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Proposed Legislation

McKinney's CPL § 270.15

§ 270.15 Trial jury; examination of prospective jurors; challenges generally

Currentness

1. (a) If no challenge to the panel is made as prescribed by section 270.10, or if such challenge is made and disallowed, the court shall direct that the names of not less than twelve members of the panel be drawn and called as prescribed by the judiciary law. Such persons shall take their places in the jury box and shall be immediately sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the action. In its discretion, the court may require prospective jurors to complete a questionnaire concerning their ability to serve as fair and impartial jurors, including but not limited to place of birth, current address, education, occupation, prior jury service, knowledge of, relationship to, or contact with the court, any party, witness or attorney in the action and any other fact relevant to his or her service on the jury. An official form for such questionnaire shall be developed by the chief administrator of the courts in consultation with the administrative board of the courts. A copy of questionnaires completed by the members of the panel shall be given to the court and each attorney prior to examination of prospective jurors.

(b) The court shall initiate the examination of prospective jurors by identifying the parties and their respective counsel and briefly outlining the nature of case to all the prospective jurors. The court shall then put to the members of the panel who have been sworn pursuant to this subdivision and to any prospective jurors subsequently sworn, questions affecting their qualifications to serve as jurors in the action.

(c) The court shall permit both parties, commencing with the people, to examine the prospective jurors, individually or collectively, regarding their qualifications to serve as jurors. Each party shall be afforded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law. If necessary to prevent improper questioning as to any matter, the court shall personally examine the prospective jurors as to that matter. The scope of such examination shall be within the discretion of the court. After the parties have concluded their examinations of the prospective jurors, the court may ask such further questions as it deems proper regarding the qualifications of such prospective jurors.

1-a. The court may for good cause shown, upon motion of either party or any affected person or upon its own initiative, issue a protective order for a stated period regulating disclosure of the business or residential address of any prospective or sworn juror to any person or persons, other than to counsel for either party. Such good cause shall exist where the court determines that there is a likelihood of bribery, jury tampering or of physical injury or harassment of the juror.

2. Upon the completion of such examination by both parties, each, commencing with the people, may challenge a prospective juror for cause, as prescribed by section 270.20. If such challenge is allowed, the prospective juror must be excluded from service. After both parties have had an opportunity to challenge for cause, the court must permit them to peremptorily challenge any remaining prospective juror, as prescribed by section 270.25, and such juror must be excluded from service. The people must exercise their peremptory challenges first and may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box. If either party so requests, challenges for cause must be made and determined, and peremptory challenges must be made, within the courtroom but outside of the hearing of the prospective jurors in such manner as not to disclose which party made the challenge. The prospective jurors who are not excluded from service must retain their place in the jury box and must be immediately sworn as trial jurors. They must be sworn to try the action in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence.

3. The court may thereupon direct that the persons excluded be replaced in the jury box by an equal number from the panel or, in its discretion, direct that all sworn jurors be removed from the jury box and that the jury box be occupied by such additional number of persons from the panel as the court shall direct. In the court's discretion, sworn jurors who are removed from the jury box as provided herein may be seated elsewhere in the courtroom separate and apart from the unsworn members of the panel or may be removed to the jury room or be allowed to leave the courthouse. The process of jury selection as prescribed herein shall continue until twelve persons are selected and sworn as trial jurors. The juror whose name was first drawn and called must be designated by the court as the foreperson, and no special oath need be administered to him or her. If before twelve jurors are sworn, a juror already sworn becomes unable to serve by reason of illness or other incapacity, the court must discharge him or her and the selection of the trial jury must be completed in the manner prescribed in this section.

4. A challenge for cause of a prospective juror which is not made before he is sworn as a trial juror shall be deemed to have been waived, except that such a challenge based upon a ground not known to the challenging party at that time may be made at any time before a witness is sworn at the trial. If such challenge is allowed by the court, the juror shall be discharged and the selection of the trial jury shall be completed in the manner prescribed in this section, except that if alternate jurors have been sworn, the alternate juror whose name was first drawn and called shall take the place of the juror so discharged.

Credits

(L.1970, c. 996, § 1. Amended L.1981, c. 301, § 1; L.1981, c. 302, § 1; L.1983, c. 684, § 1; L.1985, c. 173, § 1; L.1985, c. 467, § 1; L.1985, c. 516, § 1; L.1997, c. 634, § 1, eff. Sept. 24, 1997.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by William C. Donnino

Voir Dire

Questioning by court and parties

The Court of Appeals continues to refine the voir dire process, emphasizing the difference, in fact and law, between a preliminary inquiry of prospective jurors to determine whether it would be a hardship to serve, and a “formal” voir dire where the prospective jurors' names are drawn or otherwise called to the jury box for the purpose of

determining their "fitness" to serve. In the former, the Court had held that a voir dire "court's consideration of a prospective juror's request to be excused, which is made before the commencement of formal voir dire, is not a material stage of the trial proceedings and the defendant's presence is therefore not required (*see People v. Velasco*, 77 N.Y.2d 469, 473 [1991])." *People v. King*, 27 N.Y.3d 147, 156, 31 N.Y.S.3d 402, 50 N.E.3d 869 (2016). In *King,* the voir dire court told the prospective jurors that he would excuse them if it was a hardship to serve and then, as to the jurors who so indicated, he had the clerk of the court hear the jurors' hardship excuses before they were excused. There was no defense objection, and the Court of Appeals declined to find that practice to be a "mode of procedure" error which did not require an objection for appellate preservation of a claimed error as a matter of law.

It is noteworthy that in making that finding the Court explained that the procedure preceded the "formal" voir dire and that "Judiciary Law § 517(c) grants to the commissioner of jurors or the court, in deciding whether an application for excusal should be granted, the authority to 'consider whether the applicant has a mental or physical condition that causes him or her to be incapable of performing jury service or there is any other fact [which] indicates that attendance for jury service in accordance with the summons would cause undue hardship or extreme inconvenience to the applicant.' " *King*, at 157. Although the clerk of the court would not be the Commissioner of Jurors and that distinction may be of de minimis concern if a defense objection were registered, if a court were to follow the *King* procedure, it may be wise to ask the Commissioner of Jurors to designate the clerk his or her agent.

Exclusion of non-parties from jury selection

But see People v. Roberts [Rush], 31 N.Y.3d 406, 104 N.E.3d 701, 79 N.Y.S.3d 597 (2018) (the trial court did not err when, before the voir dire began, the court required a relative of the defendant to step out of the courtroom until the prospective jurors entered and were seated).

PRACTICE COMMENTARIES

by William C. Donnino

Voir Dire

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Exclusion of non-parties from jury selection

Voir Dire

The selection of a fair jury is a critical part of a trial, and this section sets forth the procedural requirements of jury selection.

Number of jurors examined simultaneously

Prior to 1981 this statute required that 12 prospective jurors be called for examination. "In 1981, this statute was amended to allow 'not less than twelve' prospective jurors to be called in order to 'permit the simultaneous examination of as many jurors as possible, and thus reduce the number of "rounds" required to complete the selection' (Preiser, Practice Commentaries [McKinney's Cons Laws of NY, Book 11A, CPL 270.15, at 275])." *People v. Serrano*, 7 N.Y.3d 730, 732, 818 N.Y.S.2d 175, 850 N.E.2d 1151 (2006).

Thus, subdivision (1)(a) presently requires that "not less than" 12 prospective jurors must be called to sit in the jury "box" for simultaneous examination; there is no statutory upper limit on the number who may be called to sit in the jury "box." CPL 270.15(1)(a). In *Serrano*, the Court held that the defendant was not prejudice by having to simultaneous question 44 prospective jurors.

If the jury is not selected from the first group of people placed in the jury "box" and members of the panel remain, the court may fill the "box" with such number of the remaining people as the court deems appropriate and continue the process until a jury is selected. CPL 270.15(3). *See People v. Alston*, 88 N.Y.2d 519, 647 N.Y.S.2d 142, 670 N.E.2d 426 (1996); *People v. Williams*, 2 N.Y.3d 725, 778 N.Y.S.2d 739, 811 N.E.2d 1 (2004) (while the law authorized the voir dire court to place one prospective juror at a time in the box for questioning and challenges, the Court of Appeals believed that such procedure may "needlessly prolonged jury selection, and should not be followed").

Introduction by court

Subdivision (1)(b) begins by requiring the trial court to "initiate" the voir dire by identifying the parties and their counsel, and, more importantly, by "briefly outling the nature of the case."

That brief outline of the "nature" of the case should include a description of the charge(s), in particular to determine whether a prospective juror has a bias or prejudice with respect to the conduct defined by the charge. *See People v. Andrews*, 30 A.D.3d 434, 818 N.Y.S.2d 110 (2d Dept. 2006) (the court properly provided the jury with a description of the elements of the crimes charged); *People v. Rodriguez*, 38 A.D.3d 293, 830 N.Y.S.2d 656 (1st Dept. 2007). *Cf. People v. Harper*, 32 A.D.3d 16, 818 N.Y.S.2d 113 (2d Dept. 2006) (instructing the jury on the elements of the crime during the court's "preliminary instructions" was held appropriate), *aff'd* 7 N.Y.3d 882, 826 N.Y.S.2d 594, 860 N.E.2d 57 (2006).

Those experienced in the voir dire of prospective jurors know that jurors, on answering a question about whether they were the victim of a crime, at times report a misconception of the nature of the crime of which they were a victim. Giving a short definition or description of the allegations of the crime charged will often be helpful in dispelling early in the case any misconceptions about what the crime charged or defense is; provide a basis for determining whether there is anything about the nature of the crime charged which would prevent a prospective juror from being fair; and finally help the prospective jurors understand the lawyers' voir dire. Doing so again in the Preliminary Instructions may permit the sworn jurors to better understand the lawyers' openings and evidence to come. *See* Practice Commentaries to CPL 270.40 on describing the crime charged in the Preliminary Instructions and addressing the issue of whether the giving of the description leads to a premature decision of the question of guilt.

In addition to briefly outlining the nature of the case, a court would be advised to inform the jury about the procedure it will follow, and the function of the court and jury; the court would also be well advised to explain the basic law applicable to the case, such as the presumption of innocence, burden of proof, and meaning of proof beyond a reasonable doubt. By doing so, the court may give context to the examination of the parties who are likely to address

those subjects, and the court and the parties can in their examination of the prospective jurors make sure that the prospective jurors are prepared to follow that law. *See* C.J.I.2d [NY] Model Charges: Voir Dire.

Questioning by court and parties

Next, the court is responsible for the initial examination of the prospective jurors by asking them "questions affecting their qualifications to serve as jurors in the action" [subdivision (1)(b)]. The voir dire court is "encouraged" to engage in an "extensive examination of the venire" and to discharge those "who offer[ ] troubling responses." *People v. Steward*, 17 N.Y.3d 104, 111, 926 N.Y.S.2d 847, 950 N.E.2d 480 (2011).

In addition, subdivision (1)(c) dictates that "[e]ach party shall be afforded a fair opportunity to question the prospective jurors as to any *unexplored matter* affecting their qualifications ..." (emphasis added). In doing so, the trial judge has the discretion to limit the amount of time each party may question the prospective jurors. *Id.*; *People v. Jean*, 75 N.Y.2d 744, 551 N.Y.S.2d 889, 551 N.E.2d 90 (1989). The fair exercise of that discretion, however, requires that the trial court take into account such factors as "the number of jurors and alternate jurors to be selected and the number of peremptory challenges available to the parties; the number, nature and seriousness of the pending charges; any notoriety the case may have received in the media or local community; special considerations arising from the legal issues raised in the case...." *People v. Steward*, 17 N.Y.3d at 110-11. Counsel should also be attentive to explaining to the trial court the reasons for any time in addition to that initially set by the trial court because a "court should be willing to reconsider ... if a party raises a legitimate concern once jury selection is underway."

Prior to *Steward*, the Court of Appeals in *Jean* had approved the trial court's allocation in that felony trial of 15 minutes for each of the first two rounds and 10 minutes for the third round. *Steward*'s allotment of five minutes per round appeared "substantially shorter than the norm in this multiple felony prosecution," and taking that into consideration, as well as the celebrity status of the victim who was accordingly known to many prospective jurors and other issues related to the facts of the case, it was an abuse of discretion to so limit the parties. *People v. Steward*, 17 N.Y.3d at 111-12. Any error in the allotment of time to the parties to question the prospective jurors is subject to a harmless error analysis. *Steward*, 17 N.Y.3d at 113.

Each party must be given a "fair opportunity to question the prospective jurors." While the statute and decisional law *[see People v. Boulware*, 29 N.Y.2d 135, 324 N.Y.S.2d 30, 272 N.E.2d 538 (1971)] define some parameters, the "scope" of the examination is by this statute left to the sound discretion of the court. *See generally*, Bamberger, "Jury Voir Dire In Criminal Cases," 78 N.Y. St. B.J. 24, 27-28 (2006).

The statutory limits require that a question address an "unexplored" matter and not be "repetitious or irrelevant."

The parties are also not to ask questions about a prospective juror's "knowledge" of the rules of law, nor per *Boulware*, 29 N.Y.2d at 144, a prospective juror's "attitudes" of matters of law. But that admonition does not rule out a party questioning a prospective juror about whether he or she is prepared to follow the instructions of the court on the law or on a particular point of law. *Boulware* 29 N.Y.2d at 142.

A prospective juror's assurance that he or she can generally follow the law as set forth by the court is not necessarily an assurance that when the juror hears the judge's description of the basic law, he or she can or will follow that law. That is why it is important for the court to set forth the basic law applicable to the case in order to provide a party a cross-reference about the law the party wants to make sure the prospective juror will follow. It is not appropriate for the prospective jurors to hear the basic law from a party; only the court should define the law.

The voir dire is for questioning the prospective jurors about their qualifications, it is not a forum for a party to lecture the jury, be it about the law, criminal justice, or otherwise. Declaratory statements should generally be no longer than necessary to provide the proper background for a question.

Hypotheticals are problematic, often designed to argue the speaker's case than to test the qualifications of the prospective jurors. *See* *People v. Salley*, 25 A.D.3d 473, 808 N.Y.S.2d 664 (1st Dept. 2006) (court properly precluded "hypothetical factual scenarios"); *People v. Davis*, 248 A.D.2d 281, 670 N.Y.S.2d 76 (1st Dept. 1998) (court properly precluded questions about "whether certain hypothetical facts would be legally sufficient proof of guilt"); *People v. Woolridge*, 272 A.D.2d 242, 707 N.Y.S.2d 634 (1st Dept. 2000) (court properly precluded asking prospective jurors "to commit themselves in advance to a particular view of hypothetical factual scenarios").

Proper questions include those "dealing with the prospective jurors' occupations, education, experience with crime, and knowledge of or familiarity with the defendant, his victims, counsel or the police ... whether they would give the defendant a fair trial, and how they would react to certain witnesses." *People v. Boulware*, 29 N.Y.2d at 142.

Critically, this statute authorizes a court to assume the questioning of a prospective juror if necessary "to prevent improper questioning" by a party. *See* *People v. Pepper*, 59 N.Y.2d 353, 359, 465 N.Y.S.2d 850, 452 N.E.2d 1178 (1983) ("the court's efforts to curtail further repetitious questioning and to effectively summarize the prospective jurors' previous responses by asking questions in conclusory fashion" was proper).

Restricting disclosure of prospective juror address

In 1983, subdivision 1-a was added permitting a court to restrict, upon a showing of "good cause," the disclosure of the "business or residential address" of a prospective juror to anyone other than counsel for a party. The "good cause" set forth in the statute relates to crimes threatening the integrity of the proceedings or harm to a prospective juror.

This provision does not authorize an "anonymous jury," given that the names of the prospective jurors are not by its terms subject to restriction. *But see* *People v. Watts*, 173 Misc.2d 373, 661 N.Y.S.2d 768 (Supreme Court, Richmond County, 1997) ("where the acts of a defendant represent a clear threat to either the safety or integrity of the jury, the Court may find under existing law that the defendant has forfeited his statutory right to the jurors' names and addresses").

Challenges

Once the questioning of the prospective jurors is completed, subdivision two requires that the parties be given first an opportunity to challenge a prospective juror for cause and then peremptorily.

A challenge for cause is waived if not made "before [the prospective juror] is sworn as a trial juror," or if based upon a ground not then known, "before a witness is sworn at the trial" [subdivision four]. Thus, in accord with that provision, a challenge for cause could also be made after the exercise of peremptory challenges. *See* *People v. Harris*, 57 N.Y.2d 335, 350, 456 N.Y.S.2d 694, 442 N.E.2d 1205 (1982). An erroneous denial of a defendant's challenge for cause is not preserved for appellate review unless the defendant peremptorily challenges that prospective juror and the defendant exhausts all of his or her peremptory challenges. *People v. Culhane*, 33 N.Y.2d 90, 350 N.Y.S.2d 381, 305 N.E.2d 469 (1973); *People v. Lynch*, 95 N.Y.2d 243, 715 N.Y.S.2d 691, 738 N.E.2d 1172 (2000).

Subdivision two sets forth the procedure for the exercise of peremptory challenges. The People must go first, then the defendant, and the People "may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box." Once a prospective juror is accepted by

the parties, they cannot thereafter exercise a peremptory challenge. *Harris*, 57 N.Y.2d at 349-350; *People v. Alston*, 88 N.Y.2d 519, *supra*. Challenges for cause and peremptory challenges are to be made within the courtroom, but it is the better practice, and, upon application of a party, it is required that the challenges be made "outside of the hearing of the prospective jurors" [subdivision two]. *But see People v. Pepper*, 59 N.Y.2d at 359 (an error in doing so did not require reversal in the absence of demonstrated prejudice).

Exclusion of non-parties from jury selection

A defendant is entitled to a public trial [U.S. Const. amend VI; N.Y. Civil Rights Law § 12], and jury selection is part of the trial. *Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *People v. Antommarchi*, 80 N.Y.2d 247, 250, 590 N.Y.S.2d 33, 604 N.E.2d 95 (1992). Thus, a court must exercise care in deciding whether to exclude a person from the courtroom during jury selection. *See Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *People v. Jones*, 96 N.Y.2d 213, 726 N.Y.S.2d 608, 750 N.E.2d 524 (2001).

For example, excluding family members during jury selection to make more room for prospective jurors, or to avoid their communication with the prospective jurors in the absence of a cognizable threat to do so, is error. *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (error to exclude the defendant's uncle); *People v. Martin*, 16 N.Y.3d 607, 925 N.Y.S.2d 400, 949 N.E.2d 491 (2011) (error to exclude the defendant's father). Appellate review of any such exclusion, as a question of law, requires preservation. *People v. Alvarez*, 20 N.Y.3d 75, 955 N.Y.S.2d 846, 979 N.E.2d 1173 (2012).

Even if there is a basis to close the courtroom, the court should "ordinarily" not exclude members of the defendant's family or those who have a "special relationship" with the defendant "of a kind that enables the proposed spectator to give the defendant the kind of moral and emotional support that might be expected from a family member." *People v. Nazario*, 4 N.Y.3d 70, 72, 790 N.Y.S.2d 628, 823 N.E.2d 1274 (2005) (error to exclude the defendant's drug counselor); *People v. Gutierez*, 86 N.Y.2d 817, 633 N.Y.S.2d 470, 657 N.E.2d 491 (1995) (error to exclude the defendant's family).

Notes of Decisions (241)

McKinney's CPL § 270.15, NY CRIM PRO § 270.15
Current through L.2024, chapters 1 to 49, 61 to 93. Some statute sections may be more current, see credits for details.

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