

THE USE OF JURY CONSULTANTS



Earl E. O'Connor American Inn of Court
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Team Judge McCarthy

Quick background on jury service and juror questionnaires in Kansas



Jury Service and Juror Questionnaires

Persons excluded from jury service:

- K.S.A. § 43-158
 - The following persons shall be excused from jury service:
 - (a) Persons unable to understand the English language with a degree of proficiency sufficient to respond to a jury questionnaire form prepared by the commissioner;
 - (b) persons under adjudication of incompetency;
 - (c) persons who within 10 years immediately preceding have been convicted of or pleaded guilty, or nolo contendere, to an indictment or information charging a felony;
 - (d) persons who have served as jurors in the county within one year immediately preceding; and
 - (e) a mother breastfeeding her child. Jury service shall be postponed until such mother is no longer breastfeeding the child.

- K.S.A. § 43-159
 - In addition to the persons excused from jury service in K.S.A. § 43-158, and amendments thereto, the following persons may be excused from jury service by the court:
 - (a) Persons so physically or mentally infirm as to be unequal to the task of ordinary jury duty;
 - (b) persons whose presence elsewhere is required for the public welfare, health or safety;
 - (c) persons for whom jury service would cause extraordinary or compelling personal hardship; and
 - (d) persons whose personal relationship to the parties or whose information or interest in the case to be tried is such that there is a probability such persons would find it difficult to be impartial.

Juror questionnaires:

- K.S.A. § 43-161
 - Each jury commissioner may require any person . . . to answer in writing such questions as the commissioner may address to such person, relating to such person's name, age, residence, occupation and qualifications as a juror, with a view to the due and faithful jury service of such person and such questions involving similar matters relating to all persons living in such person's residence.
 - Any such person whose name has been selected for a jury list who fails or refuses to answer such questions in writing and signing such person's name thereto, shall be cited for contempt of court.
 - Any such person whose name has been selected for a jury list who willfully or corruptly makes false answers to such questions put to such person by the jury commissioner shall be guilty of a class A nonperson misdemeanor.

Preparation of jury lists:

- K.S.A. § 43-162
 - Jury commissioners shall cause to be prepared under their supervision a list of persons qualified as jurors in each county. Jury lists shall be prepared from **voter registration records** of the county, lists of **licensed drivers** residing in the county or enumeration or census records for the county, in accordance with the intent and purposes of this act. On and after January 1, 1985, lists of holders of state-issued nondrivers' identification cards who reside in the county may also be used in the preparation of jury lists. Jury lists prepared from multiple sources may be used if one or more of the foregoing records is used as a material source in preparing the list. The commissioners shall cause the jury list of each county to be revised and updated by adding names of qualified jurors and removing names of those who have died, removed from the county, or who have otherwise become disqualified. For the purposes of preparation and revision of jury lists, commissioners shall have access to the voter registration records of the county, records of the division of vehicles pertaining to licensed drivers who reside in the county and enumeration or census records for the county. On and after January 1, 1985, commissioners shall have access to records of the division of vehicles pertaining to nondrivers' identification card holders who reside in the county, for the purposes of preparation and revision of jury lists.

Disqualifying information of juror(s):

- K.S.A. § 43-174
 - On and after July 1, 2013, any jury commissioner that receives information regarding citizenship from a prospective juror or court of this state that disqualifies or potentially disqualifies such prospective juror from jury service pursuant to K.S.A. § 43-156, and amendments thereto, shall submit such information to the secretary of state in a form and manner approved by the secretary of state. Any such information provided by a jury commissioner to the secretary of state shall be limited to the information regarding citizenship and the full name, current and prior addresses, age and telephone number of the prospective juror, and, if available, the date of birth of the prospective juror. Any such information provided by a jury commissioner to the secretary of state shall be used for the purpose of maintaining voter registrations as required by law.

Voir Dire



Voir Dire

The purpose of the voir dire examination is to enable the parties to select competent jurors without bias, prejudice, or partiality. The nature and scope of the voir dire examination is within the sound discretion of the trial court. *State v. Aikins*, 261 Kan. 346, 365 (Kan. 1997) (overruled on other grounds).

CRIMINAL CASES

Composition of Jury Panel:

The 6th Amendment requirement of an impartial jury mandates that any selection system may not systematically exclude any distinctive group in the community. *Taylor v. Louisiana*, 419 U.S. 522 (1957). The selection of a jury from a representative cross section of the community is an essential component of the 6th Amendment right to a jury trial. *Taylor*, 419 U.S. at 528.

Manner of Seating Jurors:

K.S.A. § 22-3411a provides “In all felony trials, upon the request of either the prosecution or the defendant, the court shall cause enough jurors to be called, examined, and passed for cause before any peremptory challenges are required, so that there will remain sufficient jurors, after the number of peremptory challenges allowed by law for the case on trial shall have been exhausted, to enable the court to cause 12 jurors to be sworn to try the case.”

The procedure in selection of jurors is within the discretion of the trial court, and such discretion will not be reversed absent showing of abuse. *State v. Heck*, 8 Kan. App. 2d 496 (Kan. Ct. App. 1983). Although the statute allows for substitution of an alternate juror during deliberations and a defendant is not entitled to a particular composition of the jury, the substitution of an alternate must be for good cause. *State v. Cheek*, 262 Kan. 91, 100, 102 (Kan. 1997).

Voir Dire

Under K.S.A. § 22-3408(3), both the State and the defendant shall have the right to conduct voir dire. Under the statute, the court may limit the examination at any time if the court is of the opinion that the examination constitutes harassment, is causing unnecessary delay, or serves no useful purpose. The court may also conduct an additional examination. *State v. Mahkuk*, 220 Kan. 74, 77 (Kan. 1976).

In *State v. Hayes*, 258 Kan. 629 (Kan. 1995), defense counsel learned in voir dire that some prospective jurors had opinions regarding the guilt of the accused. The trial court refused to allow inquiry into whether the opinion was one of guilt or innocence; refusal was upheld on appeal.

The right to challenge a juror for cause is meaningless unless it is accompanied by the right to ask relevant questions upon which the challenge for cause can be predicated. *Ham v. South Carolina*, 409 U.S. 524, 532–33 (1973). The trial court has broad discretion to control the scope

and manner of voir dire. The legislative intent in Kansas is to give counsel the right to conduct the voir dire, as compared to the federal system, where the trial court often conducts the voir dire with additional questions from counsel. *See Aldridge v. United States*, 283 US 308 (1931); FED. R. CRIM. P. 24(a).

Peremptory Challenges

There are an unlimited number of preemptory challenges. Historically, counsel could exercise preemptory challenges without any explanation. This changed, however, with the Supreme Court decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) after the court found that preemptory challenges were being used in a racially biased manner. Now, lawyers may not exercise preemptory challenges in a discriminatory manner based upon race, gender, or ethnicity.

CIVIL CASES

Examining jurors

Prospective jurors must be examined under oath or affirmation regarding their qualifications to sit as jurors. The court must permit the parties or their attorneys to conduct an examination of prospective jurors.

Challenges for Cause

All challenges for cause, whether to the array or panel or to individual prospective jurors, must be decided by the court.

Peremptory Challenges

After the panel has been passed for cause, each party is entitled to three preemptory challenges, except as provided in subsection (h) of K.S.A. § 60-248, and amendments thereto, when there are alternate jurors. Preemptory challenges must be exercised in a manner that will not communicate to the challenged prospective juror the identity of the challenging party or attorney.

Background on jury consultants



Jury Consultants

Background (Litigation Insights will explain in more detail):

- Used in both criminal and civil matters
- Used before trial, during trial, and after a verdict

When using jury consultants, things to be aware of:

- Hearsay
 - District courts have discretion to refuse to accept the contents of affidavits executed by hired jury consultants, as such affidavits contain hearsay statements from jury consultants that the consultants are told by jurors.
 - *United States v. Davis*, 60 F.3d 1479, 1484 (10th Cir. 1995)
- No right to use a jury consultant
 - “[A] jury consultant is not a ‘basic’ tool of the defense.”
 - *Busby v. State*, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999)
 - “[A] jury consultant is neither ‘necessary for adequate representation’ of the defendants . . . nor one of the basic tools of ‘raw materials integral to the building of an effective defense.’”
 - *United States v. Rivera*, 292 F. Supp. 2d 823, 825 (E.D. Va. 2003) (citations omitted)
- Discovery/work product doctrine
 - “[A] jury consultant’s discussions with . . . legal counsel, including notes of such discussions, may reflect the mental impressions and legal theories of [legal] counsel. Therefore, such information goes to the core of the work product doctrine and is not discoverable.”
 - *In re Jefferson Cty. Appraisal Dist.*, 315 S.W.3d 229, 234 (Tex. Ct. App. 2010) (citations omitted)
 - “Likewise, any material or impressions developed by the jury consultant in anticipation of trial that reflect the consultant’s opinions or conclusions is ordinarily not discoverable, unless otherwise disclosed or reviewed by a testifying expert.”
 - *Id.* at 234–35 (emphasis added) (citations omitted)
- Some courts may require leave to employ a jury consultant
 - “The court hereby **ORDERS** that any party who wishes to employ a jury consultant in this matter must obtain the prior permission of the Court.”
 - *United States v. Martinez*, No. 3:06-CR-45-01, 2008 WL 394959, at *1 (D.N.D. Feb. 12, 2008) (emphasis in original)
- Characterization of jury consultant
 - “It is sufficient for plaintiffs’ jury consultant to introduce him or herself as a member of plaintiffs’ litigation team.”
 - *Allstate Ins. Co. v. Nassiri*, No. 2:09-CV-369 JCM GWF, 2013 WL 2394116, at *7 (D. Nev. May 30, 2013)