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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)
Petition to Amend Rules of Criminal) Supreme Court No. R-21-0045
Procedure 16.3, 18.3, 18.4, and 18.5; Rules)
of Civil Procedure 16 and 47; Justice Court) Reply to Comments
Rule of Civil Procedure 134; and Rule of)
Procedure for Eviction Actions 12)
_____)

Petitioner, the Statewide Jury Selection Workgroup (SJSW), of the Task Force on Jury Data Collection, Practices, and Procedures, respectfully submits this reply to comments posted in this matter. The SJSW initially filed Petition R-21-0045 on November 23, 2021, requesting expedited consideration and emergency adoption of proposed changes to the captioned rules. This was done at the request of the Supreme Court after it had issued an order abolishing peremptory challenges in jury selection in the courts of the State of Arizona effective January 1, 2022. The Supreme Court adopted the SJSW’s proposed rule amendments on an emergency basis on December 8, 2021, and opened the petition for public comment until May 1, 2022.

A quorum of SJSW members met on May 20, 2022, discussed the comments submitted, approved a response and authorized the SJSW chair to file this response on their behalf.

REPLY

Four comments were submitted in this matter: the Maricopa County Public Defense Offices; the Honorable D. Douglas Metcalf, Superior Court in Pima County; the State Bar of Arizona on behalf of its Civil and Criminal Practice and Procedure Committees; and the Mutual Insurance Company of Arizona (MICA).

After discussion and consideration of the well-reasoned comments, which were generally supportive of the rule amendments, Petitioner recommends one amendment to clarify that a judge retains the ability to control voir dire and to confirm that the judicial officer has the ability to preclude excessive, abusive, or improper questioning during voir dire.

Petitioner is not recommending additional amendments, but has provided alternative language for the Supreme Court's consideration if the Supreme Court determines that other changes suggested by those submitting comments should be incorporated into the rules.

Additionally, Petitioner has identified that the Rules of Civil Procedure do not authorize stipulations to remove a potential juror, which is a procedure permitted under the Rules of Criminal Procedure. Petitioner identifies this difference for the Supreme Court's consideration.

1. Recommended amendment for conformity purposes.

In developing its recommendations, Petitioner recognized that judges have inherent authority to control voir dire. Consequently, Petitioner did not consider it necessary to recommend amendments that clarified the existence of this inherent authority. However, both Judge Metcalf and the State Bar Civil Practice and Procedure Committee raised

concerns that Petitioner's adopted rule changes limited judicial authority to control voir dire in civil cases by emphasizing attorney-conducted voir dire. Both commenters proposed amending the comments to Civil Rule 47 to clarify that judges retain the authority to limit voir dire.

After discussion, Petitioner recommends amending Civil Rule Rule 47(c)(5)(B), Rules of Civil Procedure, to clarify that judicial officers have discretion to control voir dire. If the Court is inclined to make this clarifying amendment, Petitioner recommends adding the following sentence to Civil Rule 47(c)(5)(B):

(B) Extent of Questioning. Voir dire questioning of a jury panel is not limited to the grounds listed in Rule 47(d) and may include questions about any subject that might disclose a basis for the exercise of a challenge for cause. The court retains the discretion to manage voir dire, including to preclude improper, excessive, or abusive questioning.

In discussing this issue, the SJSW recognized that similar concerns have not been raised in criminal cases. Unlike Civil Rule 47, Criminal Rule 18.5(f) states: "However, the court may limit or terminate the parties' voir dire on grounds of abuse." The SJSW concluded that its proposed amendment to Civil Rule 47(c)(5)(B) prevents the argument that the Supreme Court intentionally created a difference in the language of the Criminal and Civil Rules with the purpose of restricting a judge's ability to control voir dire in civil cases.

If the Supreme Court considers amending Civil Rule 47(c)(5)(B) as set forth above, for purposes of conformity, the SJSW recommends the following amendment to Criminal Rule 18.5(f):

(f) Voir Dire Examination. In courts of record, voir dire examination must be conducted on the record. The court must conduct a thorough oral examination of the prospective jurors and control the voir dire examination. Upon request, the court must allow the parties sufficient time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors. A party's failure to submit questions to the court prior to examination should not be grounds to deny a party the opportunity to conduct an oral examination. ~~However, the court may limit or terminate the parties' voir dire on grounds of abuse.~~ Nothing in this rule precludes submitting written questionnaires to the prospective jurors or examining individual prospective jurors outside the presence of other prospective jurors. The court retains the discretion to manage voir dire, including to preclude improper, excessive, or abusive questioning.

2. Identified difference in language for consideration.

When the Supreme Court eliminated peremptory challenges by adopting R-21-0020, it amended Criminal Rule 18.5(i) to state that the parties may stipulate to the removal of a prospective juror. However, it did not include a similar provision in the Civil Rules. In its initial rule petition, the workgroup did not suggest adding this language to the Civil Rules.

Both commenters to R-21-0020 and the SJSW discussed the potential for abuse of Rule 18.5(i) whereby parties could circumvent the abolition of peremptory challenges by agreeing for each side to stipulate to the removal of jurors for reasons other than cause. Ultimately, because the SJSW concluded that its mandate did not include recommendations to amend the rules adopted by this Court when it abolished peremptory challenges, the SJSW did not decide whether to recommend the deletion of the stipulation provision in the Criminal Rules.

Nevertheless, Petitioner would like to draw the Supreme Court's attention to this difference in the rules, which expressly allows parties in a criminal case but not a civil case to stipulate to the removal of a prospective juror.

If the Supreme Court seeks uniformity in rules, the following changes will create consistency by either striking this provision from the Criminal Rules or adding it to the Civil Rules.

Criminal Rule 18.5(i):

~~Stipulation to Remove a Prospective Juror. The parties may stipulate to the removal of a juror.~~

or

Civil Rule 47(d)(4):

Stipulation to Remove a Prospective Juror. The parties may stipulate to the removal of a juror.

RESPONSE TO OTHER COMMENTS

1. Comments regarding sealing and destruction of jurors' responses to questionnaires.

Two commenters stated concerns with the requirement that the parties must return or destroy all copies of case-specific written questionnaires. Petitioner notes that this issue predates the revisions to the rules. Before the use of digital questionnaires, courts provided prospective jurors with paper questionnaires. After jury selection was completed, courts often sealed the jurors' responses and ordered the parties to destroy or return any copies of the questionnaires provided to the parties. In other instances,

courts permitted parties to retain the jurors' responses and entered a protective order, restricting distribution of the jurors' information and answers.

Given the limitations of A.R.S. § 21-312, Petitioner does not affirmatively recommend that the Supreme Court modify the existing language of the rules. Petitioner also notes concern expressed by the Clerks of Court regarding the potential release of confidential juror information if the Criminal Rules are revised to permit counsel to retain the jurors' responses to case-specific written questionnaires.

Yet, the State Bar Criminal Practice and Procedure Committee raises reasonable concerns about the need for successor counsel to review completed case-specific questionnaires, particularly copies containing counsel's notes or other work product. If the Supreme Court decides the Criminal Rules should permit counsel in criminal cases to retain copies of the questionnaires, Petitioner provides the Supreme Court with the following options:

A. Criminal Rule 18.3(c):

Confidentiality of Case-Specific Written Questionnaires. If the court requires prospective jurors to complete case-specific written questionnaires, any completed case-specific questionnaires must be filed under seal and must be maintained in a manner and form approved by the court as part of the case file. Before conducting oral voir dire, the prospective jurors' responses to the case-specific written questionnaires must be provided to each party by the clerk or court. Any party or counsel receiving a copy of responses to the case-specific written questionnaires must not disclose the information to the public and may disclose the information only to the extent necessary for the proper conduct of the case. ~~When jury selection is completed, each recipient must destroy or return to the court all copies of the responses to the case specific written questionnaires.~~

Alternatively,

- B. ~~When jury selection is completed, each recipient must destroy or return to the court all copies of the responses to the case specific written questionnaires.~~ When jury selection is completed, counsel for either party may retain copies of the case-specific written questionnaires but may not disclose them without specific authorization from the court.

As a final alternative,

- C. ~~When jury selection is completed, each recipient must destroy or return to the court all copies of the responses to the case specific written questionnaires.~~ When jury selection is completed, counsel for either party may retain copies of case-specific written questionnaires containing work product within their case files. Otherwise, each recipient must destroy or return to the court all copies of the responses to the case-specific written questionnaires.
2. **Comment regarding the absence of guidance on how to provide jurors with assistance in completing the questionnaire and ensuring that jurors are providing their individual responses to the juror questionnaires.**

The Maricopa County Public Defense Offices' comment expressed concern regarding prospective jurors who are unable to complete the juror questionnaires. Petitioner concluded that requests for reasonable accommodations are best left to the jury commissioners and the judicial officers presiding over the trials. Petitioner also believes this can be addressed through education, which may include a recommendation to provide a notice on any questionnaire that requests for accommodations in completing the questionnaire should be made to the jury commissioner or the judge.

The Criminal Practice and Procedure Committee's comment expressed concern that the affirmation was inadequate to ensure that the responses are the sole views of the summoned juror. Petitioner believes the issue can be addressed as part of the written instructions in the juror questionnaire and through oral voir dire. For example, in the

written questionnaire, the templates can be revised to have the affirmation state: “I swear or affirm that the answers provided in response to the case-specific written questionnaire are truthful and reflect my own views.”

If the Supreme Court is inclined to amend the procedural rules to address this concern, Petitioner recommends the following amendments:

Criminal Rule 18.5:

(a) Swearing the Jury Panel. Each prospective juror must swear or affirm that the answers provided in response to the case-specific written questionnaire are truthful and reflect the prospective juror’s own views. Before oral voir dire, each prospective juror must swear or affirm that they will truthfully answer all questions concerning their qualifications.

Civil Rule 47:

(c)(1) Voir Dire Affirmation and Oath. Each prospective juror must swear or affirm that the answers provided in response to the case-specific written questionnaires are truthful and reflect the prospective juror’s own views. Before oral voir dire, each prospective juror must take an oath administered by the clerk. The oath's substance must be as follows: “You do solemnly swear (or affirm) that you will truthfully answer all questions about your qualifications to serve as a trial juror in this action, so help you God.” If a prospective juror elects to affirm rather than swear the oath, the clause “so help you God” must be omitted.

3. Comments regarding the use of the written case-specific questionnaires.

Two commenters addressed concerns regarding the language in Civil Rule 47(c)(3) and Criminal Rule 18.5(c) that states: “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.” This language was discussed at length among the workgroup members before the initial rule petition was filed and again in response to the comments.

Ultimately, the workgroup supported—and Petitioner continues to support—its original proposal that affords judicial officers the discretion to use a written case-specific questionnaire unless otherwise ordered by the court. The rules do not require any cause determination before deciding to use only oral voir dire, and the rules do not require an express determination that use of a questionnaire is not feasible or that using a written questionnaire is impractical.

Petitioner’s adopted changes responded to the overwhelming concern among practitioners that the elimination of peremptory challenges, coupled with inadequate questioning of prospective jurors, could result in the empanelment of a juror who is biased or unfair. Relying on experience and research, Petitioner recommended an increased use of written case-specific questionnaires to assist the court and the parties with gathering additional information that would help determine whether a prospective juror has the ability to be fair and impartial. Petitioner believed—and continues to believe—that judicial officers are in the best position to assess the capabilities of their courts, their summoning practices, and the needs of the case to determine whether a questionnaire should be used.

One commenter indicated that use of a questionnaire in every case is impractical. Before submitting the initial petition, the workgroup identified and discussed the different summoning practices and the diverse technical tools used by Arizona courts. To alleviate administrative concerns, the workgroup urged access to a uniform tool for all Arizona courts to allow courts to issue electronic questionnaires to prospective jurors

as part of the summoning process or after the jurors arrive at the courthouse for jury service.

Perhaps improved access to electronic questionnaires will make the use of case-specific questionnaires practical in more cases. However, nothing in the rules requires judicial officers to use case-specific questionnaires. Therefore, Petitioner does not believe changes to the rules are necessary.

4. Comments regarding the timing to discuss and submit questions in civil cases.

Two commenters addressed the pretrial procedure for submitting proposed questions for the case-specific written questionnaires in civil cases. One commenter suggested the process for submitting proposed questions for the questionnaire occurred too late, while another commenter suggested the process occurred too early. Petitioner's original proposal, as adopted by the Supreme Court, permits—but does not require—the court to discuss case-specific jury questionnaires at the trial-setting conference in civil cases. If the judge believes submission of the jury questionnaire at the final trial management conference occurs too late, the judicial officer retains the discretion to set an earlier deadline. Therefore, Petitioner concludes that revision to its proposal is unnecessary.

5. Comment regarding Civil Rule 47(b)(3) and (c)(2) underscoring that juror information should remain confidential in the absence of a court order to the contrary.

Although Petitioner does not oppose the recommended changes to Rule 47(b)(3) and (c)(2), Petitioner finds the changes unnecessary.

6. Comment regarding when the questionnaires are administered.

One commenter suggested that the questionnaires should be administered to prospective jurors prior to the day of trial. As the Supreme Court is aware, the summoning practices of certain courts prohibit this change because some courts do not create jury panels until the day of trial after the prospective jurors arrive at the courthouse. The workgroup acknowledges the need for courts to manage the timing of juror questionnaires differently and suggests leaving this administrative function within the discretion of each court.

CONCLUSION

The amendments adopted by the Supreme Court in December 2021 have proven to be workable since they took effect on January 1. Petitioner recommends one amendment to confirm that judicial officers maintain discretion over voir dire.

Respectfully submitted this 1st day of June, 2022.

/s/
Honorable Pamela S. Gates
Chair, Task Force on Jury Data Collection,
Practices and Procedures; Statewide Jury
Selection Workgroup