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New *voir dire* law a 'victory for fairness'

BY DEBBIE SWANSON

In August, Gov. Deval L. Patrick signed into law Chapter 254 of the Acts of 2014 ("the *voir dire* law"), allowing attorney-conducted *voir dire* in the state of Massachusetts. Its passage permits attorneys to question potential jurors in Superior Court trials, with the goal of obtaining a fair and impartial jury. Judges maintain authority to impose reasonable limitations on the process by overseeing the type of questions asked and the amount of time an attorney is permitted.

In addition, the new law allows attorneys to suggest a monetary amount for damages suffered by a plaintiff in a civil trial. This is another long-sought after change that will enable jurors to receive guidance in determining monetary damages, rather than estimating a figure.

Douglas K. Sheff, immediate past president of the Massachusetts Bar Association, said of the bill, "This is a major victory for fairness in the courtroom — a great asset moving forward."

The signing of the *voir dire* law had been a long time coming for many Massachusetts trial attorneys. Both the Massachusetts Bar Association and the Massachusetts Academy of Trial Attorneys (MATA) had advocated for attorney-conducted *voir dire* for more than 20 years.

In 2013, both the MBA and MATA again filed bills, which State Rep. Garret Bradley (D-Hingham) consolidated into a broad based tort-related bill. State Rep. Christopher M. Markey (D-Dartmouth), acting chair of the Judiciary Committee, was also very instrumental in the final passage of the law, which, after passing through the Senate and the House, was signed by the governor on Aug. 6, 2014, making the commonwealth the 40th state to allow *voir dire*.

"This is a tremendous victory for litigants and attorneys who deserve cutting edge procedures to eliminate the potential of bias or racism from any court proceeding," said Martin W. Healy, the MBA's chief legal counsel and chief operating officer. "We are grateful to the legislative leaders in the House and Senate for advancing this much needed improvement to our trial system."

History of *voir dire*

Voir dire is a French term that refers to the practice of questioning a juror to determine if they will be fair and impartial in hearing the case. While the practice has been used in the United States for more than 200 years, in Massachusetts, it has remained exclusive to judges, who traditionally ask potential jurors a list of yes or no questions, and jurors respond with a show of hands. Without opportunity for questioning, trial attorneys have been forced to make decisions based on assumptions.

Those who have been advocating for *voir dire* feel that when questioned by an attorney rather than a judge, jurors may feel less intimidated and offer a more meaningful and honest response.

"It's difficult in a group setting for a person to answer a question about their own prejudices," said MBA President Marsha V. Kazarosian. "*Voir dire* is the only way to hear what's on a potential juror's mind."

Advocates have also felt that attorneys, who are most familiar with the details of the case, should be responsible for formulating and steering their questions appropriately. While some innovative Massachusetts judges have allowed attorney follow-up questions, it has been on a case-by-case basis.

"By asking questions, [the attorney] can filter who should and should not be on a jury," said Sheff. "Jurors may not even know they have a bias, but something exists that may make them an unfair juror."

The process can also help uncover if a juror is affected by outside influences or has circumstances going on in their personal life, which could alter their ability to hear the case impartially.

Past resistance

Trial attorneys in the commonwealth have been advocating for *voir dire* for more than two decades. Past attempts were met with resistance, with critics fearing that allowing the practice would negatively impact both costs and time.

Court officials had raised concerns that *voir dire* could considerably lengthen the time it takes for jury selection. However, the new law gives the judge final authority over the process, allowing them to specify the questioning time each attorney is allowed.

Cost has been another dispute; the Office of Jury Commissioner estimated it would result in an additional 154,000 summonses mailed next year, increasing postage cost, printing cost and juror expense. Expense would also be passed along to employers of the potential jurors, who are obligated to pay a juror's wages for the first three days of service.

However, Superior Court Judge Dennis Curran did an independent study of actual court cases that showed concrete savings of costs with less jurors needed.

"The first question should be about the fairness of a trial," said Sheff. "Cost should be second to that."

Sheff, who has been in discussions with colleagues in other states where *voir dire* is commonplace, said he is confident that the process will save time in the long run.

"Once a lawyer becomes good at it, it can be done in a reasonable time frame, and it may eliminate bad results that can come from bias jurors, such as appeals," he added.

The attorney's role

While the focus of *voir dire* is on questioning, Kazarosian said that when done well, an attorney doesn't approach the opportunity by presenting a series of questions. Rather, he or she tries to engage the men and women of the potential jury in a casual manner.

"With true attorney conducted *voir dire*, it's more of a conversation with a jury pool, rather than question and answer session. The attorney brings up situations — past cases, things that are potential hotbeds — and tries to draw out conversation," she explained.

"A juror may not say they have a prejudice, but something comes out in conversation that raises doubt if they'll be able to hear a case impartially," she said. "I've seen it happen myself; people believe in a concept that would prohibit them from making an unbiased decision."

Like any new process, trail lawyers should expect a learning curve, and the MBA will offer educational classes about *voir dire* once details are finalized about the new law's implementation. In addition, Kazarosian pointed out that there are many Massachusetts lawyers who also practice in states that permit *voir dire*, so they are familiar with the process and will become resources for sharing their knowledge.

How long it takes to perfect it will vary with each person, said Kazarosian. "It depends on a lawyer's level of comfort conversing with the group, engaging in give and take conversations."

Moving forward

Supreme Judicial Court Chief Justice Ralph D. Gants had formed a committee to study the implementation of *voir dire* during the legislative debate over the pending bill, naming Sheff to serve as the representative from the MBA. Chaired by Justice Barbara A. Lenk, the group will also include representatives from other organizations and the five Massachusetts Trial Court departments that conduct jury trials.

While still in its early stages, the committee's goal is to improve the quality of *voir dire* by identifying best practices and proposing revisions to the rules of criminal and civil procedures. When committee recommendations are released, they will be applied to all courts that conduct jury trials.

Kazarosian said that it is currently too early to tell exactly how the process will unfold; specifics, including whether potential jurors are to be approached a group or one-on-one, have not been nailed out.

"Presently, the bill has left it at the discretion of the trail judge. That can vary; some judges may be more limited than others. And it's likely to change over time, as both judges and lawyers learn more about the process," she said.

For trial lawyers in the Bay State, the passage of Chapter 254 of the Acts of 2014 has ushered in long-awaited improvements to the jury process. ■

Jason Scally contributed to this article.