

Is Judicially Supervised Jury Selection in Pennsylvania an Emerging Right?

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It is perhaps axiomatic that an essential component of the constitutional right to trial by jury is the existence of a jury that is both fair and impartial. Impartiality is typically facilitated and protected through the voir dire process where potential jurors are vetted to discern actual bias or the appearance of partiality. As set forth more fully below, recent local rule changes, perhaps prompted by Pennsylvania Supreme Court concurring decisions, suggests that the right to judicial supervision of the jury selection process may be an emerging right in the Commonwealth.

In light of several recent Court decisions and perhaps more importantly, pointed criticisms contained in concurring opinions, the Pennsylvania Court of Common Pleas of Allegheny County felt compelled to alter its long standing voir dire process by amending its local rules to now permit any party to request that a judge preside over voir dire and the jury selection process in civil cases. L. R. Civ. P. 212.2(d).

Prior to the recent changes, the Civil Division of the Court of Common Pleas of Allegheny County did not assign a trial judge to preside over jury selection. Instead, the “Calendar Control Judge” delegated that duty to a court clerk in the Jury Assignment Room. Potential jurors met individually with the clerk and the parties’ attorneys. The clerk asked a series of standardized questions, and then the lawyers could pose up to five additional inquires. The clerk permitted brief follow-up questions in an effort to fully appreciate the jurors’ replies. If an attorney wished to challenge a juror for cause, the clerk noted the challenge, and, after interviewing all potential jurors, the clerk and attorneys returned to the Calendar Control Judge’s courtroom. There, the judge, reading the transcript of what occurred just moments ago, and only a few yards away, ruled on the challenges for cause. Allegheny County judges in the civil division did not view the demeanor of prospective jurors, unless an attorney asked for the juror to appear before the judge in chambers to recreate the initial voir dire.

In 2017, the Pennsylvania Supreme Court, in the case of *Shinal v. Toms*, 162 A.2d 429 (Pa. 2017), noted that the discretion afforded to a trial judge in granting or denying challenges for cause was directly linked to the fact the trial judge hears what the potential juror says and

directly observes the juror’s demeanor, hesitation, doubt and nervousness. The *Shinal* Court went on to hold that “because the law endeavors to hold the jury system free from any appearance of partiality, it is incumbent upon *trial courts*” to explore and remove any bias.

On May 14, 2018, the Pennsylvania Superior Court revisited the issue of challenges for cause during voir dire and in particular, the jury selection process utilized by the Allegheny County Civil Division. In *Trigg v. Children’s Hospital of Pittsburgh of UPMC*, the Superior Court reversed and remanded a medical malpractice case because Plaintiff’s counsel was forced to use three-fourths of his peremptory charges on jurors that exhibited bias during voir dire. The *Trigg* Court focused on the lack of judicial observation of the voir dire process in Allegheny County because it is conducted by a clerk and how this unfairly impacts the Court’s ability to make a fair and informed ruling on whether a potential juror exhibited bias in his or her responses. The majority opinion emphasize how critical judicial oversight is on conducting fair voir dire and the concurring opinion by Judge Bowes, which was joined by Judge Olson, urged Allegheny County to re-examine and revise its voir dire procedures to conform to Pennsylvania law.

The Superior Court’s decision in *Trigg* was appealed and the Pennsylvania Supreme Court ultimately reversed and remanded to the trial court but it confined its analysis to a waiver issue alone. The Court concluded that the plaintiff should have objected to the judge’s absence in the voir dire process from the outset—even though the local Allegheny County rules actually provided for his absence.

However, both concurring opinions in the case filed by Justice Donohue (joined by Justices Baer, Dougherty, Wecht and Mundy) and Justice Wecht (joined by Justice Dougherty) emphasized the right to a jury in civil jury trials provided by the Pennsylvania Constitution and the essential role the voir dire plays in preserving that right. They also explored Pennsylvania case law on actual bias challenges, focusing again on the seminal opinion in *Shinal v. Toms*, 162 A.3d 429, 440 (Pa. 2017). A venireperson may be challenged for bias that is either implied or actual. Actual bias arises when a juror’s prejudice “is revealed through his or her conduct or answers.” Both concurring opinions emphasized that Pennsylvania case law makes clear that actual bias is largely evaluated by observing the juror’s conduct face-to-face.

The concurring opinions expressed “reservations” and “deep misgivings” about a civil voir dire process conducted outside the presence of a judge. Like the Superior Court, both

concurrences determined that a second round of questioning would not yield adequate information for a judge to evaluate a prospective challenge based on actual bias. Each of the concurring opinions called for the Civil Procedural Rules Committee to consider whether civil jury selection should mirror criminal jury selection by requiring the judge's presence unless the parties agreed to waive it. Although not part of the holding, this strongly worded guidance leaves little doubt about the value Pennsylvania appellate courts place on a trial judge's personal observation of jury selection.

While the recent changes to the voir dire process in Allegheny County may render concerns regarding the lack of direct judicial involvement moot going forward, to the degree that other counties across Pennsylvania continue to conduct civil jury selection outside the presence of a judge, prudent counsel should consider objecting to this process both at the outset and when challenging a prospective juror based on actual bias—even if rules or local custom render the objection futile. The Supreme Court of Pennsylvania has clearly signaled that in their view, such a process is inadequate to properly evaluate a potential juror for bias.

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