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Changes to rules on juror contact pose ethical issues

By: Thomas E. Peisch December 17, 2015

All lawyers understand the importance of juror service to a well-functioning civil and criminal justice system. The availability of citizens who are willing to take time from busy personal lives to serve as jurors is essential to the functioning of the system.

Beginning in 1982, implementation of a "one day/one trial" system of jury service has made the experience simpler and more predictable for jurors. See G.L.c. 234A, §41. The statutory assurance that jury service is limited to one day or one trial, combined with a statutory limitation on being called for subsequent service (G.L.c. 234, §2), demonstrate a recognition of the demands that jury service can impose.

Until recently, jurors could be assured of some measure of privacy in connection with their service and of anonymity once their service was complete. These protections were built into the system by statute and the Rules of Professional Conduct.

Unfortunately, jurors can no longer count on such assurances. Because of a highly touted statutory change and an amendment to one of the Rules of Professional Conduct, jurors are now subject to interrogation by lawyers at the outset of their service and to potentially intrusive post-service inquiries. This column will discuss both developments and consider some of their implications.

For many decades, the questioning of potential jurors, otherwise known as voir dire, was exclusively the province of the court, with lawyers given an opportunity to suggest (but not pose) questions. See G.L.c. 234, §28. The trial judge was entrusted with discretionary authority as to whether to pose the suggested questions or to modify them before doing so.

It has been my experience in nearly 40 years of trying cases that questions from trial judges are almost universally viewed as neither intrusive nor threatening. In addition, an extra protection of the privacy rights of jurors has been provided by a prohibition on pre-jury service contact by lawyers as well as by a requirement that all copies of the confidential questionnaire completed by jurors be destroyed "as soon as practicable" after voir dire is completed. See G.L.c. 234, §24A; G.L.c. 234A, §23.

The new reality is that potential jurors now face interrogation by the lawyers under the authority of the change to G.L.c. 234, §28, which was enacted by the Legislature and signed by the governor in 2014.

For trials beginning after April 3, 2015, lawyers have been permitted to put direct questions to potential jurors, subject to the court's supervision. This dramatic change in practice, known as "attorney voir dire," appears to have come along with almost universal support from various sections of the bar, if not from trial judges.

The ostensible purpose of the change was to ferret out jurors who are biased or who have pre-conceived notions of the civil litigation process, notwithstanding the views of many that no such bias exists. See, e.g., *Sylva v. Anthony*, 14 Mass. L. Rptr. 337 (Super. Ct. 2002) (Gants, J.) (denying attorney-conducted voir dire and holding that it was more likely to be used to select jurors pre-disposed to one party rather than impartial ones).

To implement this change, the Superior Court has promulgated Standing Order 1-15, which requires leave of court to conduct attorney voir dire and puts limitations on questions that can be posed.

Although the standing order attempts to prevent inquiry into areas that intrude upon a juror's personal privacy, it is not difficult to imagine that potential jurors will find the questioning invasive.

For example, the standing order permits questioning regarding a juror's personal background as well as any alleged "preconceptions or biases." These are areas that are almost certain to invade a juror's privacy.

Attorney-conducted voir dire is new to Massachusetts, so it remains to be seen what its effect will be on jury service. However, it is not unreasonable to expect that a measurable number of jurors may find the questions intrusive, which will obviously affect the jury service experience.

It also remains to be seen whether trial judges who are conducting orientation of new jurors will alter their practices as a result of this change.

Unfortunately, the conclusion of a trial does not mean that inquiry into a juror's affairs necessarily ends. A recent change to the Rules of Professional Conduct, apparently unrelated to the statutory change mentioned above, removes the long-standing prohibition on post-verdict contact with jurors set forth in Rule 3.5.

Effective July 1, 2015, a lawyer is now free to contact a juror following a verdict unless the court has expressly prohibited such contact, or the juror has made known to the lawyer that he or she does not wish to speak with the attorney, or the contact involves "misrepresentation, coercion, duress or harassment."

The new version of Rule 3.5 puts limitations on the kinds of communications that lawyers may have with jurors, but this does not ameliorate the extra intrusion caused by post-verdict contact.

It appears highly likely that only lawyers for the losing party in a trial will be motivated to contact jurors. Under those circumstances, it is not difficult to imagine that those contacts will be less than pleasant. This is particularly concerning when considered with the lawyer's duty of "zealous" representation as required by Rule 1.3.

In light of the new version of Rule 3.5, the lawyer for the losing side may feel compelled, for example, to contact jurors and inquire about evidentiary matters or jury instructions that are the subject of an appeal.

Some lawyers have wasted no time in taking advantage of this change. As Lawyers Weekly has reported, a few days after the change took place, attorneys for an individual convicted in 2012 of a quadruple murder sent questionnaires to the jurors who had heard the case. The questionnaires inquired into, among other issues, whether the jurors were experiencing any particular sources of stress during the trial!

It does not appear that the advocates for attorney voir dire or for the changes in Rule 3.5 considered the cumulative effect of these two changes. But to put it bluntly, jurors who have gone through the process of interrogation by counsel prior to their jury service now face further interrogation when their service has been concluded. That can hardly be good for the jury system.

The statutory framework governing jury service has gone a long way toward making it predictable and limiting the disruption in a juror's personal and professional life. That is obviously good for the justice system. Unfortunately, the "one-two punch" of attorney voir dire and removal of restrictions on post-verdict contact with jurors goes in precisely the opposite direction.

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