

Jones, Blechman, Woltz & Kelly,
P.C.

ATTORNEYS AND COUNSELORS AT LAW

MEMORANDUM

August 20, 2009

TO: 2009 Boyd Graves Conference

FROM: Jury Venire Committee

Introduction

The committee considered issues related to the lists of jury panel members that are made available to attorneys in civil cases, focusing especially on whether standards should be adopted to govern the size of jury venires and the data disclosed to attorneys.

This consideration focused on both the master jury panel and the trial panel. We looked at issues relating to size of the panel, information about individuals contained in the panel, and the time and manner in which the panel information is made available to the attorneys.

We discussed how these issues are currently being handled by various courts and we examined whether changes in the law should be recommended to ensure a consistent, predictable and fair experience to litigants in various jurisdictions. The analysis included questions such as: i) what information should be provided to counsel about the potential jurors; ii) when should that information be provided; iii) are there any uniform standards that should work in all venues or does this have to be handled on a jurisdiction-by-jurisdiction basis; and, iv) are there any improvements that can be suggested to accomplish these ends.

The Conference members were: Howard C. McElroy, Esq., Hon. R. Terrence Ney, John M. Oakey, Jr., Esq., Glenn W. Pulley, Esq., Barbara S. Williams, Esq. and Wallace B. Wason, Jr., Chair. Because the results of our committee could have ramifications for the Clerks of Court or Jury Control Offices run by the Sherriff's Department, we asked the Clerks' and Sheriffs' Associations to appoint liaisons, and the Conference members were joined by Hon. D. Bruce Patterson of Rockbridge County and Sheriff Lane Perry of Henry County.

Requirements Under Existing Laws

The laws that currently govern these issues are contained in the appendix to this memorandum. The essential process is summarized in this section.

The clerk, in the presence of the judge, creates a master panel that includes enough potential jurors to cover all of the trials during the term, or as many jurors as the judge directs. Va. Code § 8.01-348. The master panel must be in alphabetical order and must include the name, age, address, occupation and employer of each juror. Va. Code § 8.01-351.

Jones, Blechman, Woltz & Kelly, P.C.

Page 2

The master panel list is kept in the clerk's office and is available for inspection by counsel in any case to be tried by a jury during the term. *Id.*

Upon request, the clerk or sheriff or other officer responsible for notifying jurors to appear in court must provide the trial panel to counsel of record. Va. Code § 8.01-353. Like the master panel, the trial panel shall show the name, age, address, occupation and employer of each person on the panel. *Id.*

The trial panel must be provided at least forty-eight hours before the trial. *Id.* The parties are responsible for verifying the accuracy of the information in the trial panel; even if the clerk or sheriff makes a mistake, their error is not grounds for a mistrial or assignable as error on appeal. *Id.*

At trial, the court will replace any members of the trial panel who should be dismissed for cause. Va. Code § 8.01-358. Thereafter, in an ordinary civil case, the parties work from a trial panel of at least thirteen jurors. Va. Code § 8.01-359. The sides each use their three preemptory strikes to reach a final jury of seven. *Id.* For each desired alternate, three additional members of the panel are required, and each side gets one strike. Va. Code § 8.01-360.

Discussion of Issues Under Existing Laws

Depending on the jurisdiction and the anticipated number of trials, the master panel can include hundreds of names. The information in the master panel is helpful, but it does not provide counsel with the names or information for those jurors who will be participating in a specific trial.

In order to learn about the particular jurors who will be called for their trial, attorneys need to obtain the trial panel. There is some variance in the way trial panels are produced, particularly when some of the largest jurisdictions are compared to other jurisdictions. The variability issues deal with the timing of the trial panel list production, the content of the list and the correlation to actual trial jurors.

As far as timing, the law indicates that the trial panel must be produced forty-eight hours before the trial. Sometimes, the list is provided well in advance of the trial. Other times, the list is not available until much later.

If the trial starts on a Monday and the trial panel list is not produced until the last possible moment, it creates problems for the lawyers who will be trying the case. They may not have time during normal business hours to share the list with local counsel, their clients or others. Since the parties are responsible for any errors contained in that list, they need the list with enough time to make effective use of it. It is not an efficient use of court time for parties to be asking the jurors in open court questions they could have verified before trial, such as address, employer, etc.

Jones, Blechman, Woltz & Kelly, P.C.

Page 3

The lists provided to counsel do not always include all of the details required to be produced. Counsel may have to request the additional information to which they are entitled, which causes a delay, or they may have to ask during voir dire.

Approximately 88 of the 120 circuit court clerks use a standard jury questionnaire form prepared by the office of the Executive Secretary, either as-is or with modification. The remaining clerks have devised their own forms. Some jurisdictions collect and distribute to lawyers information that is not collected by other clerks, e.g., spouse's occupation. Samples of several questionnaires are included in the appendix.

On some occasions in some of the largest jurisdictions, the lawyers have been provided with a list of hundreds of names along with an indication that those are the persons scheduled to be present on the day the trial is scheduled to start, without there being any specification which jurors have been assigned to a particular trial. Shortly before the trial starts they are provided with a list of jurors who will be coming into their courtroom. Those jurors may be listed by juror number or re-numbered in the order selected for the trial, as opposed to the way they were listed in the master panel or pre-trial trial panel.

Other times, the lawyers are provided with a list containing a manageable number of jurors. Then, on the day of trial, they find themselves without a jury because the court did not have enough jurors come in that day to cover all of the trials. When they start picking a jury, fewer than half of those from their trial panel list are part of the actual venire. The remainder of the venire consists of jurors who were struck or excused from other courtrooms.

Since the trial will be heard by seven jurors and selected from thirteen, counsel ought to be able to obtain a list that enables them to prepare for the jurors who will be in their courtroom. Jurors should remain in a consistent order from list to list so any information gathered from a previous list does not have to be shuffled to fit the new order. Obviously, the system needs to take account of the possibility of no-shows as not all jurors who are summoned will appear. However, it was thought that there should be some number or a range of numbers that will allow the flexibility that the court/clerk/sheriff/jury control office may need while still providing the litigants with a fair preview of their jury.

Questions Considered by the Committee

- 1) Is it feasible and would you support changing the requirement for the timing of the trial panel production, e.g., no later than two business days before trial?
- 2) Is it feasible and would you support a requirement, excluding unusual circumstances, that a trial panel contain a specific number or a range of potential jurors, e.g., unless a trial has an inordinate amount of pre-trial publicity, involves a prominent party or is expected to last more than one week, or other unusual circumstances, the trial panel list shall [include 25 names] [be no less than 20 and no more than 40 names], etc.?

- 3) Is it feasible and would you support changing the requirement for the information to be included in the trial panel list, e.g., marital status or spouse's occupation?
- 4) Should there be two different trial panels, a "pre-trial" and a "day of" list, and, if so, how should they be formatted?
- 5) Are there any other changes that should be considered for the master panel process, timing or content?
- 6) Are there any other changes that should be considered for the trial panel process, timing or content?

Discussion

There was a consensus that changing the date for the availability of the trial panel list from two days to two business days would be a good idea. Even though there are calls that come in as late as the night before trial from prospective jurors requesting to be excused, there is no reason why this deadline cannot be adjusted.

Although the lawyers agreed that they would like to have the information, there was strong resistance from the Clerk's Association to adding a requirement for the collection and disclosure of information about the spouse. They viewed it as an invasion of privacy and would oppose it to protect their constituents.

There was not much discussion about the master panel. It seemed to be functioning fine.

The limited and specific trial panel disclosure generated the most discussion. Several of the largest jurisdictions (Fairfax, Loudoun and possibly Norfolk) oppose providing the trial panel of specific jurors in advance of the day of trial. The primary objections are logistics and additional costs.

In Fairfax, for example, there are usually 5 to 8 jury trials starting each Monday morning. When jurors report on Monday their id badge is scanned and the jury system randomly selects jurors for each of those trials. Each juror is assigned a "group number" and each group has between 6 and 9 members (with varying numbers in each group they can usually get the exact number they need). They generally call 17 jurors for civil cases and 24 jurors for 1-day felony cases, however they do not call in enough jurors to start every jury trial. About half the cases start at 10:00 am. Jurors not chosen ("strike jurors") are sent back to the jury assembly room and again randomly assigned to new jury panels and sent to another courtroom for a case that did not start at 10:00 am. This cuts down on the cost of calling many more jurors each Monday morning so each courtroom will have the minimum of 17 or 24 jurors needed for that case. Even with this procedure, Fairfax County will summon between 12,000 and 13,000 jurors this year.

Fairfax does have a procedure for parties to request a "pre-panel." When a pre-panel is requested, the number of civil jurors is increased from 17 to 25 and the number of criminal jurors

Jones, Blechman, Woltz & Kelly, P.C.

Page 5

is increased from 24 to 30 to allow for "no shows". At \$30/juror, that is an additional \$180 to \$240 in juror pay for each trial.

The Fairfax Clerk is concerned that if "pre-panels" become the norm they will not be able to effectively use the many "strike" jurors that are excused from the 10:00 trials and the annual jury payment costs will skyrocket because they will be required to call an average of 50-60 more jurors each Monday (\$1,500 - \$1,800).

In Loudoun, the night before a jury trial the jury manager updates an automated phone message that tells jurors who have been summoned whether their group numbers will be required to report the following morning. On the morning of trial they still may not know which groups of jurors will be assigned to a specific courtroom because of last minute changes (settlements, continuances, change of pleas, etc.). That clerk believes that preparation of panel lists for each trial would be "very challenging". He also states that this would require a larger Master Jury List because more jurors would have to be called for each jury trial day since they would not be able to shift the "strike" jurors or juror "groups" from courtroom to courtroom as needed.

Other large jurisdictions with multiple simultaneous juries (Henrico, Richmond, Rockingham, Fauquier, York, Chesapeake, Virginia Beach) either already provide limited and specific trial panels or do not have any objection to doing so. We were not able to determine how these jurisdictions are able to provide the specific trial panel lists without having the budgetary implications raised by Fairfax and Loudoun. We did note that in some of those jurisdictions, the eventual jury may include many people who were not on the trial panel list produced before the trial because jurors struck from other cases are often added to the venire pool to replace the no-shows or the strikes for cause.

We considered whether uniformity could be reached through a modification to the Uniform Pretrial Scheduling Order under Rule 1:18 that would allow a judge to specify a trial panel in advance in those cases where the parties really needed it. We ultimately decided against this because we felt that those requests would create more work for all concerned. We believed that a better result would be one in which the total pool of jurors could simply be divided in advance for those trials that are sufficiently complicated, expensive, significant, etc. that they receive a priority, start or first place setting.

Recommendations

The Committee offers the following recommendations:

I. That Legislation be Introduced to Amend Va. Code 8.01-353(A) as Follows:

§ 8.01-353. *Notice to jurors; making copy of jury panel available to counsel; objection to notice.*

A. The sheriff shall notify the jurors on the list, or such number of them as the judge may direct to appear in court on such day as the court may direct. Such notice shall be given a juror as provided by § 8.01-298. Verbal direction given by the judge, or at his direction, to a juror who has been given notice as hereinbefore provided that he appear at a later specified date, shall be a sufficient notice. Any notice given as provided herein shall have the effect of an order of court. No particular time in advance of the required appearance date shall be necessary for verbal notice hereunder, but the court may, in its discretion, excuse from service a juror who claims lack of sufficient notice. Upon request, the clerk or sheriff or other officer responsible for notifying jurors to appear in court for the trial of a case shall make available to all counsel of record in that case, a copy of the jury panel to be used for the trial of the case at least ~~forty-eight hours~~ **two business days** before the trial. Such copy of the jury panel shall show the name, age, address, occupation and employer of each person on the panel. Any error in the information shown on such copy of the jury panel shall not be grounds for a mistrial or assignable as error on appeal, and the parties in the case shall be responsible for verifying the accuracy of such information.

B. No judgment shall be arrested or reversed for the failure of the record to show that there was service upon a juror of notice to appear in court unless made a ground of exception in the trial before the jury is sworn.

(Code 1950, § 8-208.16; 1973, c. 439; 1974, c. 243; 1976, c. 261; 1977, c. 617; 1980, c. 452; 1981, c. 150; 1988, c. 350.)

II. That Members of the Local Bars in Jurisdictions That Do Not Provide a Specific Trial Panel of a Limited Number of Potential Jurors in Advance of the Day of Trial Consider Forming Delegations to Raise the Statutory Obligations with the Clerks of Their Jurisdictions and Discuss Possible Solutions

Conclusion

Thank you for consideration of this report.

APPENDIX

Master Panel

§ 8.01-348. How names of jurors drawn from box.

Prior to or during any term of court at which a jury may be necessary, the clerk or deputy clerk, in the presence of the judge or, in his absence, a commissioner in chancery appointed for the purpose by the judge, shall, after thoroughly mixing the ballots in the box, openly draw therefrom such number of ballots as are necessary for the trial of all cases during the term or as the judge shall direct. However, a commissioner shall not be eligible to witness the drawing of a jury to be used in the trial of any case in which he will be interested as attorney or otherwise.

(Code 1950, § 8-208.13; 1973, c. 439; 1977, c. 617; 1983, c. 425.)

§ 8.01-351. Preparation and disposition of list of jurors drawn.

The clerk shall make and sign a list of the names on the ballots in alphabetical order showing the name, age, address, occupation and employer of each juror, and shall deliver an attested copy of the list to the sheriff. The list shall be signed also by the judge or the commissioner in chancery appointed by the judge. The list shall be available in the clerk's office for inspection by counsel in any case to be tried by a jury during the term.

(Code 1950, § 8-208.15; 1973, c. 439; 1977, c. 617; 1988, c. 818.)

Trial Panel

§ 8.01-353. Notice to jurors; making copy of jury panel available to counsel; objection to notice.

A. The sheriff shall notify the jurors on the list, or such number of them as the judge may direct to appear in court on such day as the court may direct. Such notice shall be given a juror as provided by § 8.01-298. Verbal direction given by the judge, or at his direction, to a juror who has been given notice as hereinbefore provided that he appear at a later specified date, shall be a sufficient notice. Any notice given as provided herein shall have the effect of an order of court. No particular time in advance of the required appearance date shall be necessary for verbal notice hereunder, but the court may, in its discretion, excuse from service a juror who claims lack of sufficient notice. Upon request, the clerk or sheriff or other officer responsible for notifying jurors to appear in court for the trial of a case shall make available to all counsel of record in that case, a copy of the jury panel to be used for the trial of the case at least forty-eight hours before the trial. Such copy of the jury panel shall show the name, age, address, occupation and employer of each person on the panel. Any error in the information shown on such copy of the jury panel shall not be grounds for a mistrial or assignable as error on appeal, and the parties in the case shall be responsible for verifying the accuracy of such information.

B. No judgment shall be arrested or reversed for the failure of the record to show that there was service upon a juror of notice to appear in court unless made a ground of exception in the trial before the jury is sworn.

(Code 1950, § 8-208.16; 1973, c. 439; 1974, c. 243; 1976, c. 261; 1977, c. 617; 1980, c. 452; 1981, c. 150; 1988, c. 350.)

Final Composition of Jury

§ 8.01-358. Voir dire examination of persons called as jurors.

The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

(Code 1950, §§ 8-208.28, 8-215; 1973, c. 439; 1977, c. 617; 1981, c. 280.)

§ 8.01-359. Trial; numbers of jurors in civil cases; how jurors selected from panel.

A. Five persons from a panel of not less than 11 shall constitute a jury in a civil case when the amount involved exclusive of interest and costs does not exceed the maximum jurisdictional limits as provided in § 16.1-77 (1). Seven persons from a panel of not less than 13 shall constitute a jury in all other civil cases except that when a special jury is allowed, 12 persons from a panel of not less than 20 shall constitute the jury.

B. The parties or their counsel, beginning with the plaintiff, shall alternately strike off one name from the panel until the number remaining shall be reduced to the number required for a jury. Where there are more than two parties, all plaintiffs shall share three strikes between them and all defendants and third-party defendants shall share three strikes between them.

C. In any case in which there are two or more parties on the same side, if counsel or the parties are unable to agree on the full number to be stricken, or, if for any other reason a party or his counsel fails or refuses to strike off the full number of jurors allowed such party, the clerk shall place in a box ballots bearing the names of the jurors whose names have not been stricken and shall cause to be drawn from the box such number of ballots as may be necessary to complete the number of strikes allowed the party or parties failing or refusing to strike. Thereafter, if the opposing side is entitled to further strikes, they shall be made in the usual manner.

D. In any civil case in which the consent of the plaintiff and defendant shall be entered of record, it shall be lawful for the plaintiff to select one person who is eligible as a juror and for the defendant to select another, and for the two so selected to select a third of like qualifications, and the three so selected shall constitute a jury in the case. They shall take the oath required of jurors, and hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as a jury of seven.

Jones, Blechman, Woltz & Kelly, P.C.

Page 9

(Code 1950, § 8-208.21; 1973, c. 439; 1974, c. 611; 1975, c. 578; 1977, c. 617; 1985, c. 188; 2005, c. 356.)

§ 8.01-360. Additional jurors when trial likely to be protracted.

Whenever in the opinion of the court the trial of any criminal or civil case is likely to be a protracted one, the court may direct the selection of additional jurors who shall be drawn from the same source, in the same manner and at the same time as the regular jurors. These additional jurors shall have the same qualifications, and be considered and treated in every respect as regular jurors and be subject to examination and challenge as such jurors. When one additional juror is desired, there shall be drawn three veniremen, and the plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall each be allowed one peremptory challenge. When two or more additional jurors are desired there shall be drawn twice as many venireman as the number of additional jurors desired. The plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall each be allowed one additional peremptory challenge for every two additional jurors. The court shall select, by lot, those jurors to be designated additional jurors. The plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall be advised by the court which jurors are additional jurors at the time the jury is impaneled; however, in no event, shall any juror be made aware of his status as a regular or additional juror until he is excused as a juror. Before final submission of the case, the court shall excuse any additional jurors in order to reduce the number of jurors to that required by §§ 8.01-359 and 19.2-262.

(Code 1950, § 8-208.22; 1973, c. 439; 1977, c. 617; 1992, c. 536; 1998, c. 279.)

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