

**SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE**

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.Civ.P. 220.3

The Civil Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.Civ.P. 220.3 for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **November 10, 2023**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Civil Procedural Rules Committee,

Maureen Murphy McBride
Chair

Rule 220.3. [Voir Dire] Voir Dire of Jurors.

(a) **Judge's Presence Required. Voir dire of prospective jurors shall be conducted, and the jurors shall be selected, in the presence of a judge, unless the judge's presence is waived by all parties with the consent of the court.**

(b) **Instruction of Juror Duties.** Upon completion of the oath, the judge shall instruct the prospective jurors upon their duties and restrictions while serving as jurors, and of any sanctions for violation of those duties and restrictions, including those in Rules 220.1 and 220.2.

~~(b)~~(c)**[Voir dire] Juror Information. Voir dire** shall be conducted to provide the opportunity to obtain, at a minimum, a full description of the following information, where relevant, concerning the prospective jurors and their households:

- (1) **[Name] name**;
- (2) **[Date] year** and place of birth;
- (3) **[Residential] residential** neighborhood and zip code (not street address);
- (4) **[Marital] marital** status;
- (5) **[Nature] nature** and extent of education;
- (6) **[Number] number** and ages of children;
- (7) **[Name] name**, age, and relationship of members of prospective juror's household;
- (8) **[Occupation] occupation** and employment history of the prospective juror, the juror's spouse and children, and members of the juror's household;
- (9) **[Involvement] involvement** as a party or a witness in a civil lawsuit or criminal case;
- (10) **[Relationship] relationship**, friendship, or association with a law enforcement officer, a lawyer, or any person affiliated with the courts of any judicial district;

- (11) **[Relationship] relationship** of the prospective juror or any member of the prospective juror's immediate family to the insurance industry, including employee, claims adjuster, investigator, agent, or stockholder in an insurance company;
- (12) **[Motor] motor** vehicle operation and licensure;
- (13) **[Physical] physical** or mental condition affecting ability to serve on a jury;
- (14) **[Reasons] reasons** the prospective juror believes **[he or she] the prospective juror** cannot or should not serve as a juror;
- (15) **[Relationship] relationship**, friendship, or association with the parties, the attorneys, and prospective witnesses of the particular case to be heard;
- (16) **[Ability] ability** to refrain from using a computer, cellular telephone, or other electronic device with communication capabilities in violation of the provisions of Rule 220.1; and
- (17) **[Such] such** other pertinent information as may be appropriate to the particular case to achieve a competent, fair, and impartial jury.

[Note: For example, under presently prevailing law as established by the Superior Court, *voir dire* should have been allowed with respect to the effect of pre-trial publicity on prospective jurors' "attitudes regarding medical malpractice and tort reform." *Capoferri v. Children's Hosp. of Phila.*, 893 A.2d 133 (Pa.Super. 2006) (en banc).]

[(c)](d) Voir Dire by Written Questionnaire Permitted. The court may provide for **[voir dire] voir dire** to include the use of a written questionnaire. **[However, the] The** use of a written questionnaire without the opportunity for oral examination by the court or counsel is not a sufficient **[voir dire] voir dire**.

[Note: The parties or their attorneys may conduct the examination of the prospective jurors unless the court itself conducts the examination or otherwise directs that the examination be conducted by a court employee. Any dispute shall be resolved by the court.]

A written questionnaire may be used to facilitate and expedite the voir dire examination by providing the trial judge and attorneys with basic background information about the jurors, thereby eliminating the need for many commonly asked questions.]

[(d)](e) Individual Voir Dire Permitted. The court may permit all or part of the examination of a juror out of the presence of other jurors.

(f) Recording of Voir Dire. Voir dire, including all rulings by a judge, shall be recorded in full. The recording shall be transcribed only upon written request of a party or order of court.

Comment:

Subdivision (a) – The permitted waiver is a waiver only of the judge’s physical presence during voir dire. It is not a waiver of a party’s opportunity to create a record or to have the judge make decisions based upon that record. This subdivision is also intended to provide flexibility to permit another judge, or a senior judge, in the judicial district to preside over voir dire, as circumstances warrant.

Subdivision (c)(17) – See Capoferri v. Children’s Hospital of Philadelphia, 893 A.2d 133 (Pa. Super. 2006) (en banc) (voir dire should have been allowed with respect to the effect of pre-trial publicity on prospective jurors’ “attitudes regarding medical malpractice and tort reform”), as an example of the type of information that may be sought from potential jurors to achieve a competent, fair, and impartial jury in a particular case.

Subdivision (d) – The parties or their attorneys may conduct voir dire of the prospective jurors unless the court itself conducts voir dire or otherwise directs that the voir dire be conducted by a court employee. Any dispute shall be resolved by the court.

A written questionnaire may be used to facilitate and expedite the voir dire by providing the trial judge and attorneys with basic background information about the jurors, thereby eliminating the need for many commonly asked questions.

Historical Commentary

The following commentary is historical in nature and represents statements of the Committee at the time of rulemaking:

EXPLANATORY COMMENT—1997

New Rule 220.1 governing voir dire, the examination of prospective jurors, furthers the goal of establishing a uniform civil practice throughout the Commonwealth with respect to the information which the parties may obtain concerning prospective jurors.

The rule specifies the information which the parties should be able to obtain through voir dire but does not require a particular manner of voir dire. Subdivision (a) is devoted to listing the information to which the parties are entitled.

The rule does not dictate the mechanics of voir dire, but leaves the method of voir dire to the local courts of common pleas. Subdivision (b) does give some guidance, however. Voir dire may include the use of a written questionnaire, but no form of questionnaire is mandated or suggested. The note observes that a written questionnaire may “facilitate and expedite” voir dire by providing basic background information. The rule provides that “the use of a written questionnaire without the opportunity for oral examination is not a sufficient voir dire.” The parties are entitled to both hear prospective jurors and observe their demeanor.

The rule recognizes that service upon a jury may be a new and disquieting experience to citizens called as prospective jurors. Information may be sought which a prospective juror feels uncomfortable revealing in open court. Thus, subdivision (c) provides that the “court may permit all or part of the examination of a juror out of the presence of other jurors.”

EXPLANATORY COMMENT—2008

Rule 220.1 governing *voir dire* has been amended with the addition of a note to subdivision (a)(16). Subdivision (a) lists the information to which parties are entitled to obtain during *voir dire*, concluding with a catch-all provision in subparagraph (16). The note cites *Capoferri v. Children's Hospital of Philadelphia*, 893 A.2d 133 (Pa. Super. 2006) (en banc), as an example of the type of information that may be sought from potential jurors pursuant to subparagraph (16) to achieve a competent, fair and impartial jury in a particular case.

EXPLANATORY COMMENT—2015

The Supreme Court of Pennsylvania has adopted new Rules 220.1 and 220.2 and the amendment of current Rules 220.1 and 223.1. The changes are intended to provide guidance to the bench and bar regarding the use of electronic devices by jurors in civil cases.

The new rules and amendments provide for jurors to be instructed that the use of electronic devices is restricted during their tenure as a prospective juror, *i.e.* a member of

the jury pool, and as a selected juror. The new provisions require the trial court to instruct jurors that they may not conduct independent research on the Internet about the case, communicate about the case electronically, e.g. “tweet” or “blog,” or use such devices during juror service. A trial court is required to instruct jurors at the earliest opportunity of interaction between the juror and the trial court, and then repeat those instructions as often as practicable. The new rules and amendments provide for sanctions against any person who violates the provisions of these rules. It should also be noted that a note to new Rule 220.1 cross-references Section 1.180 of the Pennsylvania Suggested Civil Jury Instructions, Pa. SSJI (Civ), § 1.180. These instructions specifically address the use of electronic devices by jurors.

While the proposal focuses on the use of electronic devices by jurors, it remains silent as to their use in the courtroom by the public and media. Rule of Judicial Administration 1910 outlines the responsibility of a trial court regarding the broadcasting, televising, or taking of photographs in the courtroom in civil proceedings.

SUPREME COURT OF PENNSYLVANIA

PUBLICATION REPORT

Proposed Amendment of Pa.R.Civ.P. 220.3

The Civil Procedural Rules Committee is considering recommending the amendment of Pennsylvania Rule of Civil Procedure 220.3 to require *voir dire* of jurors to be conducted in the presence of a judge unless the parties and the judge agree to waive that requirement.

In *Trigg v. Children’s Hospital of Pittsburgh of UPMC*, 229 A.3d 260 (Pa. 2020), the Supreme Court examined *voir dire* procedures set forth in Allegheny County Local Rule 220.1. Pursuant to this local rule, Allegheny County did not require the trial judge to preside over jury selection. Rather, potential jurors met with a court clerk assigned by the Calendar Control Judge and the parties’ attorneys. The potential jurors were asked standard questions by the clerk; the attorneys were then permitted to ask five additional questions. Follow-up questions were permitted to clarify a juror’s answer. When challenging a juror for cause, the attorneys and the juror returned to the Calendar Control Judge, who read a transcript of the *voir dire* of the juror and then ruled on the challenge for cause.¹

The trial court in *Trigg* denied the plaintiffs’ request to strike prospective jurors for cause. Instead, the plaintiffs were required to use peremptory challenges. On appeal to the Superior Court, the plaintiffs argued that the trial court erred by failing to observe the demeanor and tenor of prospective jurors during the initial questioning by the court clerk.

In its opinion, the Superior Court acknowledged that deference is given to the trial court in jury selection unless there is a palpable error. See *McHugh v. Proctor & Gamble*, 776 A.2d 266 (Pa. Super. 2001). The court concluded that this standard could not be extended to trial judges who fail to observe *voir dire* in person. It emphasized the importance for the trial judge to view the demeanor of prospective jurors. Without doing so, the trial judge does not acquire “the wisdom or insight that he could have from noting a jurors’ [sic] furtive glance, a tremor of voice, a delayed reply, a change in posture, or myriads of other body language.” *Trigg v. Children’s Hospital of Pittsburgh of UPMC*, 187 A.3d 1013, 1017 (Pa. Super. 2018). The court stated that “re-questioning prospective jurors could never reproduce the authentic reactions that they displayed when the questions were originally asked,” and concluded that “[a] judge personally witnessing the original *voir dire* is essential, because it justifies our - and a losing party’s - faith in the trial court’s rulings on challenges for cause.” *Id.* at 1017-18.

¹ Allegheny County has subsequently amended Local Rule 212.2 governing pre-trial statements to permit, *inter alia*, a party to request that a judge preside over *voir dire*.

On appeal to the Supreme Court, the majority vacated and remanded the Superior Court judgment on the basis that the issue had been waived for appellate review because no objection to the trial judge not being present during *voir dire* was placed on the record. Notwithstanding finding waiver, the majority urged the adoption of a Rule of Civil Procedure similar to Pa.R.Crim.P. 631 requiring the judge to preside at *voir dire*.

Both Justice Donohue and Justice Wecht wrote concurring opinions. They each wrote separately to assert the importance of the trial judge presiding over *voir dire* as fundamental to ensuring a fair and impartial jury. Notably, both pointed out the disparity in *voir dire* requirements in the procedural rules. Pa.R.Crim.P. 631 sets forth the mechanics for *voir dire* in criminal jury trials and requires, *inter alia*, *voir dire* to be conducted in the presence of a judge unless the parties and the judge agree to waive that requirement. In contrast, there is a lack of similar specific requirements in the Rules of Civil Procedure; such requirements have been left to the individual courts of common pleas. Both Justices concluded by asserting that this disparity should be referred to the Committee for examination.

Consistent with the Supreme Court's urging, the Committee undertook review of current practices of *voir dire* in civil cases and the provisions of Pa.R.Crim.P. 631 requiring the judge to preside over *voir dire*. It was reported to the Committee that the practice in counties with a high volume of cases is for the trial judge to perform other duties while jurors are being selected. For example, a judge may be concluding a trial while a jury is being selected for the next trial. Or, a judge may be presiding over a non-jury arbitration appeal while the jurors are selected for the next trial on that judge's docket. The Committee acknowledges that these practices enhance the efficiency and efficacy of judicial resources to timely try cases. Moreover, the Committee is cognizant that changing these practices may impact judicial operations and create logistical burdens to overcome.

The Committee has incorporated two aspects of Pa.R.Crim.P. 631 into the proposed amendment. The first aspect is new subdivision (a). This subdivision would be added to require a judge to preside over *voir dire* unless the judge's presence is waived by the parties and with the consent of the court. This provision is intended to comply with the Supreme Court's directive in *Trigg*. It should be noted that the waiver permitted in subdivision (a) is a waiver only of the judge's physical presence during *voir dire*. It is not a waiver of a party's opportunity to create a record or to have the judge make decisions based upon that record. To afford some flexibility to address logistical concerns, this new subdivision is intended to permit another judge, or a senior judge, in the judicial district to preside over *voir dire*, as circumstances warrant. Commentary has been added to advise of these nuances to the proposed amendment.

The second aspect is new subdivision (f). This subdivision would require *voir dire* to be recorded in full, including all rulings by the trial judge. The recording would only be

transcribed upon the written request of a party or by order of court. Adding this provision will make Rule 220.3 consistent with the procedures in Pa.R.Crim.P. 631.

The Committee also considered whether subdivision (d) (*voir dire* by written questionnaire permitted) should be amended to add procedures addressing the preservation of the written questionnaire as an exhibit to the proceeding for appellate review. At this juncture, the Committee believes that the creation of an adequate record is more a matter of practice than procedure. The Committee specifically requests input from the bench and bar on whether such an amendment is necessary and would provide needed clarity.

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Accordingly, the Committee invites all comments, objections, concerns, and suggestions regarding this proposed rulemaking.