THE JURY SELECTION, INSTRUCTION AND VERDICT PROCESS FOR THE DISTRICT OF MAINE IN PORTLAND AND JUDGE HORNBY'S PRACTICES IN IMPANELING A JURY

I. Assembling the List of Potential Jurors

The process of assembling potential jurors is based upon 28 U.S.C. §§ 1861-78 and the Plan for the Random Selection of Grand and Petit Jurors for Service in the District of Maine ("Jury Plan"), dated July 13, 2001, approved by the Judicial Council of the United States Court of Appeals for the First Circuit on July 13, 2001.

A. The Master Jury List

The names of prospective jurors for service in Portland are obtained from the voter registration lists of the following counties: Androscoggin, Cumberland, Knox, Lincoln, Oxford, Sagadahoc and York. The minimum number of names is two percent of the total number of persons on the voter registration lists. A new Master Jury List is prepared every four years. The most recent list was prepared in July, 2005. A new list will be prepared in the summer of 2009.

B. The Qualified Jury List

Juror qualification forms are sent to a randomly selected group of persons on the Master Jury List. From the information submitted in the juror qualification form, the jury administrator preliminarily determines whether a juror is unqualified for, exempt from, or may be excused from, jury service.

(1) Qualifications for Jury Service. The following persons are not qualified to be jurors in this District: persons who are not citizens; persons who are under the age of eighteen; persons who have not resided in the District for at least one year; persons who are unable to read, write, or understand the English language sufficiently to fill out the juror qualification form; persons who are unable to speak the English language (the qualification form asks: "Do you read, write, speak and understand the English language?"); persons who are incapable of rendering jury service due to mental or physical infirmity; and persons who have been convicted of, or who are facing charges for, the commission of a crime punishable by imprisonment for more than one year, and whose civil rights have not been restored by pardon or amnesty. Jury Plan at 6-7.

(2) Exemption from Jury Service. Members of the following groups are exempt from jury service in this District: persons who are in active service in the armed forces of the United States; persons who are non-volunteer members of a police or fire department of any state; and persons who are public officers of the federal, state, county, or municipal executive, legislative, or judicial branch. Jury Plan at 7.

(3) Excused from Jury Service. Members of the following groups are excused from jury service in this District if the individual prospective juror so requests: persons over seventy; practicing lawyers, doctors and dentists; persons who have served on a grand or petit jury in a state or federal court within the preceding two years; and persons who are volunteer firefighters, ambulance or rescue crew members. Jury Plan at 7-8.

The names of the qualified persons are placed on the Qualified Jury List. Periodically, the Clerk draws at random from the Qualified Jury List and sends each person selected a summons to appear and a supplemental juror questionnaire to complete. The following persons, once summoned for jury service, may request to be excused in the discretion of the Court or the Clerk: persons who care for a child or children under age ten whose health or safety would be jeopardized by that person's absence for jury service; persons essential to the care of aged or infirm persons; persons whose services are essential to the operation of a business, commercial or agricultural enterprise; and persons who can show undue hardship or extreme inconvenience, such as a planned vacation. Jury Plan at 9-10. Once summoned, those persons not excused are available for jury service for a particular period of time (usually 2-6 months) whether or not immediately chosen to serve on a jury.

C. Orientation

When prospective jurors arrive at the courthouse on their first day, the jury administrator informs the jurors about various logistical considerations such as parking, meals and lodging. The clerk also answers any questions the jurors might have about their service. The jurors then view a videotape describing the stages of a civil and criminal trial and the jurors' role. Additionally, the District of Maine website, www.med.uscourts.gov, provides two resources for jurors regarding jury service: Handbook for Trial Jurors and Frequently Asked Questions.

II. Assembling a Jury Panel

Depending on the number and nature of cases scheduled for a particular trial list, the jury administrator summons jurors, chosen at random from the qualified jury

list, to appear in court for the voir dire process.[1] The list of those jurors attending and the supplemental juror questionnaires are thereafter made available in the Clerk's office, three days prior to trial, for examination by the lawyers.

III. Voir Dire

At the outset of voir dire, Judge Hornby directs the Clerk to place in the box the number of jurors necessary to seat a full jury (*e.g.*, perhaps 14 in a criminal case (12 with 2 alternates)—or 8 in a civil case, depending on the length of the trial), *plus* sufficient jurors to satisfy the parties' peremptory challenges. In most cases, the total is 14 potential jurors in a civil case and 32 in a criminal case. The Clerk, having compiled a list of potential jurors (in random order) with the aid of the Jury Management System (JMS), will call the first 14 or 32 potential jurors from the top of the list to obtain the required number of jurors in the jury box. Judge Hornby tells the chosen panel that his questions will be directed to them, but tells all the other potential jurors in the courtroom to listen carefully because they may be asked to replace a juror and will have to indicate then their answers to the previous questions. (The judge may excuse and replace a juror at any time it becomes apparent that juror cannot sit. The grounds may include that the potential juror may be unable to serve impartially or would be likely to disrupt the proceedings, or otherwise adversely affect the integrity of jury deliberation. Jury Plan at 9-10.) The judge then briefly describes the case and asks the lawyers to introduce themselves, their associates and their clients to the potential jurors and to identify their potential witnesses to see if any potential juror is familiar with any of the individuals named. Then, in accordance with District of Maine Local Rules 47(b) and 124.2(b), the judge proceeds to conduct the examination of jurors. This method of voir dire is permitted by Rule 24(a) of the Federal Rules of Criminal Procedure and Rule 47(a) of the Federal Rules of Civil Procedure.[2] This does not mean that the lawyers are excluded from the process. In accordance with the final pretrial order, the lawyers will have submitted in advance of voir dire the questions (other than the obvious) that they would like the judge to ask prospective jurors. At the end of the judge's examination, the lawyers are given the opportunity to suggest questions they believe the judge's examination has overlooked. Whether to ask further questions is within the sound discretion of the trial judge. "[T]he district court has broad discretion as to the manner in which it conducts the voir dire and the inquiries it chooses to make, subject only to the essential demands of fairness." Real v. Hogan, 828 F.2d 58, 62 (1st Cir. 1987); accord United States v. McCarthy, 961 F.2d 972, 976 (1st Cir. 1992). The

[1] In exceptional cases, detailed written questionnaires may be sent out to potential jurors to aid in the selection of an impartial jury. The judge may then hear challenges for cause based on the written answers before the jury panel is called in.

[2] Federal Rule of Criminal Procedure 24(a)(1) provides: "The court may examine prospective jurors or may permit the attorneys for the parties to do so." Fed. R. Crim. P. 24(a)(1). Federal Rule of Civil Procedure 47(a) provides: "The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination." Fed. R. Crim. P. 47(a).

judge does not have to ask every question a lawyer requests, and may cover the substance of appropriate areas by framing questions in his own words. Real, 828 F.2d at 62.

It is important to emphasize that the goal of the examination process is to ensure impartiality. "[E]ffective voir dire must expose potential bias and prejudice in order to enable litigants to facilitate the impanelment of an impartial jury through the efficient exercise of their challenges." United States v. Noone, 913 F.2d 20, 32 (1st Cir. 1990).

A. Challenges for Cause

The judge entertains challenges for cause at side bar both during and at the close of voir dire questioning. D. Me. Local Rs. 47(c), 124.2(c). The final decision to dismiss a juror for cause rests within the discretion of the trial court and will be reviewed only for "clear abuse." United States v. McNeill, 728 F.2d 5, 10 (1st Cir. 1984); United States v. Gullion, 575 F.2d 26, 29 (1st Cir. 1978); accord United States v. Gonzalez-Soberal, 109 F.3d 64, 66, 69 (1st Cir. 1997) (characterizing a judge's discretion as "substantial" and "considerable").

Examples of bias, prejudice, or favor are too numerous to review. Good common sense must be used.

> If the trial judge, who conducted the voir dire and who could develop a contemporaneous impression of the extent and intensity of community sentiment regarding the defendant, believed that he had impaneled a jury of twelve open-minded, impartial persons, then we will set aside his action only where juror prejudice is manifest.

McNeill, 728 F.2d at 9.

When a juror is struck, the next juror on the list is directed to the jury box and asked his or her responses to the preceding questions. This process continues until there are enough jurors, not successfully challenged for cause, to exercise all the peremptory challenges and produce a complete jury.

B. Peremptory Challenges

(1) Procedure. The lawyers exercise their peremptory challenges on the record at sidebar after all the challenges for cause are complete. The lawyer announces the juror number and the clerk then strikes that juror off the list. The jurors peremptorily stricken are not publicly identified until all of the peremptory challenges

have been exercised. If a Batson challenge is to be made, it should be done before the stricken jurors are identified publicly.

(2) Discriminatory Challenges. In Batson and its progeny, the United States Supreme Court has held that the Equal Protection Clause prohibits discriminatory peremptory challenges based on a juror's race, Batson v. Kentucky, 476 U.S. 79 (1986); see also Snyder v. Louisiana, 552 U.S. ___ (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); Johnson v. California, 545 U.S. 162 (2005); Georgia v. McCollum, 505 U.S. 42 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991), based on a juror's ethnic origin, Hernandez v. New York, 500 U.S. 352 (1991), or based on a juror's gender, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). For a discussion of Batson challenges based on religious discrimination, see United States v. Girouard, 521 F.3d 110 & n.3 (1st Cir. 2008) (not holding that Batson applies, but nevertheless finding the trial judge's Batson procedures satisfactory). The process by which the court determines if a peremptory challenge is improperly discriminatory is explained in Aspen v. Bissonnette, 480 F.3d 571, 574 (1st Cir. 2007) and Girouard, 521 F.3d at 113:

> First, the defendant must make a prima facie showing of discrimination in the prosecutor's launching of the strike. If the defendant fulfills this requirement by establishing, say, a prima facie case of a racially driven impetus, then the prosecutor must proffer a race-neutral explanation for having challenged the juror. If the prosecutor complies, then, at the third and final stage, the district court must decide whether the defendant has carried the ultimate burden of proving that the strike constituted purposeful discrimination on the basis of race.

The First Circuit has "cautioned that a party 'who advances a Batson argument ordinarily should come forward with facts, not just numbers alone.'" Id. at 577 (quoting United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. 1994)). See also Purkett v. Elem, 514 U.S. 765, 767-69 (1995). If arguing ethnic origin, in order to make a *prima facie* showing the moving party must

> show that the strike was used on a juror who is a member of a "cognizable . . . group," that "[has] been or [is] currently subjected to discriminatory treatment." The question is not whether members of the relevant group see themselves as part of a separate group, but rather "whether others, by

> treating those people unequally, put them in a distinct group."

United States v. Marino, 277 F.3d 11, 23 (1st Cir. 2002) (citations omitted) (finding that Italian Americans are not a "distinct group").

(3) Criminal Cases. Rule 24(b) of the Federal Rules of Criminal Procedure sets out the requirements for the number of peremptory challenges allowed for each side depending on the offense:

> Each side has 20 peremptory challenges when the government seeks the death penalty. . . . The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. . . . Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by a fine, imprisonment of one year or less, or both.

Fed. R. Crim. P. 24(b).

Local Rule 124.2(d)(2) explains the order of exercising the peremptory challenges in cases where the Government has 6 challenges, and the defendant or defendants jointly have 10 challenges:

> Government 1, defendant(s) 2,
> Government 1, defendant(s) 2,
> Government 1, defendant(s) 2,
> Government 1, defendant(s) 2,
> Government 1, defendant(s) 1,
> Government 1, defendant(s) 1.

D. Me. Local R. 124(d)(2). If the court permits more peremptory challenges, the court determines their order. Id.

(4) Civil Cases. "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." 28 U.S.C. § 1870.

Local Rule 47(d)(2) provides the order of exercising the peremptory challenges in civil cases. In civil cases where the parties have an equal number, the peremptory challenges are exercised alternately,

the plaintiff exercising the first challenge. D. Me. Local R. 47(d)(2). In land condemnation cases the claimant exercises the first challenge. Id.

C. Waiver and Striking Procedure - Criminal and Civil Cases

Any party may waive a peremptory challenge without relinquishing any remaining challenges to which the party is entitled. If all challenges are not exercised, the judge will strike from the bottom of the list the number necessary to reach twelve jurors in a criminal case and the number of jurors decided by the court to sit in a civil case. D. Me. Local Rs. 47(d)(1), 124.2(d)(1).

D. Alternate Jurors

(1) Criminal Cases. Pursuant to Federal Rule of Criminal Procedure 24(c), the judge may direct that up to six alternate jurors be selected. If one or two alternate jurors are impaneled, each side is entitled to one additional peremptory challenge. If three or four alternate jurors are impaneled, then two additional peremptory challenges are allowed for each side. If five or six alternates are impaneled, then each side is allowed three additional peremptory challenges. These peremptory challenges may be used only against the alternate jurors, and unused peremptory challenges allowed for regular jurors may not be used against the alternate jurors. Fed. R. Crim. P. 24(c). "Peremptory challenges to alternate jurors in a criminal case shall be exercised one by one, alternately, the [G]overnment exercising the first challenge." D. Me. Local R. 124.2(d)(3). Generally the judge has the alternates selected at the same time as the regular jurors. The lawyers know who the alternates are, but the jury is not told until the alternates are excused just before deliberation.

(2) Civil Cases. The institution of the alternate juror has been abolished in civil cases. Fed. R. Civ. P. 47(b) advisory committee note (1991 amendment). The court seats a jury of "not fewer than six and not more than twelve members," and all the "jurors participate in the verdict unless excused from service by the court pursuant to Rule 47(c)." Fed. R. Civ. P. 48. The verdict must be unanimous and the size of the jury cannot shrink to fewer than six members, "[u]nless the parties otherwise stipulate." Id.

After the composition of the jury is finally determined, Judge Hornby calls the lawyers to side bar to inquire if there is any objection to the jury as impaneled. Judge Hornby selects a foreperson.

IV. Jury Instructions

A. Preliminary

At the beginning of the case Judge Hornby introduces the case to the jury, introduces the courtroom personnel, and discusses the trial process in general. In all cases, jurors are permitted to take notes. In civil cases, a glossary of frequently used courtroom terms is distributed.

B. Final

Pursuant to Local Rule 130, in a criminal case the parties must file proposed final jury instructions at least three days prior to the jury impanelment. In a civil case, the final pretrial order dictates the filing requirement. At the conclusion of the testimony of a civil or criminal case, Judge Hornby distributes to the lawyers a draft set of instructions. He then conducts a "charge conference," where the lawyers may seek amendments, request additional instructions, or seek to have some deleted.

Before closing arguments and before instructing the jury, Judge Hornby provides the lawyers with a copy of his proposed instructions and gives the lawyers an opportunity to object to the proposed charge. Fed. R. Civ. P. 51 (as amended Dec. 1, 2003); Fed. R. Crim. P. 30.[3] Any objections must be specific, Mattson v. Brown Univ., 925 F.2d 529, 531 (1st Cir. 1991), and counsel may not simply incorporate by reference their earlier requests, United States v. Callipari, 368 F.3d 22, 41 (1st Cir. 2004), vacated on other grounds, 543 U.S. 1098 (2005).

Judge Hornby typically instructs the jury before closing arguments, Fed. R. Civ. P. 51(b); Fed. R. Crim. P. 30(c), but will consider the lawyers' views on this subject. Judge Hornby reads aloud his jury instructions, providing each juror with a copy of the instructions and a verdict form to read along with him. The lawyers are also given a copy of the jury instructions and the verdict forms. When the jurors retire to consider their verdict, they take into the jury room their copies of the instructions and the verdict form.

[3] Fed. R. Civ. P. 51 was amended effective December 1, 2003. The Rule now requires the court to give the parties a copy of the proposed instructions and allow the parties an opportunity to object on the record *before* the instructions and closing arguments are delivered. Fed. R. Civ. P. 51(b). "A party's failure to adhere to the protocol specified in Rule 51 constitutes a forfeiture and limits appellate review to plain error." Surprenant v. Rivas, 424 F.3d 5, 15 (1st Cir. 2005) (citing Fed. R. Civ. P. 51(d)(2)). Fed. R. Crim. P. 30 was not amended and requires only that the parties object before the jury retires to deliberate. For the sake of simplicity, the timing requirement of Fed. R. Civ. P. 51 is followed in both civil and criminal cases.

V. Taking a Verdict

When the jury has notified the judge that it has reached a verdict, everyone is reassembled in the courtroom. The clerk asks the foreperson if the jury has reached a verdict and directs the jury officer to pass the papers. The clerk hands them to the judge who then reviews them for form. He then returns them to the clerk who instructs the jury to listen as the verdict is read aloud. After reading the verdict aloud, the clerk inquires of the foreperson and the members of the jury whether that is, indeed, the jury's verdict. At that point, the judge will inquire of the lawyers whether they wish the jury to be polled.

In criminal cases the right to poll the jury post-verdict is provided for by Federal Rule of Criminal Procedure 31(d). A party must request that the jury be polled before the jury is discharged; if a party does not so request, it waives the right to poll the jury, Jaca Hernandez v. Delgado, 375 F.2d 584, 586 (1st Cir. 1967). Cf. Audette v. Isaksen Fishing Corp., 789 F.2d 956, 959 n.3 (1st Cir. 1986) (concluding, in this civil case, that "[o]nce the jury is discharged, it is too late to request a poll"). The court may also poll the jury upon its own motion. Fed. R. Crim. P. 31(d). If the poll reveals that the jury is not unanimous, the judge may direct the jury to retire for further deliberations, or may declare a mistrial and discharge the jury. Id. The judge's power in this area is discretionary. United States v. Luciano, 734 F.2d 68, 70-71 (1st Cir. 1984). In criminal cases the poll is conducted in the following manner: the clerk calls each juror by number and asks whether the verdict, as it has been read, is his or her verdict.

The Federal Rules of Civil Procedure do not address post-verdict polling of the jury. According to the caselaw, the decision whether to conduct a jury poll is solely within the discretion of the trial judge. Santiago Hodge v. Parke Davis & Co., 909 F.2d 628, 632 n.1 (1st Cir. 1990). The judge may conduct a jury poll even without a party requesting a poll, because "[t]he court has an independent interest in guaranteeing that the verdict recited by the foreperson truly reflects the conclusion of the jury." Audette, 789 F.2d at 961. The judge also has substantial discretion to decide how the jury shall be polled. Id. at 959-60. It is not necessary that the judge poll jurors on each count or interrogatory separately. Id. at 961 n.7. In Judge Hornby's court, the poll is conducted in the following manner: the clerk calls each juror by number and asks whether the particular verdict is that juror's verdict.

If the poll has not revealed any defect in the verdict, the judge will then direct that the verdict be recorded and will excuse the jury.

After the jury is excused, the jurors may not be questioned by the parties or their lawyers without the permission of the court. Permission is granted only in extraordinary situations. This is a well-settled principle in this circuit. United States v. Kepreos, 759 F.2d 961, 967 (1st Cir. 1985).

If time permits, Judge Hornby may invite the jurors to meet with him after their verdict to discuss the workings of the federal judicial process and to solicit their views on how the conditions of their jury service could have been improved. The Judge does not discuss details of the particular case that has been tried.

Judge Hornby usually provides questionnaires to jurors so that they may evaluate the lawyers' performances and discuss their experiences as jurors. Feedback concerning a lawyer will be provided to the lawyer only upon request.