

# PRACTICE POINTERS

## The Basics of Jury Selection

by Francis J. Carney

This is not another article about picking juries. We don't really "pick" jurors in Utah because we don't have meaningful (i.e., attorney-conducted) *voir dire*. We make hunches on sparse information and then bounce the worst of them.

So this article isn't about what to look for in a potential juror. It is, instead, for the novice who has never tried a civil jury case in state court and hasn't a clue about how to do it. There's nothing in that to be ashamed of. No one learns this in law school, nor is there anything out there that explains it.<sup>1</sup>

### The Jury Panel

The trial jury of eight (and sometimes an alternate) is chosen from the jury panel, which consists of anywhere from about twenty-five to fifty or more citizens selected from the master jury list for the county.<sup>2</sup> The size of the panel depends on the notoriousness of the cause or the parties, or the likely length of the trial. Normally it will be about twenty-five panelists unless counsel and the trial judge determine that more will be necessary to get the eight jurors needed in a civil action.

First morning of trial. Sweaty palms. Before the action starts, counsel briefly meet with the judge to work out any last-minute problems. Then all return to the courtroom. The bailiff goes to the jury assembly room and brings the panel to

the courtroom. The courtroom clerk gives each counsel a list of the jury panel, including names and addresses.

The panel files into the courtroom and is seated behind the bar by the bailiff. You're seated at counsel table; plaintiff's counsel at the table closest to the jury box, defense counsel at the other. (If you're really bush league, arrive early and claim the table closest to the jury box, even though you are the defense lawyer.)

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Everybody settles down and the judge greets the panel. Then the clerk, who has all the potential jurors' names on slips of paper, puts them into a box and mixes them up. One by one, she draws them out and calls the names aloud.

### Musical Chairs

As their names are called, the panelists are reseated in front of the bar. For example, the first, Number 1, is seated in the first chair in the jury box. Then the rest of the jury box is filled with the next seven or however more it holds. As their

names are called, the rest of the panel take their seats in order around the courtroom.

Keep track of where everyone is seated; it's important. I use a sheet of paper with several columns. The far left column has the numbers of the panelists, say 1-25. The next column has their names. The third has a blank space for some descriptive information so I can remember who they are. The fourth column has space for comments that I fill in later. The fifth has a space for my rough rating system: "NO!" for a definite strike, "YES!" for a definite keeper, and so on.

If there are eight people seated in the jury box, scratch a dark line under Number 8 on your chart. If there are another eight in the front row on the right side of the courtroom, put another dark line under Number 16. And another under Number 24, for the next eight on the front row on the left. This way you can remember who is sitting where. For example, I know from my chart that the lady in the blue dress seated at the far left seat of the left front row is Mrs. Brown, Number 17. The first person on the left front row must be Number 9, Mr. Sorensen. And so on.

So the first panelist, Mr. O'Rourke, is called. I write his name in my first column. I may write a short description: "Gray suit, bolo tie." This happens quickly, and you have to keep up. Mr.

<sup>1</sup>Rule 47, Utah Rules of Civil Procedure, provides an outline but not much more. For criminal trials, review Rule 18, Utah Rules of Criminal Procedure.

<sup>2</sup>The master jury list is drawn from voter registration and driver's license

records. The procedures followed to select the panel are set forth in Rule 4.404, Utah Code of Judicial Administration, and more generally in section 78-46-1 et seq., Utah Code Annotated (1993).

O'Rourke seems ill-tempered as he takes his new seat, a perfect defense juror. So I write a note under my "comments" column: "nean!" This goes on until all the panelists are reseated.

Now the judge has the panelists stand and take the "oath of the panel." Then the *voir dire* starts.<sup>3</sup>

### **Voir Dire**

Most judges conduct the *voir dire* themselves and allow attorneys little or no role in directly questioning the jury panel. Some judges even insist that the attorneys ask the questions to the judge, not to the panel. So the result is something like this: "Your Honor, I wonder if you might ask Mrs. Jones in what capacity she knew Dr. Mann. Was she an employee at his clinic?" To which the judge says, "Yes, that's an appropriate question, counsel. Mrs. Jones, you heard the question, how is it that you know Dr. Mann?"

The judge usually will start off by having each panelist in turn stand up, state his or her name, address, employment, marital status, spouse's employment, and level of schooling. When that first round is finished, more specific *voir dire* is done.

The judge will ask a list of questions on statutory disqualifications, such as being under the age of eighteen or not speaking English. These are found in Utah Code Annotated section 78-46-7. Temporary exemptions from jury duty also are raised, such as undue hardship.

Then come the additional questions the attorneys and the judge have agreed upon. (That's the "proposed *voir dire*" you were supposed to submit by the time of the pretrial conference.) For example, "Has any member of the panel ever been a party in a civil action seeking damages? Please raise your hands."

All those raising their hands are noted. Then the judge may explore the specifics. There is some artistry in this. Normally we don't take the time to individually question each panelist privately, so there is always the possibility that inflammatory answers will "taint" the panel. An experienced judge will cut short anyone who seems on the verge of expressing inflammatory answers, and will keep the panelists to short, predict-

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able answers, or question them privately in chambers.

This is a true-life example from a medical malpractice trial. The judge asks, "Do any members of the panel have any strong opinions about medical malpractice lawsuits?" Five or six, including Mr. Jensen, raise their hands. The right way to do it would have been to question privately, in chambers, those who raised their hands. The wrong way was to ask, in open court, "Tell us about those opinions, Mr. Jensen." Mr. Jensen is only too happy to let everyone know that there are too many lawyers, too many malpractice suits, and that the plaintiff's lawyer is notorious for filing frivolous suits. Get the point? Let's hope your trial judge does.

When the questioning by the court is finished, the judge may allow some

follow-up by the attorneys. More commonly, you'll be asked to approach the bench for an opportunity to discuss other questions to be put to the panel by the judge.<sup>4</sup> There's an increasing variation in approach used by judges so you'll want to ask at the pretrial conference whether the court permits attorney *voir dire*, and with what restrictions.

### **Challenges to the Panel**

Once in a rare while you may encounter a challenge to the panel (or, in the quaint language of an earlier time, "to the array"). Suppose every one of the twenty-five people seated around you is a white, middle-aged, pipe-smoking male member of the NRA. There's something suspicious about it, but there's nothing to warrant a cause challenge as to any one of the group. Nevertheless, the panel, as a whole, isn't representative.

This is where the "challenge to the array" is used. Read Rule 47(d), Utah Rules of Civil Procedure, and Utah Code Annotated section 78-14-16. The challenge to the panel is justified for a "material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn."

### **Challenges for Cause**

When the *voir dire* is finished, you "try" the challenges for cause. Which means you approach the bench again and discuss with the court (out of the hearing of the panel) which jurors ought to be stricken for cause, that is, for the reasons set forth in Rule 47(f), Utah Rules of Civil Procedure.

Mr. Jensen ought to be stricken for cause because he harbors a state of mind

<sup>3</sup>Make a motion for attorney-conducted *voir dire* if you feel strongly enough about it. Read Rule 47(a), Utah Rules of Civil Procedure. *Evans v. Doty*, 824 P.2d 460 (Utah Ct. App. 1991), and Fred Howard's article "Judge Versus Attorney-Conducted *Voir Dire*" in the October 1991 *Utah Bar Journal*, at page 13.

<sup>4</sup>Written panel questionnaires are becoming more common and are a useful way of expediting the process if used with discretion. These are distributed to the panel before it is brought into the courtroom, filled out, and copies made for counsel.

which will keep him from being impartial. Or maybe someone has a must-keep business trip in three days. Those sorts of panelists will be stricken for cause.

When that is done, you go back to your table. The judge asks each counsel in turn: "Counsel, do you pass the panel for cause?" You reply, "Yes, subject to the matters we discussed at the bench." Make sure that you have made a record of any challenges for cause which were not granted, or have been given permission to make a record later on.

### Peremptory Challenges

Then the peremptory (not "pre-emptory") challenges start. The clerk has kept a blue sheet with the names and numbers of all the panelists. She has crossed through those stricken for cause. (So have you on your chart.) The bailiff gives the blue sheet to the plaintiff's lawyer first. While this is under way, the judge gives the jurors a stock speech to keep them entertained while the attorneys are busy making their peremptories.<sup>5</sup>

Here's where keeping score pays off. Suppose you are picking a jury of eight with no alternates out of a panel of twenty-five. Four panelists have been stricken for cause, Numbers 1, 8, 13, and 23. You've crossed them off your chart. Each side gets three peremptories, for a total of six. Therefore, you're going to choose your jury from the first fourteen remaining on the panel.<sup>6</sup>

Go down to Number 17. Cross out everyone below her: they are now irrelevant. In other words, your jury is going to be picked from the top fourteen remaining after strikes for cause. That means everyone above Number 18. No one below Number 17 can possibly be chosen so do not waste any of your

peremptories on them. (Trust me, this really happens.)

The idea is not to pick the best but to strike the worst. Plaintiff's counsel, JSB, goes first. She decides Number 9 is tight-fisted. So she takes the blue sheet, crosses through the name of Number 9, and writes "P's #1-JSB." The bailiff hands the blue sheet over to FJC, defense counsel. He has a bad feeling about Number 2. So he crosses out Number 2, and writes "D's #1-FJC." And so on, until each side has exercised their three peremptories.<sup>7</sup>

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There is some strategy in this. Suppose Number 4 strikes you as unfriendly. But he is also (you surmise) unfriendly to the other side as well. The game is to force the other side to use their peremptory to strike Number 4. So even though Number 4 is the one you most want to

strike, you'll save him for last, hoping that your opponent will bounce him first. And if you represent the defense, this often will work because you get the final shot.

A few words of caution. First, do not be obvious about your strikes. You can discuss the merits of someone sitting on the panel without you and your associates staring at them. Second, do not belabor the process. Take a few minutes, and no more, for each peremptory. Finish up before the court finishes its jury talk. I guarantee that your hunches will be as likely wrong as right no matter how many times you've done this exercise. Dawdling over it is not going to make it any better or easier.

When the defense has made its third peremptory, it's over. The bailiff takes the blue sheet to the clerk, who gives it to the judge, who gives it back to the clerk. The clerk then reads out the names of the eight chosen jurors. The judge thanks those not chosen and excuses them. Then the eight chosen are reseated in the jury box, in order, as Jurors 1 through 8. The judge gives them their oath as jurors, then swears the bailiff to his oath to take charge of the jury. Then there is a break, and opening statements are made on your return. —



<sup>5</sup>Some of these stock harangues have been quite entertaining. Judge Stewart Hanson, Sr.'s was one, and has been handed down to successive generations of Third District Judges. David Dee's talk on the history of the City-County Building was more interesting than worrying about the peremptories, but is now, sadly, obsolete.

<sup>6</sup>Rule 47 sets forth a rarely-followed procedure for choosing alternates. Usually,

court and counsel will stipulate just to choose a jury of nine and make the last chosen the alternate, rather than going through this process.

<sup>7</sup>See *Randle v. Allen*, 862 P.2d 1329 (Utah 1993), holding that under Rule 47(c), multiple defendants have a total of only three peremptories unless there is a "substantial controversy" between them.