bias and Striking For Cause Where Appropriate, of Biased Venirepersons.

We propose to educate on the need for open-ended questioning without rote, conclusory rehabilitation of potentially biased jurors. New research by Professor Jessica Salerno at Arizona State University confirms the importance and utility of open-ended questioning in voir dire, and the harm of such rote rehabilitation. *See* Salerno, J. M., Campbell, J. C., Phalen, H. J., Bean,

S. R., Hans, V., Spivack, D., & Ross, L. The impact of minimal versus extended *Voir Dire* and judicial rehabilitation on mock jurors' decisions in civil cases. *Law and Human Behavior* (in press 2021) (cited herein, "Salerno, et al."). In a series of mock jury studies, Professor Salerno confirmed the hypothesis that "extended (versus minimal) voir dire questions" were "better able to identify mock jurors who hold extreme attitudes that could threaten their impartiality or willingness to follow the law" and "that these excludable jurors would render different judgments." Salerno, et al., at 36. Of particular note, Professor Salerno found that traditional, conclusory, closed-ended questioning (substantially, asking potential jurors 'Can you follow the law and render an impartial decision') resulted in elimination of less than 2% of potential jurors for bias, extended questioning identified disabling bias in 42% of potential jurors. *See id.* at 36. Also notably, Professor Salerno concluded that not only is judicial rehabilitation (e.g., "but you can set aside any biases you may have, correct?") ineffective in eliminating bias, but that mock jurors who have been judicially rehabilitated incorrectly report "the illusion that they were putting their biases aside when the impact of those biases remained undiminished." *See id.* at 37.

The training should include explanation of these findings, again, to help participants in the new voir dire process understand and support the necessity of the process, and to understand the problems in the old process the new rules ask both judges and lawyers to avoid.

C. We Propose Hands-On, How-To Trainings in Open-Ended Voir Dire to Empower Judges and Lawyers to Participate in the New Voir Dire Process Effectively.

We strongly recommend a program of participatory, hands-on training on how to conduct voir dire using open-ended questions, avoiding rote rehabilitations, and utilizing case-specific questionnaires where possible, and use of mini-openings where case-specific questionnaires are not practical. While it is important to show everyone the compelling research of Professor Salerno and her colleagues, it is not abstract agreement but facility with putting it into effect that matters, and that will make the rule changes function well. This is also consistent with the Arizona Supreme Court's approach to major reforms, as most recently, the Court implemented tiered civil discovery in July 2018 to allow an extended period of training first, to permit the courts and counsel to understand and put into effect properly those significant changes.

A training course could be developed and implemented to audiences in each county, or in groups of counties where appropriate (e.g., combining trainings in Yuma and La Paz Counties, for example), to reduce the number of trainings necessary. The training should include components of explanation of open-ended questioning, watching videos of effective open-ended questioning, and specifically how to pivot in those exchanges to asking in a disarming fashion about the degree of commitment to beliefs or attitudes that suggest bias. Ultimately, it should include a component where judges in rotations conducting voir dire can participate in questioning with other trained judges, consultants, or other persons of assistance as the Court may choose.

D. Judges and Lawyers Should Be Trained on Implicit Bias, and on the Identification and Appearance of Particular Biases to Aid Judges in Approaching It.

To allow judges and lawyers to conduct voir dire in a manner that roots out and eliminates bias, they should be trained about implicit bias, to understand it in potential jurors and also our fellow judges and lawyers, and ultimately, ourselves. The Task Force has already determined in its draft report to recommend "[t]raining for judicial officers and attorneys around implicit bias and its impact on jury selection." (Draft Report, at 11).

But like understanding that open-ended questions are effective is not the same as being able to put that knowledge into practice. Thus, just as we recommend hands-on training for participation in open-ended questioning in voir dire, we likewise recommend training on how juror statements may or may not reflect incipient biases, so they can be the subject of follow-up questioning. To that end, we suggest training about implicit bias include instances of how lawyer questions and juror answers can encode implicit biases concerning law enforcement, racial groups, or other social groups, including those protected under Code of Judicial Conduct 2.3(C). Training should help judges and lawyers to recognize signs of such bias, along with how to approach questioning to elicit the honest, open statements of attitudes not as easily expressed in the current system. It is important to engage the jurors extendedly, and to tease out value statements, beliefs, and other statements indicating predisposition. These will likely lead to the increased number of disqualifications for cause Professor Salerno's that research suggests will follow, but inducing honest answers, and understanding the biases at play, can only aid that process.

E. The Criminal and Civil Sections of the State Bar Should Organize Trainings on the New Rules, Dovetailing with the Judicial Trainings, and Working With Stakeholders in the State Bar.

While judicial training is of great importance, so much of voir dire depends on lawyers, and it will be important to have a robust program of lawyer-focused training. It will be useful for the lawyer training to reflect an awareness of the content of the judicial training, as the lawyer's role should be described consistently in both. Judges will retain the authority to take a more leading role in voir dire, or to defer more of the questioning to lawyers, and lawyers need to be conscious of how either of those two different approaches may play out under the new rules, consistent with the training to be provided to the judges. The State Bar can organize and facilitate trainings once the judiciary is clear in how it wishes to proceed, and can work within the framework of the criminal and civil practice sections to do so. On the criminal side, the State Bar can involve prosecution and defense stakeholder groups such as the Arizona Prosecuting Attorneys' Advisory Council and the Arizona Attorneys For Criminal Justice to organize, participate in, publicize, and as appropriate, lead these trainings. On the civil side similarly, groups like the Arizona Association of Defense Counsel and the Arizona Association for Justice, among others, can perform like roles and functions.

F. Prospective Jurors Should Likewise Be Provided Information Consistent with the Training of Judges and Lawyers, to Help Them Participate Most Helpfully in the New Voir Dire Environment.

The court's communications with prospective jurors should be consistent with communications with judges and lawyers. The Task Force's October 4 report recommended updates to "the statewide video used during jury orientation to remind jurors of the importance of jury service and to help explain the jury selection process". Task Force Report, at 4. Additionally, we recommend that the video be updated to make it congruent with the move toward open-ended voir dire, as by explaining that everyone has implicit biases, by normalizing the concept of bias to make it non-threatening in voir dire, and by emphasizing the importance of candor and openness to making the process work well. These changes would make voir dire congruent with Prof. Salerno's research, referenced not only in this memorandum, but also in the draft Comment to the revised Arizona Rules of Criminal and Civil Procedure that provide guidance to the Superior Court about the conduct of voir dire.