

STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENT TO
MAINE RULES OF CIVIL PROCEDURE

2019 Me. Rules 07

Effective: September 1, 2019

All of the Justices concurring therein, the following amendment to the Maine Rules of Civil Procedure is adopted to be effective on the date indicated above. The specific amendment is stated below. To aid in the understanding of the amendment, an Advisory Committee Note appears after the text of the amendment. The Advisory Committee Note states the reason for recommending the amendment, but the Advisory Committee Note is not part of the amendment adopted by the Court.

1. Subdivisions (a), (b) and (c) of Rule 47 of the Maine Rules of Civil Procedure are deleted and the following language is substituted:

RULE 47. SELECTING JURORS

(a) Examination of Jurors.

(1) *Purpose.* The examination of prospective jurors is intended to allow for the selection of jurors who

(A) are qualified and willing to sit;

(B) have not formed any preconceptions about a case that they cannot set aside or that would otherwise interfere with their ability to be fair and impartial; and

(C) are prepared to hear and decide any case for which they are selected without bias, prejudice, or interest, accepting the law as instructed by the court.

(2) *Methods for Examination of Jurors.*

(A) In all cases, the examination of prospective jurors shall occur through oral questions by the court, in open court or at sidebar, unless the court determines that a question or questions must be asked in a different setting.

(B) The court may also permit the prospective jurors to be examined through

(i) the use of questionnaires, or

(ii) direct oral questioning by attorneys or unrepresented parties.

(3) *Process for Establishing Examination Method(s).* Before the date of jury selection, the attorneys, unrepresented parties, and the court shall discuss readiness for trial and issues in each case, including the questions to be posed to jurors.

(A) The court may set a deadline for receipt of proposed written questionnaires or topics to be addressed in questioning by an attorney or unrepresented party.

(B) At the jury selection conference, the court will indicate the questions it intends to ask the prospective jurors. The attorneys and unrepresented parties may request amendments, deletions, or supplementation. Any such requests must be made part of the record.

(C) At that conference, the court will consider any timely requests for use of questionnaires or direct questioning of prospective jurors by the attorneys or unrepresented parties. Those requests must be made as set forth below:

(i) *Written Questionnaires.* Any party who seeks to have a written questionnaire submitted to prospective jurors must file a draft of the specific questions sought to be posed at least 21 days before the day of jury selection, unless otherwise ordered by the court.

(ii) Attorney or Unrepresented Party Questions (“Direct Questioning”). Any party who seeks to ask the prospective jurors oral questions shall file a request to pose oral questions, including the proposed topics of inquiry, at least 21 days before the day of jury selection, unless otherwise ordered by the court. The proposed topics of inquiry should allow for brief responses from prospective jurors. In its discretion, the court may require the specific proposed questions to be submitted in advance for review.

(4) *Decisions on Methods to be Used.* The court shall permit questionnaires or direct questioning to be used, and set a specific time limit for direct questioning, if the court finds that the requesting party has complied with subdivision (a)(3)(C) of this Rule and that:

(A) answers to the approved questionnaires or topics of inquiry for direct questioning may add materially to appropriate information that could be gained through the court’s oral questioning;

(B) the written questionnaires are phrased to allow a “yes” or “no” answer unless, in unusual circumstances, the court specifically approves questions that seek other brief responses; and

(C) use of the written questionnaire or direct questioning will assist materially in obtaining a fair and impartial jury and will not unduly extend the time required to select a jury.

(5) *Conducting the Examination.* At all times the court shall control the examination of prospective jurors. Even after permitting the use of written questionnaires or direct questioning, the court may limit or terminate either process at any time if it determines that:

(A) the questions being posed are outside the approved topics of inquiry;

(B) the questioning or the process is hindering or having a negative effect on the selection of a fair and impartial jury;

(C) the questions are taking more time than was designated by the court; or

(D) the questions being posed are improper.

(b) Challenges for Cause.

(1) *Generally.* Challenges for cause of individual prospective jurors shall be made during or at the conclusion of the examination.

(2) *Process When Questionnaires are Allowed.* When questionnaires are to be used, initial challenges for cause directed to individual prospective jurors shall be made after the questioning conducted by the court and after any case-specific jury questionnaire has been reviewed. These initial challenges for cause shall be made out of the hearing of any prospective jurors.

Thereafter, individual potential jurors shall be selected by lot in a sufficient number to comprise the jury, plus peremptory challenges. In the court's discretion, several additional potential jurors may be selected by lot in the event that any of the initially selected potential jurors are subject to a further challenge for cause or in cases where alternate jurors are needed.

(3) *Process When Direct Questioning is Allowed, With or Without Questionnaires.* When direct questions are to be used, initial challenges for cause directed to individual prospective jurors shall be made after the questioning conducted by the court and after any case-specific jury questionnaire has been reviewed. These initial challenges for cause shall be made out of the hearing of any prospective jurors.

Thereafter, individual potential jurors shall be selected by lot in a sufficient number to comprise the jury, plus peremptory challenges. In the court's discretion, several additional potential jurors may be selected by lot in the event that any of the initially selected potential jurors are subject to a further challenge for cause or in cases where alternate jurors are needed.

Counsel or unrepresented parties shall then be given a reasonable opportunity to direct questions to the array of potential jurors, within the topic and time parameters established by the court. If any of those jurors are excused for cause and there are not enough remaining jurors to allow for the selection of a jury, given each party's right to peremptory challenges, additional potential jurors shall be selected by lot and may then be questioned by counsel or parties.

(c) Peremptory Challenges.

(1) *Manner of Exercise.*

(A) Generally. After all jurors challenged for cause have been excused, except in cases where the court has permitted direct questioning of prospective jurors by attorneys or unrepresented parties, the clerk shall draw the names of eight prospective jurors and shall draw one additional name for each peremptory challenge allowed to any party by this rule or by the court. The clerk shall then prepare a list of the names drawn. As each peremptory challenge is exercised, the clerk shall strike out the name of the juror challenged on the list of the drawn prospective jurors. Any attorney or unrepresented party may waive the exercise of any peremptory challenge without thereby giving up the right to exercise any remaining peremptory challenge to which that party is entitled. If all peremptory challenges are not exercised, the court will strike from the bottom of the list sufficient names to reduce the number of jurors remaining to eight.

(B) When the Court has Permitted Direct Questioning by Attorneys or Unrepresented Parties. In cases where the court has permitted direct questioning of prospective jurors by attorneys or unrepresented parties, peremptory challenges shall be made concerning the prospective jurors randomly selected for questioning as set forth in Rule 47(b)(3) above. The process for exercising peremptory challenges shall be that process set forth in Rule 47(c)(1)(A) above.

(2) *Order of Exercise.* In any action in which both sides are entitled to an equal number of peremptory challenges, they shall be exercised one by one, alternatively, with the plaintiff exercising the first challenge. In any action in which the court allows several plaintiffs or several defendants additional peremptory challenges, the order of challenges shall be as determined by the court.

(3) *Number.* Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered to be a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

Advisory Note – September 2019

Rule 47 is amended to state more explicitly that, in addition to oral questioning of prospective jurors by the court, the court may allow (i) use of written questionnaires or (ii) direct questioning of prospective jurors by attorneys or unrepresented parties. If the court makes the findings indicated to support use of a questionnaire or direct questioning by parties, the court shall allow the use of questionnaires or direct questioning, subject to the court's authority to terminate the questioning if any of the listed problems develop.

The conference about how jury selection will proceed may occur as part of the trial management conference, or during another conference to be held sometime before the date of selection.

Unless the court orders otherwise, requests for use of written questionnaires or direct questioning of jurors must be submitted at least 21 days before the date for jury selection. Before the date of jury selection, the court will meet and confer with the attorneys or unrepresented parties to review and decide on any requests for questionnaires or direct questioning.

The types of questions that are proper to pose during jury selection—whether by the court, by the attorneys (or parties, if unrepresented), or through a questionnaire—have been addressed in *State v. Roby*, 2017 ME 207, 171 A.3d 1157; *State v. Simons*, 2017 ME 180, 169 A.3d 399; *Grover v. Boise Cascade Corporation*, 2004 ME 119, 860 A.2d 851; and *United States v. Ramírez-Rivera*, 800 F.3d 1, 38 n.32 (1st Cir. 2015). See also Alexander, *Maine Jury Instruction Manual*, §§ 2-4D, 2-4E, 2-4F (2018-2019 ed.).

Even if parties agree on language in a proposed written questionnaire, the court may decline to use the proposed language. Before approving written questionnaires, trial judges should carefully review all questionnaire language, particularly questions that seek responses other than “yes” or “no.”

If the court determines that any direct questioning by counsel or unrepresented parties is inappropriate or improper, it should limit or terminate the questioning or take other appropriate responsive steps. See *State v. Rancourt*, 435 A.2d 1095, 1098-1100 (Me. 1981); see also *State v. Woodburn*, 559 A.2d 343, 344 (Me. 1989) (“Considerable discretion over the conduct and scope of juror voir dire is vested in the trial court, which has the responsibility

of balancing the competing considerations of fairness to the defendant, judicial economy, and avoidance of embarrassment to potential jurors.”).

In addition to the amendments to subdivision (a) of Rule 47, subdivision (b) is amended to clarify what has long been the law, that challenges for cause and exclusions for cause may occur at the end of and during voir dire. *See Woolley v. Henderson*, 418 A.2d 1123, 1127 (Me. 1980).

Subdivision (c) of Rule 47 is amended to outline the procedure for the exercise of peremptory challenges depending on whether questioning of jurors by attorneys or unrepresented parties has been allowed.

Dated: July 18, 2019

FOR THE COURT,*

/S/

LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
JEFFREY L. HJELM
THOMAS E. HUMPHREY
Associate Justices

* This Rule Amendment Order was approved after conference of the Court, all Justices concurring therein.