

Lawyer-Conducted Voir Dire Is a Seventh Amendment Right

by Jackson Howard

The Seventh Amendment of the Constitution of the United States provides as follows:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The amendment gives rise to the questions, "What is encompassed by the right to a trial by jury?" and "What is its relationship to the principle of due process?"

Would anyone argue that a plaintiff or defendant is not entitled to an attorney? Would anyone argue that a litigant is not entitled to cross-examine a witness? These arguments wouldn't be taken seriously. On what basis, then, is there an argument that a litigant does not have the right to participate directly in the impanelling of the jury, especially in light of the Seventh Amendment and in the face of the clear language of Rule 47 of the Utah Rules of Civil Procedure?¹ Unless litigants are allowed to participate directly in the *voir dire* process, they are being denied their constitutional rights.

With all respect to the judiciary, judges do not see the jury from the same vista that litigants see it. Furthermore, not all judges are skilled at conducting *voir*

dire examination. Many judges seem to have as their principal concern to "get this over with as quickly as possible." Although litigants have no desire to prolong the ordeal, at the same time they have a substantial interest in who sits on the jury, and what latent biases and prejudices are present. Admittedly, lawyers, like judges, possess different levels of skill but, after all, the litigant selects the lawyer and takes his or her infirmities and skills as a risk of that selection. The litigant never selects the judge.

◆
"Nearly every state in the union recognizes a litigant's right to directly participate in voir dire examination."
◆

Nearly every state in the union recognizes a litigant's right to directly participate in *voir dire* examination, and it does not place any great burden on the court. For example, in Idaho, each member of the panel completes a pre-impanelling questionnaire. The lawyers are furnished the questionnaire responses in advance of trial so that *voir dire* examination is shortened by the answers to the questionnaire, many of which the lawyer would be reluctant to ask in any *voir dire* conducted orally. With the information acquired by the questionnaire, the lawyers conduct *voir dire* in a time not greater than court-conducted *voir dire*.²

In every jury trial, I make a motion to allow counsel to conduct *voir dire*. I did so in the case *Evans v. Doty*, 824 P.2d 460 (Utah Ct. App. 1991). In *Evans*, the trial court did not permit counsel to conduct *voir dire* and refused to ask several questions contained in the plaintiff's written requests which were designed to probe the jurors' exposure to tort reform propaganda. Although the Court of Appeals did not reverse in that case, it provided interesting commentary on the right of the parties to conduct their own *voir dire*. The Court of Appeals noted: "In sum, we believe the trial court should have asked the potential jurors some of the questions proposed by [the plaintiff] about their exposure to tort reform and medical negligence propaganda - not just if they had been biased by the exposure." *Evans*, 824 P.2d at 467. Although the Utah Court of Appeals did not expressly endorse counsel-conducted *voir dire*, it opened the door slightly by observing that "a trial judge should liberally allow questions 'designed to discover attitudes and biases, both conscious and sub-conscious,' even though such questions go beyond that needed for challenges for cause." *Evans*, 824 P.2d at 462 (quoting *Doe v. Hafen*, 772 P.2d 456, 457 (Utah Ct. App. 1989)).

The problem with the court's reasoning in *Evans* is that *voir dire* examination is not totally effective if limited to written questions submitted to the judge. The information sought is best obtained if a

Mr. Howard is a shareholder in the Provo law firm Howard, Lewis & Petersen.

¹Rule 47 provides as follows:

The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional

questions of the parties or their attorneys as is material and proper.

UTAH R.CIV.P. 47(a).

²One might refute this essay by reference to the O.J. Simpson trial. I do not suggest that the O.J. Simpson trial should be a standard, for the *voir dire* conducted in that trial was a total aberration, substantially unnecessary, and evidence of a courtroom out of control. The O.J. Simpson case is not the standard for *voir dire* examinations throughout the United States.

colloquy is permitted between counsel and the juror. *Voir dire* examination is similar to cross-examination – much is learned from the tone and tenor of the question and the tone and tenor of the response. This kind of questioning is an art, and cannot be reduced to written interrogatories. How many times has a good cross-examiner caused a witness to completely reverse his or her testimony simply by the nature, manner, and persistence of questioning? This is the art of advocacy, and the same principles apply to *voir dire* examination. Why this proposition continues to elude Utah judges is incomprehensible to me.

After *Evans*, I tried a case called *Barrett v. Peterson*, 868 P.2d 96 (Utah Ct. App. 1993). I filed a motion to conduct my own *voir dire*, which the court denied. The Court of Appeals noted that although lawyer-conducted *voir dire* is permitted under Utah Rule of Civil Procedure 47(a), "Utah courts, according to long-standing custom, usually conduct *voir dire* themselves." *Barrett*, 868 P.2d at 101 n.6. This is the weakest of reasoning in support of judge-conducted examination.

Since *Barrett*, I have tried other cases and have filed my motion and brief citing *Evans* and *Barrett*, without success. Judges continue to believe that only they know how to conduct *voir dire* examinations, or that somehow *voir dire* will be unduly time-consuming or an attempt to prejudice the jury.

Is it worse to risk prejudicing the jury than not to know the prejudices of the jurors? I say no because the court has vast powers to supervise *voir dire*, and can easily prevent lawyers from converting *voir dire* examination into a mini-trial of personal prejudices. On the other

hand, litigants must be given the right to ferret out the subtleties that otherwise are obscured or left unanswered in court-conducted *voir dire* examination. Only in rare instances does the effect of undetected bias become apparent. Most of the damage is shrouded in the language of the verdict, "no cause of action."

◆
"Is it worse to risk prejudicing
the jury than not to know the
prejudices of the jurors?"
◆

In cases in which the court has conducted the *voir dire* and permitted counsel to ask follow-up questions, I have always found a challenge for cause to at least one juror, even after the judge has exhausted what he or she believed to be an adequate *voir dire* examination. Here is an example from a medical malpractice case. The court had completed the *voir dire* questioning and permitted limited examination by counsel. One member of the jury panel had been my client. That panelist also was a friend of the defendant doctor's father, and belonged to the same religion. On first impression, one would think this juror would be favorable to me. Although I cannot set forth the entire exchange between the juror and me, it went, in abbreviated form, something like this:

Q: John, I know you have been my client, and I suspect that you respect and have confidence in me. Is that true?

A: Yes.

Q: At the same time, I know that you are familiar with the defendant's father and probably see him on a weekly basis. Is that not true?

A: Yes.

Q: Now, John, you've told the court that you can be impartial and fair in this case and that you can render a verdict without partiality to either side, but I am wondering if you have fully thought out the nature of your relationship with Doctor Blank's father. Don't you think that you might be embarrassed in seeing him again if the facts required you to render a substantial verdict for the plaintiff? Would that not cause you some trepidation and perhaps prevent you from being totally objective in this case?

A: It might.

Based on the responses to those questions, the juror who had already told the court that he could sit in this case and impartially reach a verdict was excused. I could recite many other examples, but all trial lawyers have had this experience.

In conclusion, let me say that the refusal to allow lawyers to participate in *voir dire* examination is a travesty and smacks of judicial abuse of authority. In my opinion, it is reversible error not to allow lawyer-conducted *voir dire*. The dilemma is that undiscovered biases and prejudices can never be a basis for appeal, and consequently, we are dealing with a double negative that favors the position of the court. It is something like the parachute manufacturer that claims it has never had a dissatisfied customer.³

³Reference should be made to other articles on the subject. See, e.g., Fred D. Howard, *Judge Versus Attorney-Conducted Voir Dire*, 4 UTAH B.J., Oct. 1991, at 13.