**SUPERIOR COURT OF ARIZONA**
**PIMA COUNTY**
**DIVISION 16**
**110 WEST CONGRESS STREET**
**TUCSON, ARIZONA 85701**

**HON. D. DOUGLAS METCALF**
JUDGE

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VIA Electronic Upload

Arizona Supreme Court
1501 West Washington Street
Phoenix, Arizona 85007

Re: Rule Petition R-21-0045

Dear Justices:

This comment is directed at Petition R-21-0045, which amends Rules 16 and 47 of the Arizona Rules of Civil Procedure to increase the use of case-specific juror questionnaires in civil cases.

I am a judge on the superior court for Pima County. I make this comment on my own behalf, and not on behalf of any colleague or the court itself. I have served two rotations on the civil bench, and I have used a detailed case-specific juror questionnaire for a civil jury trial after the rule changed in January.

My comment is directed towards three parts of the rule change. First, the amended rule makes the use of juror questionnaires the norm, if not the expectation, in all civil cases, and requires the trial judge to make a finding of non-feasibility in order to justify not using a juror questionnaire. I suggest that be scaled back a bit to make it more discretionary because there are many cases where the benefit of a questionnaire is outweighed by the cost of the resources used to manage it. Second, the amended rule requires the court to decide whether to use a juror questionnaire far too late in the life of a case to be practical. I suggest that the use of a questionnaire be addressed at the trial setting conference. Third, the amended rule will encourage lawyers to try their cases during voir dire. I suggest a slight addition to the comment to the rule to ensure that the court maintains control of voir dire.

## 1. Making Jury Questionnaires the Default

### a. The New Rule

Amended Rule 47(c)(3), provides, in relevant part: "Unless the court orders otherwise, the court should require each prospective juror to complete a case-specific written questionnaire in a manner and form approved by the court." "Should" is the operative word.

The proposed comment to amended Rule 47(c)(3) explains that case-specific written questionnaires should be used "where feasible, deferring to the court on the method and manner of administration."

Thus, the amended rule and accompanying comment strongly suggest that the court use a case-specific written jury questionnaire in every case unless the court makes a finding that it is not feasible.

As a practicable matter, the superior court is not in a position to use a case-specific written jury questionnaire in every case, or nearly every case, and here is why.

**b. The New Rule is Impractical**

In order for the superior court to use a case-specific written juror questionnaire, the attorneys must prepare questions, file them with the court, the court must then review them, decide which questions can be asked, provide them to the jury commissioner who must then mail them or send them electronically to each potential juror for them to fill out and return to the court. The jury commissioner or judge's judicial assistant must then compile the responses into a spreadsheet or other format, which is voluminous and unwieldy, send it to the lawyers, who, along with the judge, must then cull through the information and determine which answers might show bias or burden. It must also be compiled in a manner that can be filed with the clerk of court. *See* Rule 47(b)(3). Even if technology can be used to allow jurors to answer questions on the day of trial, the information must still be collected, organized, and then reviewed by the lawyers and the court.

The work (and resources) it takes to a manage case-specific juror questionnaire may be justified in certain cases where prospective jurors have strong opinions about the case. But most civil cases tried in the superior court do not engender such passion. At the same time, juror questionnaires are time consuming for both the court and the attorneys. For the litigants, this will increase the cost of litigation and diminish access to the courts, especially in smaller cases. For the court, it will take time away from processing other cases and handling routine matters in a timely fashion. The studies the Task Force reviewed when it proposed the amendments to Rule 47 do not address the time and expense involved in using case-specific juror questionnaires. There are trade-offs in everything, including procedural rules. Those trade-offs should be considered in the implementation of this new rule.

The use of case-specific jury questionnaires may also result in the court having to summons many more potential jurors as each juror would have to be summonsed for a particular case, instead of the current (at least pre-COVID) practice of summonsing jurors on a particular day for use in any trial that starts on that day. This is due to the fact that jurors could only participate in the case in which they filled out the questionnaire. We ask a lot of jurors to take time away from their lives and come down to the court and serve on a jury. That burden should be part of the analysis.

### c. Suggested Edits to the Rule

To give the court more flexibility in the use case-specific juror questionnaires for routine cases that do not engender passion by prospective jurors, I suggest that "may" be used instead of "should" in Rule 47(c)(3) as the following edit shows (shown in ~~strikethrough~~ and **bold/underline**):

> (3) *Case-Specific Written Questionnaires.* ~~Unless the court orders otherwise~~, ~~t~~**The** court ~~should~~ **may** require each prospective juror to complete a case-specific written questionnaire in a manner and form approved by the court. The case-specific written questionnaire should include questions about the prospective juror's qualifications to serve in the case, any hardships that would prevent the prospective juror from serving, and whether the prospective juror could render a fair and impartial verdict.

The 2022 comment to Rule 47(c)(3) would not have to be changed because it contemplates that juror questionnaires should only be used "where feasible."

## 2. The Decision Point on Whether to Use a Juror Questionnaire Occurs Far Too Late in the Life of a Case

Newly enacted Rule 16(f)(4) requires the parties to file questions for a case-specific written questionnaire on the same day the joint pretrial statement is due, which by default is two weeks before trial unless the court orders that it be filed earlier. Most lawyers do not want to file the joint pretrial statement until shortly before trial because it is time consuming and therefore expensive to prepare, and the lawyers can avoid that time and expense if the case settles.

Filing potential questions two weeks before trial is far too late in the life of case to be practical. It presumes that the court can review the juror questions proposed by the lawyers, decide which ones to ask, have those assembled and sent to the prospective jurors, have them answer the questions and return them to the court, have the court assemble the answers and organize them into a spreadsheet or other format and then send them to the lawyers, and then have the court and lawyers review the answers, all within a two week period.

It is also inconsistent with the requirements of Rule 47(c)(3) and its comment that before the court declines the use of case-specific juror questionnaire, the court make a finding that the use of a juror questionnaire is not feasible. The Court has to make this finding at a hearing based on the argument of the parties. The current rule does not contemplate a hearing on this issue or suggest a time for it.

The better time to discuss all of this and set a schedule for the filing of proposed questions is the trial setting conference. To address this issue many civil judges in Pima County currently add the following language to the scheduling order: "Any party that seeks to use a Case Specific Written Questionnaire pursuant to Ariz. R. Civ. P. 47(c)(3), must inform the Court no later than at the Trial Setting Conference that a questionnaire is being requested. Any request for a questionnaire made after the Trial Setting Conference will be denied as untimely." Obviously, it would be better for this to be in a rule, rather than in the scheduling order, as some lawyers do

not review the scheduling order, and the practice could vary from division to division and county to county.

This allows the Court to hear argument on the use of case-specific juror questionnaire at the trial setting conference and make a finding as to whether one should be used (*i.e.* that its use is not feasible), and then to set deadlines for the parties to submit their proposed case specific juror questions in a timely manner, which gives the court, and court staff, sufficient time to prepare the case-specific juror questionnaires, have them sent to the prospective jurors, get the responses back, assemble them into a readable format, and provide them to the lawyers.

To that end, I suggest that Rule 16(f)(4) be amended as follows:

> (4) *Additional Documents to File if Trial Is to a Jury*. If the trial is to a jury, the parties must—on the same day they file the Joint Pretrial Statement—file:
>
> (A) an agreed-on set of jury instructions, verdict forms, ~~questions for a case-specific written questionnaire,~~ and questions for oral voir dire; and
>
> (B) any additional jury instructions, verdict forms, ~~questions for a case-specific written questionnaire,~~ and questions for oral voir dire, but not agreed on.

I further suggest that Rule 16(e)(2)(D) be amended as follows:

> (2) *Subject Matter*. In addition to setting a trial date, the court may discuss at the Trial-Setting Conference:
>
> (D) the areas of inquiry and specific questions to be asked by the court and the parties during voir dire, including any limitations on written or oral examination**,** ~~and~~ whether to permit the parties to give brief pre-voir dire opening statements**, whether to use a case-specific juror questionnaire, and if so, the deadline for the parties to file their requested questions**;

### 3. Lawyers Should not be Encouraged to Try Their Cases During Voir Dire

The comment to Rule 47 now provides:

> When feasible, the court should permit liberal and comprehensive examination by the parties, refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective jurors' views narratively. The court should refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law.

This new comment could be read to suggest that the court is restricted in its ability to restrain the lawyers from trying their case during a voir dire. As the Eighth Circuit has noted, "[p]articipation by counsel in the voir dire process frequently results in undue expenditure of time in the jury selection process, with selection of a jury that has been exposed to studied efforts

to predispose the result before the trial commences in earnest." *Hicks v. Mickelson*, 835 F.2d 721, 726 (8th Cir. 1987).

To address this issue, I suggest that the following sentence be added to the end of the comment: "Nothing in this rule prevents the court from managing voir dire and precluding improper questioning." Thus, the comment to Rule 47 would read as follows

> When feasible, the court should permit liberal and comprehensive examination by the parties, refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective jurors' views narratively. The court should refrain from attempting to rehabilitate prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law. **<u>Nothing in this rule prevents the court from managing voir dire and precluding improper questioning.</u>**

**4. Conclusion**

I appreciate the Supreme Court's work to improve the jury selection process to make it as fair and just as possible. However, as with any new procedure, there are practical difficulties that must be addressed and overcome. My comment seeks to do that, while maintaining the spirit of the changes to the voir dire process.

Respectively submitted,

/s/ *D. Douglas Metcalf*

D. Douglas Metcalf