RULE 47. SELECTING JURORS

(a) Examination of Jurors.

(1) *Purpose*. The examination of prospective jurors is intended to allow for the selection of jurors who

(A) are qualified and willing to sit;

(B) have not formed any preconceptions about a case that they cannot set aside or that would otherwise interfere with their ability to be fair and impartial; and

(C) are prepared to hear and decide any case for which they are selected without bias, prejudice, or interest, accepting the law as instructed by the court.

(2) *Methods for Examination of Jurors*.

(A) In all cases, the examination of prospective jurors shall occur through oral questions by the court, in open court or at sidebar, unless the court determines that a question or questions must be asked in a different setting.

(B) The court may also permit the prospective jurors to be examined through

(i) the use of questionnaires, or

(ii) direct oral questioning by attorneys or unrepresented parties.

(3) *Process for Establishing Examination Method(s)*. Before the date of jury selection, the attorneys, unrepresented parties, and the court shall discuss readiness for trial and issues in each case, including the questions to be posed to jurors.

(A) The court may set a deadline for receipt of proposed written questionnaires or topics to be addressed in questioning by an attorney or unrepresented party.

(B) At the jury selection conference, the court will indicate the questions it intends to ask the prospective jurors. The attorneys and unrepresented parties may request amendments, deletions, or supplementation. Any such requests must be made part of the record.

(C) At that conference, the court will consider any timely requests for use of questionnaires or direct questioning of prospective jurors by the attorneys or unrepresented parties. Those requests must be made as set forth below:

(i) Written Questionnaires. Any party who seeks to have a written questionnaire submitted to prospective jurors must file a draft of the specific questions sought to be posed at least 21 days before the day of jury selection, unless otherwise ordered by the court.

(ii) Attorney or Unrepresented Party Questions ("Direct Questioning"). Any party who seeks to ask the prospective jurors oral questions shall file a request to pose oral questions, including the proposed topics of inquiry, at least 21 days before the day of jury selection, unless otherwise ordered by the court. The proposed topics of inquiry should allow for brief responses from prospective jurors. In its discretion, the court may require the specific proposed questions to be submitted in advance for review.

(4) *Decisions on Methods to be Used*. The court shall permit questionnaires or direct questioning to be used, and set a specific time limit for direct questioning, if the court finds that the requesting party has complied with subdivision (a)(3)(C) of this Rule and that:

(A) answers to the approved questionnaires or topics of inquiry for direct questioning may add materially to appropriate information that could be gained through the court's oral questioning;

(B) the written questionnaires are phrased to allow a "yes" or "no" answer unless, in unusual circumstances, the court specifically approves questions that seek other brief responses; and

(C) use of the written questionnaire or direct questioning will assist materially in obtaining a fair and impartial jury and will not unduly extend the time required to select a jury.

(5) *Conducting the Examination*. At all times the court shall control the examination of prospective jurors. Even after permitting the use of written questionnaires or direct questioning, the court may limit or terminate either process at any time if it determines that:

(A) the questions being posed are outside the approved topics of inquiry;

(B) the questioning or the process is hindering or having a negative effect on the selection of a fair and impartial jury;

(C) the questions are taking more time than was designated by the court; or
(D) the questions being posed are improper.

(b) Challenges for Cause.

(1) *Generally*. Challenges for cause of individual prospective jurors shall be made during or at the conclusion of the examination.

(2) *Process When Questionnaires are Allowed*. When questionnaires are to be used, initial challenges for cause directed to individual prospective jurors shall be made after the questioning conducted by the court and after any case-specific jury questionnaire has been reviewed. These initial challenges for cause shall be made out of the hearing of any prospective jurors.

Thereafter, individual potential jurors shall be selected by lot in a sufficient number to comprise the jury, plus peremptory challenges. In the court's discretion, several additional potential jurors may be selected by lot in the event that any of the initially selected potential jurors are subject to a further challenge for cause or in cases where alternate jurors are needed.

(3) *Process When Direct Questioning is Allowed, With or Without Questionnaires*. When direct questions are to be used, initial challenges for

cause directed to individual prospective jurors shall be made after the questioning conducted by the court and after any case-specific jury questionnaire has been reviewed. These initial challenges for cause shall be made out of the hearing of any prospective jurors.

Thereafter, individual potential jurors shall be selected by lot in a sufficient number to comprise the jury, plus peremptory challenges. In the court's discretion, several additional potential jurors may be selected by lot in the event that any of the initially selected potential jurors are subject to a further challenge for cause or in cases where alternate jurors are needed.

Counsel or unrepresented parties shall then be given a reasonable opportunity to direct questions to the array of potential jurors, within the topic and time parameters established by the court. If any of those jurors are excused for cause and there are not enough remaining jurors to allow for the selection of a jury, given each party's right to peremptory challenges, additional potential jurors shall be selected by lot and may then be questioned by counsel or parties.

(c) Peremptory Challenges.

(1) *Manner of Exercise.*

(A) Generally. After all jurors challenged for cause have been excused, except in cases where the court has permitted direct questioning of prospective jurors by attorneys or unrepresented parties, the clerk shall draw the names of eight prospective jurors and shall draw one additional name for each peremptory challenge allowed to any party by this rule or by the court. The clerk shall then prepare a list of the names drawn. As each peremptory challenge is exercised, the clerk shall strike out the name of the juror challenged on the list of the drawn prospective jurors. Any attorney or unrepresented party may waive the exercise of any peremptory challenge without thereby giving up the right to exercise any remaining peremptory challenge to which that party is entitled. If all peremptory challenges are not exercised, the court will strike from the bottom of the list sufficient names to reduce the number of jurors remaining to eight.

(B) When the Court has Permitted Direct Questioning by Attorneys or Unrepresented Parties. In cases where the court has

permitted direct questioning of prospective jurors by attorneys or unrepresented parties, peremptory challenges shall be made concerning the prospective jurors randomly selected for questioning as set forth in Rule 47(b)(3) above. The process for exercising peremptory challenges shall be that process set forth in Rule 47(c)(1)(A) above.

(2) *Order of Exercise.* In any action in which both sides are entitled to an equal number of peremptory challenges, they shall be exercised one by one, alternatively, with the plaintiff exercising the first challenge. In any action in which the court allows several plaintiffs or several defendants additional peremptory challenges, the order of challenges shall be as determined by the court.

(3) *Number.* Each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered to be a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

Advisory Note – September 2019

Rule 47 is amended to state more explicitly that, in addition to oral questioning of prospective jurors by the court, the court may allow (i) use of written questionnaires or (ii) direct questioning of prospective jurors by attorneys or unrepresented parties. If the court makes the findings indicated to support use of a questionnaire or direct questioning by parties, the court shall allow the use of questionnaires or direct questioning, subject to the court's authority to terminate the questioning if any of the listed problems develop.

The conference about how jury selection will proceed may occur as part of the trial management conference, or during another conference to be held sometime before the date of selection.

Unless the court orders otherwise, requests for use of written questionnaires or direct questioning of jurors must be submitted at least 21 days before the date for jury selection. Before the date of jury selection, the court will meet and confer with the attorneys or unrepresented parties to review and decide on any requests for questionnaires or direct questioning.

The types of questions that are proper to pose during jury selection—whether by the court, by the attorneys (or parties, if unrepresented), or through a questionnaire—have been addressed in *State v. Roby*, 2017 ME 207, 171 A.3d 1157; *State v. Simons*, 2017 ME 180, 169 A.3d 399; *Grover v. Boise Cascade Corporation*, 2004 ME 119, 860 A.2d 851; and *United States v. Ramírez-Rivera*, 800 F.3d 1, 38 n.32 (1st Cir. 2015). *See also* Alexander, *Maine Jury Instruction Manual*, §§ 2-4D, 2-4E, 2-4F (2018-2019 ed.).

Even if parties agree on language in a proposed written questionnaire, the court may decline to use the proposed language. Before approving written questionnaires, trial judges should carefully review all questionnaire language, particularly questions that seek responses other than "yes" or "no."

If the court determines that any direct questioning by counsel or unrepresented parties is inappropriate or improper, it should limit or terminate the questioning or take other appropriate responsive steps. *See State v. Rancourt*, 435 A.2d 1095, 1098-1100 (Me. 1981); *see also State v. Woodburn*, 559 A.2d 343, 344 (Me. 1989) ("Considerable discretion over the conduct and scope of juror voir dire is vested in the trial court, which has the responsibility of balancing the competing considerations of fairness to the defendant, judicial economy, and avoidance of embarrassment to potential jurors.").

In addition to the amendments to subdivision (a) of Rule 47, subdivision (b) is amended to clarify what has long been the law, that challenges for cause and exclusions for cause may occur at the end of and during voir dire. *See Woolley v. Henderson*, 418 A.2d 1123, 1127 (Me. 1980).

Subdivision (c) of Rule 47 is amended to outline the procedure for the exercise of peremptory challenges depending on whether questioning of jurors by attorneys or unrepresented parties has been allowed.

Advisory Committee's Notes
June 2, 1997

Rule 47 (e) was adopted to permit note-taking by jurors during trial, subject to the discretion of the court. The subdivision is identical to

M.R.Crim.P. 24 (f), which has been successfully implemented at criminal trials, with the intention of making the practice uniform in criminal and civil trials.

Advisory Committee's Note
January 3, 1978

This amendment [to subdivision (c)(1)] provides for modification of the manner of exercise of peremptory challenges in the selection of an eight person jury as provided, as of this date, by amendment to Rule 38(a). The rule, as so modified, results in the selection of an eight person jury. The provisions of the rule are subject to any stipulation entered into under Rule 48(b) for reduction in the size of the jury.

This amendment [to subdivision (c)(3)] is intended to adjust the number of peremptory challenges in accordance with the eight person jury provided for this date in Rule 38(a). The rule, as amended, provides for three peremptory challenges as opposed to two peremptory challenges which were allowed in the case of the selection of a six person jury. This amendment represents a return to the provisions of the rule as they existed prior to October l, 1975 when the statutory provisions provided for the use of eight person juries.

Rule 47(d) is amended simultaneously with amendments to Rules 38 and 48 in order to implement the provisions of Chap. 102 of the Public Laws of 1977. Rule 38(a) provides for the selection of eight person juries where requested by either party prior to trial. The amendments to 47(d) represent a return to the system of selection of alternate jurors which existed prior to October 1, 1975 when eight person juries were mandated by the pertinent statutory provisions. The rule now provides for the selection of "not more than 3 jurors" as alternates and provides for a maximum of two peremptory challenges if three alternate jurors are to be selected, and for a single peremptory challenge, for each party, if either one or two alternate jurors are selected. It should be noted that the challenges provided for under Rule 47(d) may be utilized only with respect to potential alternate jurors.

Advisory Committee's Note
October 1, 1975

This amendment, like the simultaneous changes made in Rules 38 and 48, accommodates the jury selection procedures to the 1975 amendment of 14 M.R.S.A. § 1204, providing for six-member juries. *See* Advisory Committee's Notes to Rules 38, 48.

Advisory Committee's Note
January 1, 1973

Rule 47(c) and Rule 47(d) are amended simultaneously with amendments to Rules 38 and 48 in order to implement the permissive 1972 statute authorizing the Supreme Judicial Court to institute 8-member juries (with 6-juror majority verdicts). *See* the Advisory Committee's Note (January 1, 1973) to Rule 38(a).

Rule 47(c)(1) is amended to reflect the smaller number of jurors that will be drawn and Rule 47(c)(3) and Rule 47(d) are amended in order to reduce the number of peremptory challenges and the maximum permissible number of alternate jurors, respectively, approximately in proportion to the reduction of the number of jurors from 12 to 8.

At the same time that Rule 47 is being amended to implement the 8-member jury statute, a new third sentence is added to Rule 47(c)(1) in order to specify by rule the better practice in regard to waiver of peremptory challenges. That new sentence, taken from Rule 19 of the Local Rules of the United States District Court for the District of Maine, makes clear that a party by waiving the exercise of any one of his peremptory challenges does not thereby relinquish his right to exercise any subsequent remaining peremptory challenge to which he is entitled. This is already the better practice. *See* Field, McKusick and Wroth, *Maine Civil Practice* § 47.3, at 640-41.

Advisory Committee's Note
December 31, 1967

These amendments are intended to bring the civil and criminal practice with regard to challenges to the jury and alternate jurors into substantial conformity. They are drawn from Maine Criminal Rule 24 and the practice of

the United States District Court for the District of Maine under its Local Rule 19.

In an accompanying statutory change, 14 M.R.S.A. § 1204 has been amended to eliminate the now largely formal practice of drawing two regular panels at the beginning of the term and to substitute for provisions concerning peremptory challenges and alternate jurors an express rule-making power in the Supreme Judicial Court. 1967 Pub. Laws, Chap. 441, Sec. 3. The provision of 14 M.R.S.A. § 1302 for a challenge to the panel has also been repealed. *Id.,* Sec. 4. These changes parallel amendments made to the comparable criminal procedural statutes when the Maine Rules of Criminal Procedure were promulgated. *See* 15 M.R.S.A. § 1258.

Under the amended rule a jury will be specially drawn for the trial of each case. It is envisioned that the practice will be substantially as follows:

All jurors available for the trial of the case will be examined on voir dire. In the federal court Judge Gignoux accomplishes this step with a set of prepared questions which he addresses to all the prospective jurors as a group, directing further questions to a juror as circumstances dictate. After the voir dire, under amended Rule 47(b) counsel will make their challenges for cause at the bench out of the hearing of the jurors. This practice, identical to that under Criminal Rule 24(b), is intended to eliminate any prejudice which might result from a challenge for cause. *See* Reporter's Notes, Me.R.Crim.P. 24.

Under amended Rule 47(c), when challenges for cause have been completed and the challenged jurors excused, the clerk will draw a number of jurors' names equal to the size of the jury plus the total number of peremptory challenges available to all parties—20 names in the ordinary civil case (12 plus four challenges for each party). As he draws, the clerk will make a list of the drawn jurors. Counsel for each party will then alternately strike from the completed list the names of those whom they wish to challenge peremptorily up to the maximum allowed. When all challenges have been exercised, if more than 12 names remain the court will strike the surplus from the bottom of the list. The remainder will be the jury for the trial of the case. This procedure is based on Maine Criminal Rule 24(c) and local Rule 19(c) of the United States District Court for Maine. Its purpose is to eliminate complexity and potential

for prejudice which tend to discourage the exercise of peremptory challenges. *See* Reporter's Notes, Me.R.Crim. P. 24.

Subdivision (c)(3) incorporates the number of peremptory challenges presently allowed by 14 M.R.S.A. § 1204 (Supp. 1966) for cases in which a jury is specially drawn. The last sentence of the subdivision is taken from 28 U.S.C.A. § 1870, source of the comparable federal rule for civil actions. Its effect is the same as that of the last sentence in Maine Criminal Rule 24(b).

Subdivision (d) increases to four the number of alternate jurors permitted in a civil action from the two allowed under 14 M.R.S.A. § 1204 (Supp.1966). The increase brings the number of alternates into line with that permitted by Maine Criminal Rule 24(d). Although both of the comparable Federal Rules permit six alternates, the smaller number seems warranted by the actualities of Maine practice. The rule is generally similar to Federal Civil Rule 47(b), except that the provisions of the latter as to the drawing and functions of alternate jurors are omitted to be consistent with Maine Criminal Rule 24(d). These provisions appear in virtually identical form in 14 M.R.S.A. § 1204 as amended in 1967.

Reporter's Notes
December 1, 1959

This rule modifies Federal Rule 47 only in minor respects. It also follows closely existing Maine practice.

R.S.1954, Chap. 113, Sec. 101 [now 14 M.R.S.A. § 1301] provides that the court shall on motion pose certain questions to prospective jurors. At present there is no uniform practice among judges as to permitting counsel to question prospective jurors. While subdivision (a) of this rule preserves a discretion in the trial judge to permit interrogation by counsel, Federal Rule 47(a) is modified to indicate clearly that questioning by the judge should be the normal procedure.

R.S.1954, Chap. 113, Sec. 95 [now 14 M.R.S.A. § 1204] provides for alternate jurors in both civil and criminal cases.* It is substantially the same

* [Field, McKusick & Wroth noted: "As amended by 1965 Laws, c. 356, §§ 12, 13, and 1967 Laws, c. 441, § 3, the section now applies only to civil cases and gives the court specific rulemaking

as Federal Rule 47(b), and it seems preferable to incorporate the statute by reference in lieu of adopting the federal rule. Otherwise there would be undesirable minor variations in practice between civil and criminal cases.

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authority as to the number of alternates and challenges to them. *See* Advisory Committee's Note . . ." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 635 (2d ed. 1970).]