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

1. Subsections (a) (b) and (c) of Rule 47 of the Maine Rules of Civil Procedure are amended to read as follows:

RULE 47. JURORS

(a) Examination of Jurors.

(1) *Purpose*. The purpose of examination of jurors is to assure that the jurors selected for each particular case are qualified and willing to sit, that they have not formed any preconceptions about the case that they cannot set aside or that would otherwise interfere with their ability to be fair and impartial, and that they 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) *Conduct of the Examination*. The court shall conduct the examination of prospective jurors ~~unless in its discretion it permits the parties or their attorneys to do so~~ by oral questioning in open court or at sidebar, unless the court determines that a question or questions must be presented to a juror in a closed setting, and may permit examination by written questionnaires or examination by oral questions posed by the parties' attorneys (or any party if unrepresented), or both. The court shall permit the parties or their attorneys to suggest additional questions to supplement the inquiry and shall submit to the prospective jurors such additional questions as it deems proper, or the court in its discretion may permit the ~~parties or their~~ attorneys or unrepresented parties themselves to make such additional inquiry as it deems proper.

(3) *Methods for Examination of Jurors*. Prior to jury selection, the attorneys, unrepresented parties and the court shall meet to discuss readiness for trial and issues in each case to be set for jury selection, including the questions to be posed to jurors.

(A) *Written Questionnaires*. If, in addition to the oral examination of jurors by the court, any party seeks to have a written questionnaire submitted to prospective jurors, that party's attorney (or the party if unrepresented) shall file a draft of the specific questions sought to be posed sufficiently in advance of the day of jury selection so that the court can review the proposed questionnaire. In its discretion, the court may approve use of a written questionnaire when the court finds that

(i) answers to the approved questions may add materially to information that could be gained through oral questioning by the court,

(ii) the questions are phrased to allow a "yes" or "no" answer unless the court specifically approves questions that seek other responses, and

(iii) completion and review of the questionnaire will not unduly extend the time required to select a jury.

(B) *Attorney or Unrepresented Party Questions*. If, in addition to the oral examination of jurors by the court and any written questionnaire, any party seeks to pose oral questions to prospective jurors, that request must be made sufficiently in advance of the day of jury selection by the party's attorney (or the party if unrepresented) so that the court can meet with counsel and any unrepresented parties to consider whether to approve the request and the proposed topics of inquiry. In its discretion, the court may require the specific proposed questions to be submitted in advance for review.

The court may approve oral questioning by the attorneys or any unrepresented party when the court finds that

(i) answers to the questions may add materially to information that could be gained through oral questioning by the court, and

(ii) the questioning can be completed in a reasonable time, to be determined by the court.

(C) *Process Where Questionnaires or Attorney or Unrepresented Party Questions are Allowed*. In such cases, initial challenges for cause directed to individual prospective jurors shall be made at the bench after initial general voir dire conducted by the court and any case-specific jury questionnaire has been reviewed.

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 parties if unrepresented) 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 is not a sufficient number of remaining jurors to comprise the jury plus peremptory challenges, additional potential jurors shall be selected by lot and may then be questioned by counsel or parties.

(b) Challenges for Cause. Challenges for cause of individual prospective jurors shall be made at the bench, during or at the conclusion of the examination.

(c) Peremptory Challenges.

(1) *Manner of Exercise.* After all jurors challenged for cause have been excused, except in cases where the court has permitted questioning of an array 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. In cases where the court has permitted questioning of an array of prospective jurors by attorneys or unrepresented parties, peremptory challenges shall be made to the prospective jurors already randomly selected for questioning as set forth in Rule 47(a)(3)(B) above. Peremptory challenges shall be exercised by striking out the name of the juror challenged on a list of the drawn prospective jurors prepared by the clerk. Any attorney or unrepresented party may waive the exercise of any peremptory challenge~~s~~

without thereby relinquishing 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.

(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 as 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 – _____2019

Rule 47 is amended to state more explicitly that, in addition to oral questioning of prospective jurors by the court, the court, in its discretion, may allow (A) use of written questionnaires or (B) questioning of an array of prospective jurors by unrepresented parties or attorneys for each side. Questionnaires must be submitted and approved in advance of the day of jury selection, and if the attorney's or party's questioning of jurors is sought, the topics of the questioning must be approved by the court in advance of the day of jury selection.

The types of questions that are proper to pose during jury selection—whether by the court or the attorneys, or through a questionnaire—are summarized in subdivision (a)(1), and 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 Corp.*, 2004 ME 119, 860 A.2d 851; and *United States v. Ramirez-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.).

Although parties may 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 and particularly questions that seek responses other than "yes" or "no."

Jury selection precedes the time in a trial when trial advocacy begins. *Roby*, *Simons*, *Grover,* and *Ramirez-Rivera* indicate that some types of questions and lines of questioning of jurors by counsel or parties are inappropriate. Inappropriate questions include:

1. Questions and comments that seek to establish a personal rapport with jurors or that are designed to influence jurors in considering the merits of the case.

2. Questions that seek personal information about jurors, their families, their workplaces, or their friends, except in the rare circumstance where such information demonstrably relates to a significant issue to be considered by the jury in the case.

3. Questions that ask about jurors' knowledge of or beliefs about the law.

4. Questions that describe actual or hypothetical fact situations and ask jurors how they might respond to the facts described.

5. Questions that ask jurors if they "agree" or "disagree" with certain propositions, statements about law, or statements about real or hypothetical facts. *See Simons*, 2017 ME 180, ¶ 22, 169 A.3d 399. Similarly, questions that ask jurors to evaluate or give their opinions about statements or propositions, rather than simple "yes" or "no" answers, should be avoided. *See Roby*, 2017 ME 207, ¶¶ 3, 10–13, 171 A.3d 1157.

If the court determines that any questioning by counsel or parties is inappropriate or improper, it should limit or terminate the questioning or take other appropriate responsive steps.

In determining whether to proceed with questioning of prospective jurors by counsel or parties, the court may consider whether the skill levels of all who are posing the questions are adequate to prevent, for example, any disparity in skill level that would result in one party or counsel being viewed adversely by 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 for-cause exclusions 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 parties had been allowed.