

# Outline of Civil Jury Selection in Utah

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## SOME VOCABULARY

- *Array/Venire/Jury Panel*: synonyms meaning the jury panel from which the jury is chosen. Venire derives from the French infinitive “to come;” that is, to come to court. (Pronounced as anglicized to “vah-**nye**-ree, not like the French “vuh-neer”)
- *Peremptory*: A challenge made to a panelist without needing to give any cause. From the Latin *peremptorius*, meaning taking away forever. (**Per**-emptory, not **pre**-emptory. Think of Colonel “Bat” Guano in *Dr. Strangelove*: “*Per*-verts”, not “*pre*-verts.”)
- *Petit Jury*: A trial jury, as opposed to a grand jury. From the French for little or small, *petit*. (Pronounced as anglicized to “**pet**-it”, not “pe-**teet**,” as in French.)
- *Voir dire*: The process of questioning the jury panel to arrive at a petit jury. From the French infinitives “to see” and “to tell.” Pronounced “vwah-deer,” as in Bambi. An acceptable variant is “vwah dye-er.”
- *Venireman*: A member of the venire or a potential jury member. *Veniremen* have now become *venire members* and that awkward term should be avoided: *panelist* is easier and technically correct; plain old *juror* is most commonly used.
- *Talesman*: A courthouse hanger-on dragooned into jury service even though not formally part of the venire when the number of panelists turns out to be too few. Does anyone remember Otis and Goober in *Andy of Mayberry*? (Pronounced “**tay**-les-man” and not to be confused with “talisman.”)

## RIGHT TO JURY TRIAL

- Seventh Amendment, U.S. Constitution provides for a jury trial in all suits at common law where the value in controversy exceeds twenty dollars. (Sixth Amendment provides for a jury trial in all criminal actions.)  
*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 reexamined in any court of the United States, than according to the rules of the common law.*
- Utah Const, Art. I, §10 provides for a jury trial in all capital cases. It *implies* a constitutional right to juries in civil cases:  
*In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall*

*establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.*

- *International Harvester Credit Corp v. Pioneer Tractor & Implement*, 626 P.2d 418 (Utah 1981) held that Art.I, §10 guaranteed the right of jury trial in civil cases.
- This is codified at §78-21-1:  
*Right to jury trial. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered.*

## **PROCEDURES AND JURY TRIAL ACTS**

- 28 U.S.C. Ch. 121, §§1861- 1878, the “Jury Selection and Service Act of 1968” and DUCivR 47-1 sets forth the procedures for jury selection in federal courts. See, generally, C. Wright and A. Miller, 9A Federal Practice and Procedure: Civil 2d §§2481-86 (1995).
- *Utah Code Ann.* §§78-46-1 to 41 is the “Utah Jury and Witness Act” and sets forth jury procedures in state courts.
- Rule 4-404, *Utah Code of Judicial Administration*, further delineates jury procedures for state courts.

## **WAIVER OF RIGHT TO JURY TRIAL**

- Utah Const. Art. I, §10 provides: “A jury in civil cases shall be waived unless demanded.”
- Rule 38(b) of both the Federal and the Utah civil rules requires a jury demand be made within ten days after the service of the last pleading directed to an issue upon which there is a right to a jury. Failure to do so is a waiver under Rule 38(d).
- *Aspenwood, LLC et al. v. C.A.T., LLC et al*, 2003 UT App. 28 is a recent and thorough summary of the “waiver” rule on jury demands.

## **QUALIFICATIONS OF JURORS**

- Federal: 28 U.S.C. §1865(b) provides that all citizens age eighteen or older who have resided in the judicial district for at least one year are competent to serve unless they are convicted felons, are unable to speak, read, and understand English, or are incapable by reason of mental or physical infirmities to render efficient jury service.

- State: §78-46-7 provides that all citizens age 18 or older who are residents of the county and are able to read, speak, and understand English and who are not convicted felons may be jurors.

## EXEMPTIONS/EXCLUSIONS FROM JURY SERVICE

- Federal: 28 U.S.C. §1863(b)(5)(a) provides local district courts may provide for excuses from jury service to designated occupational groups on individual requests by members of that group. §1863(b)(6) provides that armed forces personnel, police officers, firefighters, and elected officials are “exempt” from jury service. §1866(c) provides that a district judge may “excuse” any person from jury duty for good cause, or for hardship, inconvenience, etc. as defined in §1869(j).
- State: §78-46-15 allows an “excuse” from jury service upon a finding of hardship, physical or mental disability, extreme inconvenience, or public necessity. §78-46-19 provides that no person shall be required to attend court for more than one day as a jury panelist (unless to finish a trial) or to serve as a trial or grand juror more than once in two years. Rule 4-404, *Utah Code of Judicial Administration*, allows the jury clerk to make preliminary determinations on qualifications and hardships.

## NUMBER OF JURORS

- Neither the Seventh nor Sixth Amendments specify the size of the jury in federal cases.
- The common law rule was that a trial jury consisted of twelve jurors, but there is no constitutional right to that number. *Williams v. Florida*, 399 U.S. 78 (1970) and *Colgrove v. Battin*, 413 U.S. 149 (1973).
- Federal Rule 48: no fewer than six nor more than twelve jurors. Court may excuse jurors under Rule 47(c) for good cause without causing a mistrial.
- DUCivR 48-1 provides for **twelve** jurors in all civil cases, with not more than **two** jurors excused during trial or deliberation, leaving a minimum jury size of **ten**.
- Art. I, §10 of the Utah Constitution provides that the number of jurors in civil cases shall be set by statute but may not be less than **four** persons.
- §78-46-5 provides for **eight** jurors in civil cases except that the jury is only four persons in cases for damages of less than \$20,000, exclusive of costs, interest, and attorney fees. There is no jury in small claims matters. Parties may stipulate to fewer jurors- no minimum set by statute. *N.B.- Unlike in federal court, a mistrial results if a juror has to be excused and no alternates were chosen, unless the parties can agree to a smaller jury.*

## JURORS NEEDED FOR VERDICT

- Federal Rule 48 and DUCivR 48-1 require a unanimous verdict in all cases.
- The Supreme Court has not ruled on the constitutionality of a non-unanimous verdict in a federal civil case under the Seventh Amendment and the lower courts are in disarray on the issue. See, C. Wright and A. Miller, 9A Federal Practice and Procedure: Civil 2d at §2492 (1995).
- Utah Rule 47 and §78-46-5(3) requires not less than three-fourths of the jurors (6 out of 8) to reach a civil verdict.

### **ALTERNATE JURORS**

- The 1991 amendments to Federal Rule 47 abolished alternate jurors in federal civil trials.
- Utah Rule 47(b) provides for one or two alternates at the court's discretion. They are discharged when the jury retires to consider its verdict if they are not needed.
- 2001 proposed amendments to Rule 47(b) will change the manner in which alternates are chosen to reflect common practice.
- Some state judges will ask the attorneys to stipulate to allowing the alternate juror to participate in the verdict, rather than being discharged at the end of the trial without participating in the deliberations. If this is done, an agreement must be reached on whether 6 out of 9 or 7 out of 9 votes will be needed for a verdict. As one might imagine, this is rarely something that counsel can agree upon.

### **VOIR DIRE: COUNSEL OR THE COURT?**

- Both Utah and Federal Rule 47 state that the court *may* permit the parties or their attorneys to conduct the voir dire or *may* itself conduct the examination. If the court conducts the examination itself, the Rules provide that supplemental questions shall be allowed, but the court determines whether it or the attorneys ask the supplemental questions.
- DUCivR 47-1(c) provides that the Court *will* conduct the voir dire and “will permit suggestions from counsel for further examination.” Requests for additional voir dire must be submitted at least two business days before trial under DUCivR 47-1(b).
- The judge conducts the voir dire in all federal and in most state courts in Utah but more attorney-conducted voir dire is seen each year in the state forums.
- There are variations among the state courts in how much attorney-conducted voir dire is allowed. Many judges allow none at all. Others allow full attorney voir dire, within limitations. The First District judges apparently allow full attorney-conducted voir dire. Some of the Second District judges allow attorney-conducted supplemental questioning. Nearly all judges will permit attorney questioning of individual jurors during in-chambers conferences.

- *Barrett v. Peterson*, 868 P.2d 96 (Utah Ct. App. 1993): Attorney-conducted voir dire is discretionary under Rule 47 and voir dire in Utah is "customarily" conducted by the court. "In the end, it is which questions are asked that matters-- not who asks them." 868 P.2d at 102, n.6.

## JURY QUESTIONNAIRES

- *State v. Mead*, 27 P.3d 1115, 2001 UT 58: "While it may be advisable for a trial court to use a jury questionnaire in certain situations, the trial court has "considerable latitude as to the manner and form of conducting the voir dire examination." *State v. Malmrose*, 649 P.2d 56, 60 (Utah 1982). We cannot say the court abused its discretion in the instant case. Indeed, as the questions asked in voir dire were substantially similar to those requested in the proposed jury questionnaire, even were we to assume the trial court erred in failing to use the proposed jury questionnaire, Mead has demonstrated no harm."

## CHALLENGES TO THE PANEL

- 28 U.S.C. §1867 sets forth the federal procedures. Objections to the array must be made before voir dire begins or within seven days after the party could have discovered the irregularities. Federal Rule 47 is silent on panel challenges but see, *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) in which the Supreme Court struck down the exclusion of wage earners from all jury panels.
- Utah Rule 47(d) provides for challenges to the panel on the grounds of a material departure from the prescribed procedures in selecting the panel, or an intentional omission of the proper officer to summon a juror drawn. Challenge must be made before a juror is sworn. See also, §78-46-16.

## CHALLENGES FOR CAUSE

- 28 U.S.C. §1870 says that challenges for cause (or "favor") shall be decided by the court. The grounds for cause challenges are not set forth either in the Judicial Code or in the Rules. As a matter of decisional law, the trial court is required to determine whether the potential juror is impartial in the constitutional sense. *Hopkins v. County of Laramie*, 730 F.2d 603 (10th Cir. 1984) and *Geagan v. Gavin*, 292 F.2d 244 (1st Cir. 1961).
- Pre-2002 State Rule 47(f) prescribed the grounds for cause challenge in civil actions:
  - Lack of legal qualifications to be a juror
  - Relative of party
  - Debtor/Creditor, Employer/Employee, other business relationships
  - Having been a juror or witness in previous trial of same action
  - Pecuniary interest in the action
  - Having a state of mind which prevents juror from acting impartially

- 2002 amendments to Rule 47(f) would rewrite subpart (6) to read:  
  
*“Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.”*
- 2002 amendments to Rule 47(g) delineated the procedures for exercising challenges for cause. The new rule allows the court to use whatever method it sees fit, including the “strike and replace” method (theoretically what is supposed to be used now), the “struck” method (what most judges in fact use), or any other method that the court determines to use.
- The procedures for trial of cause challenges vary from court to court. Rarely, cause challenges are heard in open court and in front of the entire panel although you may become acquainted with that abominable practice if you ever try a case in Idaho. More commonly, cause challenges are heard at the bench or in chambers. (Proposed amendment to Rule 47(g) would *require* challenges to be heard outside of the panel’s hearing.)
- Counsel *must* take care to ensure that a record of cause challenges is made in order to preserve point for appeal. In other words, make sure the court reporter takes down the challenge and the ruling then or at a later convenient time.
- “Semi-cause” strikes are made when a potential juror doesn't strictly meet the elements for a cause challenge under Rule 47(f) but other reasons exist for striking him without forcing counsel to use a peremptory. For example, a panelist who knows one of the attorneys or one of the parties but doesn't think it will influence his decision. Or a panelist who appears exceedingly reluctant to sit through the trial. If there are plenty of panelists remaining, many judges will simply strike such borderline jurors even though they aren't technically cause strikes under Rule 47(f).
- Counsel should be aware of the “Juab County Effect” In rural counties many of the potential jurors may know the parties, the attorneys, and perhaps even know about the lawsuit. While that might be enough for a “semi-cause” bounce in Salt Lake County, don't expect it to happen outside the Wasatch Front.
- Cause challenges tend to be more easily granted when the panel is still large enough to ensure that a jury can be constituted. In other words, judges are more likely to bounce borderline panelists for cause when there are enough panelists remaining to ensure that a jury can be picked. After cause challenges are made, there needs to be at least 8 plus the number of peremptories needed (usually 6), still remaining on the panel. The point is to ask for a larger panel whenever the case has something about it that may increase the number of cause challenges.
- There are dozens of reported decisions on the bases for cause challenges. Counsel should review not only those cases annotated at Rule 47 of the Civil

Rules but also those following Rule 18, Utah Rules of Criminal Procedure. Only a few of the decisions are referenced here.

- *Crawford v. Manning*, 542 P.2d 1091 (Utah 1975). Wrongful death action. One panelist had strong feelings against suits for damages arising out of a death. Trial court would not discharge panelist for cause. Held: reversed. Plaintiff should not have been forced to use a peremptory on this panelist. (This case mandated reversal when a party was forced to use a peremptory challenge on panel member who should have been removed for cause. That rule was later rejected in *State v. Menzies*, 889 P.2d 393 (Utah 1994), holding that a defendant must prove *prejudice* to prevail on a claim of error based on the failure to remove a juror for cause; in other words, that a juror was impartial or incompetent.)
- *Jenkins v. Parrish*, 627 P.2d 533 (Utah 1981). Medical malpractice action. Prospective juror admission that she would give more weight to defendant physician's testimony established bias even though she also stated she could be impartial. Therefore, she should have been excused for cause

### **SUPERFICIAL JUDICIAL VOIR DIRE UNDER ATTACK**

- *State v. King*, \_\_\_\_\_ P.2d \_\_\_\_\_, 2004 UT App.210. Child sex abuse prosecution. Trial judge committed reversible error in not inquiring further as to two jurors who had family experiences with sexual abuse. Whenever a juror's impartiality is put into question, the court *must* investigate further to see whether the juror's impressions are "light" or "deeply-held." Opinion indicates that rehabilitation efforts by the trial court are proper. It is not enough that the jurors answered that they could remain fair and impartial; more probing questioning was required— few jurors will intentionally declare themselves biased. It also doesn't matter that the jurors were not challenged for cause by the defense; the court's duty of questioning is independent of counsel's duties. Defendant need *not* prove prejudice under the *Menzies* standard where the court's questioning was insufficient.
- *Depew v. Sullivan*, \_\_\_\_\_ P.2d \_\_\_\_\_, 2003 UT App 152: In an auto-accident case where defendant was on an LDS mission, trial judge committed reversible error in refusing to ask panel whether they had children on missions. The judge characterized this as one about religious affiliation and stated that “religious affiliation has nothing to do with jury service.” Court instead asked “Would the fact that. . .the defendant is on a religious mission at the present time give you any problem in applying the facts in the law as you find it from the evidence in this case?”
  - When proposed voir dire questions go directly to the existence of an actual bias, trial court has no discretion and must ask those questions.
  - This proposed question was *not* about religion but simply whether jurors had children on missions. Not all “missions” are LDS Church missions.

- It is permissible to inquire into venire members' associations with people who are of the same profession as someone connected to the case and this was analogous.
- Inquiry into religion is sometimes permissible where religion may be a source of bias. (Many cases cited.) Even if this proposed question was deemed "related to religion" is was still proper and should have been asked.
- Trial court asked: "Would the fact that. . .the defendant is on a religious mission at the present time give you any problem in applying the facts in the law as you find it from the evidence in this case?" Court of Appeals noted: "*To say the question went far enough in eliciting the information Plaintiff was entitled to get 'suggests an unwarranted naivety regarding human nature...it is unrealistic to expect that any but the most sensitive and thoughtful jurors .... will have the personal insight, candor, and openness to raise their hands in court and declare themselves biased.* (Citing *State v. Ball*).
- "The trial court's substitute question is an example of the kind of question that the Utah Supreme Court once characterized as a '**stark little exercise**...the Court characterized the 'exercise' as the all-too prevalent practice of avoiding any real inquiry into possible bias by a trial judge's asking a prospective juror if he or she could decide the case fairly and follow the law given by the judge and then taking a prospective juror's affirmative answer as dispositive of the issue of bias." (Citations omitted.)
- Plaintiff was *not* required to prove that the outcome of the trial would have been different had he been allowed the proper voir dire questions. Defendant argued that even if Plaintiff had exercised all three peremptories on members who had children on missions, he still would not have had enough votes to win. Court noted that this ignored removal of venire members for cause and that is also a purpose of voir dire. It is simply unknown if proper questioning and followup would have resulted in dismissals for cause, and Plaintiff was not required to prove that it would have.
- *State v. Menzies*, 889 P.2d 393 (Utah 1994), was a case in which the Utah Supreme Court imposed a requirement that prejudice be demonstrated and that there is no 'per se' rule that reversal was required whenever a party was forced to use a peremptory on a venire member who should have been stricken for cause. In *Menzies*, the Court held that the appellant must prove that a juror who actually sat was partial or incompetent. In the *Depew* case, the Court of Appeals noted that Plaintiff could not show that any juror was partial or incompetent, but he did not need to do so because the *Menzies* rule does not apply where the trial court does not even give the panel a meaningful opportunity to reveal any potential biases. In *Menzies*, venire members had expressed potential bias and the trial judge refused to strike them for cause. Here, it would be

impossible to strike a juror through a peremptory challenge based on a suspicion of bias because no information on the subject was allowed to be elicited at voir dire.

- *State v. Saunders*, 992 P.2d 951, 1999 UT 59: A thorough critique by the Supreme Court on the superficial questioning by trial judges in Utah that often passes as "voir dire." This case held that a trial judge abused his discretion in refusing to allow probing of potential jurors' attitudes toward child sexual abuse, given their prior acknowledgment of specialized knowledge on the subject:
  - *"We emphasize, again that trial judges should err on the side of caution in ruling on for-cause challenges and that the scope of judicial discretion accorded a trial judge must be evaluated in light of the ease with which all issues of bias can be dispensed by the simple expedient of replacing a questionable juror with another whose neutrality is not open to question."*
  - *"Effective voir dire questioning of prospective jurors must not be prevented by a procedure designed to qualify jurors as quickly as possible on the basis of superficial questions and a declaration by each juror that he or she can follow the judge's instructions and decide the case fairly."*
  - *"Ruling that a prospective juror is qualified to sit simply because he says he will be fair ignores the common-sense psychological and legal reality of the situation. It is not uncommon for people to believe that their 'biases' are in fact nonbiased objective judgments that are true and correct."*
  - *"We now make emphatically clear that a juror's statement alone that he or she can decide a case fairly pursuant to the law given by the trial court is not a sufficient basis for qualifying a juror to sit when the prospective juror's answers provide evidence of possible bias and the trial court does not allow further questions designed to probe the extent and the depth of the bias. Preventing such further inquiry and concluding the issue by taking a juror's conclusory statement that he or she will not be affected by a particular attitude or will decide the case fairly is not sufficient."*
  - *"As a general rule, trial judges have some discretion in limiting voir dire inquiry. . . That discretion is most broad when it is exercised with respect to questions that have no apparent link to any potential bias. However, the trial judge's discretion narrows to the extent that questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries."*
- *State v. Mead*, 27 P.3d 1115, 2001 UT 58: Another recent Supreme Court case criticizing superficial trial court voir dire. Failure to allow followup questioning on prior knowledge of the case from news reports was an abuse of discretion. However, Mead could not demonstrate that he was prejudiced by the trial court's leaving on the jury two jurors who had prior knowledge of the case. He needed to

at least demonstrate that the news reports were false or misleading or that somehow the jurors might have been biased. (A near-impossible task when followup questions aren't allowed.)

- Advisory Committee Note to the 2001 proposed amendments to Rule 47 is a must-read and emphasizes the court's duty to conduct a thorough and deliberative voir dire and to exclude any potential jurors whom the court is not convinced will be impartial:
  - *"In determining challenges for cause, the task of the judge is to find the proper balance. It is not the judge's duty to seat a jury from a too-small venire panel or to seat a jury as quickly as possible. Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the "right" answer from or to "rehabilitate" a juror. The judge should accept honest answers to understood questions and, based on that evidence, make the sometimes difficult decision to seat only those jurors the judge is convinced will act fairly and impartially."*
  - *"The trial court judge enjoys considerable discretion in limiting voir dire when there is no apparent link between a question and potential bias, but 'when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries.' The court should ensure the parties have a meaningful opportunity to explore grounds for challenges for cause and to ask follow-up questions, either through direct questioning or questioning by the court."*
  - *"The amendments focus on the "state of mind" clause. In determining whether a person can act impartially, the court should focus not only on that person's state of mind but should consider the totality of the circumstances. These circumstances might include the experiences, conduct, statements, opinions, or associations of the juror. Rather than determining that the juror is "prevented" from acting impartially, the court should determine whether the juror "is not likely to act impartially." These amendments conform to the directive of the Supreme Court: If there is a legitimate question about the ability of a person to act impartially, the court should remove that person from the panel."*

#### **APPEALS FOR FAILURE TO GRANT CHALLENGE FOR CAUSE**

- *State v. Menzies*, 889 P.2d. 393, 399 (Utah 1994): Error in not removing a juror for bias on a cause challenge is *not* per se reversible error. Actual prejudice must be shown and the use of a peremptory to remove the juror was not enough.
- *Depew v. Sullivan*, \_\_\_\_\_ P.2d \_\_\_\_\_, 2003 UT App 152: In an auto-accident case where defendant was on an LDS mission, trial judge committed reversible error in refusing to ask panel whether they had children on missions. The judge characterized this as one about religious affiliation and stated that "religious

affiliation has nothing to do with jury service.” Court instead asked “Would the fact that . . .the defendant is on a religious mission at the present time give you any problem in applying the facts in the law as you find it from the evidence in this case?”

- Court of Appeals distinguished *State v. Menzies*. In *Menzies*, the Court held that the appellant must prove that a juror who actually sat was partial or incompetent. In the *Depew* case, the Court of Appeals noted that Plaintiff could not show that any juror was partial or incompetent, but he did not need to do so because the *Menzies* rule does not apply where the trial court does not even give the panel a meaningful opportunity to reveal any potential biases.
- In *Menzies*, venire members had expressed potential bias and the trial judge refused to strike them for cause. Here, it would be impossible to strike a juror through a peremptory challenge based on a suspicion of bias because no information on the subject was allowed to be elicited at voir dire.
- *State v. Leleae*, 993 P.2d 232, 1999 UT App 368, is a recent decision affirming the rule set down in *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994) to the effect that a party who was forced to use a peremptory challenge must prove both that the challenge for cause should have been granted *and* that the error was prejudicial– which requires proof that a member of the jury that was seated was partial or incompetent.
- *State v. Saunders*, 992 P.2d 951, 1999 UT 59: While *Menzies* abandoned the *per se* rule that the loss of a peremptory challenge because of an erroneous denial of a for-cause challenge is reversible error, *Menzies* did not foreclose all consideration of erroneous for-cause rulings in determining whether there is sufficient prejudice in the circumstances of the case to require a reversal of a conviction. Court will take into account on a cumulative basis all erroneous rulings with respect to rulings on voir dire and for-cause challenges for the purpose of determining whether there is reversible error.
- The decision on whether to strike a juror for cause is within the discretion of the trial court and is reviewed by appellate courts on an abuse-of-discretion standard. *State v. Cox*, 826 P.2d 656, 659 (Utah Ct. App. 1992) and *State v. Leleae*, *supra*.
- *Harding v. Bell*, 2002 UT 108, \_\_\_\_\_ P.3d \_\_\_\_\_: Medical malpractice case where plaintiff was forced to use peremptory challenges on three allegedly biased panel members. Supreme Court held that plaintiff must prove both an abuse of discretion by the trial judge in not removing the panelists *and* that the failure to remove the panelists for cause allowed a biased or incompetent panelist to sit (because plaintiff had run out of peremptory strikes).

## PEREMPTORY CHALLENGES

- Federal Rule 47 refers to 28 U.S.C. §1870, which allows three peremptory challenges per party, but “several defendants or several plaintiffs may be considered as a single party” and the court may allow additional peremptories.
- The number of peremptories for multiple parties on a side is a matter of discretion for the trial court. *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220 (10th Cir. 1973); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984).
- See, Deborah F. Harris, Annotation, *Distribution and Exercise of Peremptory Challenges in Federal Civil Cases Under 28 U.S.C. §1870*, 50 A.L.R. Fed. 350 (1980).
- Utah Rule 47 allows for three peremptories per party and one for alternates. Where there are several parties on a side, they must join in a challenge before it can be made.
- *Sutton v. Otis Elevator*, 249 P. 437 (Utah 1926); *Randle v. Allen*, 862 P.2d 1329 (Utah 1993); *State v. Pena*, 869 P.2d 932, 936 (Utah 1994); *Carrier v. Pro-Tech Restoration*, 909 P.2d 271 (Utah Ct. App. 1995) *aff'd* 944 P.2d 346 (Utah 1997)(rejecting constitutional arguments of defendants). Rule 47(e) and (c) require that there be a “substantial controversy” between defendants and not merely a derivative cross claim in order for each defendant to get its own set of peremptory challenges. Otherwise, all defendants are limited to a total of three peremptories.

#### PEREMPTORY CHALLENGES: CONSTITUTIONAL ISSUES

- *Batson v. Kentucky*, 476 U.S. 79 (1986): The Equal Protection Clause governs the exercise of peremptory challenges by the state in a criminal trial. Racially-based peremptory challenges are unconstitutional.
- *Annotation: Use of Peremptory Challenges to Exclude Ethnic and Racial Groups, Other Than Black Americans, From Criminal Jury- Post Batson State Cases*, 20 ALR 5th 398 (1994).
- *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991): Batson is not limited to criminal cases but extends to racially-based peremptories in civil lawsuits between private parties.
- *J.E.B. v. Alabama*, 511 U.S. 127 (1994): The Equal Protection Clause prohibits gender-based discrimination in jury selection. “[W]hether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.”
- *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996): Jurors may not be disqualified solely because of their sexual orientation; *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir. 1994): Equal protection clause does not prohibit use of peremptories for

bilingual jurors; *U.S. v. Santiago-Martinez*, 58 F.3d 422 (9th Cir. 1995): *Batson* protection does not extend to the obese.

- *State v. Higginbotham*, 917 P.2d 545 (Utah 1996) and *State v. Cantu*, 778 P.2d 517 (Utah 1989). These and other Utah cases apply *Batson* to state criminal proceedings. *State v. Bowman*, 945 P.2d 153 (Utah Ct. App. 1997) discusses the necessary showing on knowledge of ethnicity to be made by an opponent of a peremptory strike.
- *State v. Chatwin*, 2002 UT App 363: Gender-based use of peremptory strikes by prosecutor against female juror was impermissible. Prosecutor unable to offer a facially-neutral explanation and, indeed, explanation demonstrated violation of Equal Protection rights.
- ***State v. Pharris*, 846 P.2d 464 (Utah Ct. App. 1993).**
- *State v. Jensen*, \_\_\_\_\_ P.3d \_\_\_\_\_, 2003 UT App 273. Prosecutor's challenge of men was improper. Motivation that men are more likely than women to be "involved" in a domestic protective order is gender-based and was not a facially-neutral explanation. Even though 95% of domestic violence perpetrators men, the court refused to consider the "dual motivation" analysis used by some courts.
- *State v. Colwell*, 994 P.2d 177, 2000 UT 8. Procedure for raising challenge to allegedly race-based peremptory challenge discussed. Challenging party must first make out a prima facie case of improper discrimination and that requires more than the mere fact that the juror was a minority. Race-neutral explanation by prosecutor was sufficient.
- *State v. Baker*, 935 P.2d 503 (Utah 1997): "Cure-or-waive" rule adopted on peremptory challenges. In order to preserve error of trial judge in failing to strike allegedly biased juror for cause, defendant in a criminal case must exercise a peremptory challenge against that juror.
- ***State v. Bowman*, 945 P.2d 153 (Utah Ct. App. 1997)**
- *State v. Cannon*, 2002 UT App 18: Prosecutor's justifications were "suspect," but nevertheless Court of Appeals finds State's challenges were facially valid. Trial court's findings on issue of whether challenge was racially motivated were insufficient to meet the *Bowman* requirements.
- *Casarez v. Texas*, 913 S.W. 2d 468 (Texas Ct.Crim.App., 1994): Peremptory challenges of the prosecutor in a criminal case that were based on the religion of the challenged potential jurors are not in violation of the Equal Protection Clause. Discrimination on the basis of personal belief has always been considered appropriate for jury selection and is significantly different than excluding someone based on their race or sex. "The treatment of religious creed as an inappropriate basis for peremptory exclusion cannot rationally be distinguished from a similar treatment of persons on account of their Libertarian politics, their advocacy of communal living, or their membership in the Flat Earth Society."

- *State v. Hodge*, 726 A.2d 531 (Conn. 1999): Connecticut's highest court held that the U.S. Constitution prohibits religion-based peremptory challenges. (Note that the U.S. Supreme Court denied a petition for certiorari on the issue of religion-based peremptories in *Davis v. Minnesota*, 511 U.S. 1115 (1994) from a decision of the Minnesota Supreme Court that concluded the federal constitution does not prohibit a party from exercising a peremptory challenge on the basis of religion.

## **VOIR DIRE: TORT REFORM ARTICLES AND ADVERTISEMENTS**

- *Doe vs Hafen*, 772 P.2d 456 (Utah Ct. App. 1989): Scope of voir dire is a matter for the court's discretion.
  - Refusing to ask prospective jurors what magazines they read was not an abuse of that discretion considering the totality of the voir dire that was asked.
  - The court has a duty not only to ensure impartiality but also to protect the prospective juror's privacy.
  - Foundation must be established before jurors can be asked about specific tort-reform materials under *Borkoski v. Yost*, 594 P.2d 688 (Mont. 1979) which was adopted. That foundation is a showing that the juror has read anything which might affect his ability to be impartial or that he reads any of the magazines in which the particular tort-reform articles appeared.
- *Ostler v. Albina Transfer Co., Inc.*, 781 P.2d 445 (Utah Ct. App. 1989): Abuse of discretion not shown in limited voir dire conducted by trial court.
  - Questions proposed by plaintiff are not apparent from the reported decision but he apparently wanted the court to ask potential jurors whether they had been exposed to tort-reform advertising and the court refused.
  - The judge did ask the venire if any would object to an award in excess of \$3,000,000., if any believed that people should not resort to the courts to recover damages, or if any believed that they were incapable of rendering a true and fair verdict based only on the evidence. This was held to be sufficient.
- *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452 (10th Cir. 1990): No abuse of discretion in refusing to grant voir dire into tort reform and insurance issues where plaintiffs' counsel failed to include the proffered voir dire questions nor the transcript of hearing on them before Judge Jenkins in the record on appeal.
- *Evans vs Doty*, 824 P.2d 460 (Utah Ct. App. 1991): Plaintiff is entitled to voir dire on general attitudes about medical negligence and tort reform but not necessarily on specific magazine articles absent further foundation.

- It is not enough for a judge to ask jurors whether they would be influenced by tort reform propaganda they may have heard or read.
- The court should ask jurors about specific articles if it is shown that they likely would have been exposed to them and that the articles were published recently enough so that the juror will likely remember them.
- There was no abuse of discretion by the trial court because the subject tort reform article was three years old and the jurors were not likely to remember it.
- Trial court also should have asked which jurors had been exposed to tort reform propaganda and not just whether they felt that they would be biased by such materials.
- *Doe v. Hafen* rejected to the extent it disallows general questions about tort reform propaganda.
- Trial court was in error but it was not an abuse of discretion in light of the totality of the voir dire that was asked.
- *Barrett vs Peterson*, 868 P.2d 96 (Utah Ct. App. 1993): Reversible error for court not to ask voir dire on exposure to tort reform materials. (See plaintiff's proposed voir dire in materials.)
  - Scope of voir dire is a matter of discretion by the trial court, but that discretion must be exercised in favor of uncovering bias.
  - Trial court commits reversible error when counsel is not afforded an opportunity to gain the information necessary to evaluate jurors
  - Counsel need not show that it would have made a difference to the outcome.
  - Even when specific examples of tort reform propaganda are not presented to the court, a plaintiff may inquire into general exposure to this sort of information, whether or not the juror will admit to being influenced by it.
  - Trial court should have asked if jurors had heard or read anything relating to tort-reform issues, even if plaintiff did not provide specific examples of tort reform materials which this plaintiff did. Followup questions are necessary to those who have been exposed.
  - However, Rule 47 does not require the court to allow attorney-conducted voir dire in any form.
  - Judge Bench's dissent is a must-read.

- *Rasmussen v. Sharapata*, 895 P.2d 391 (Utah Ct. App. 1995): Trial judge asked prospective jurors: “What have you read in magazines or newspaper articles or other literature about tort reform or about a lawsuit crisis?”
  - Tort reform questions are material but scope and manner of jury voir dire is a matter within the sound discretion of the trial court; therefore, abuse-of-discretion standard must be met on appeal.
  - Trial court may use any form of questioning to uncover bias.
  - Rule 47(f)(6) “impartiality” standard for cause challenges is only met when “strong and deep” opinions exist in the juror's mind.
  - Trial court may, indeed *must*, expend significant effort in rehabilitating a juror to whom an inference of bias has attached. An “inference of bias” attaches to any potential juror who admits reading tort reform literature.
  - Plaintiff's counsel failed to preserve issue of attorney-conducted voir dire for appeal.
  
- *Davis v. Grand County Service Area*, 905 P.2d 888 (Utah Ct. App. 1995)
  - Wrongful death action tried in Moab against Allen Memorial Hospital.
  - Adequacy of voir dire re whether verdict "would affect them" and what magazines read.
  - P did not prove how failure to ask question prejudiced their case
  
- Of use for federal cases on the scope of voir dire is Donald P. Duffala, Annotation, *Propriety and Prejudicial Effect of Federal Court's Refusal On Voir Dire in Civil Action To Ask Or Permit Questions Submitted By Counsel*, 72 A.L.R. Fed. 638 (1985).
  
- *Smith v. Vicorp, Inc.*, 107 F.3d 816 (10th Cir. 1997) held that a federal district judge in Utah is not bound by the state requirements on "tort reform" voir dire in a diversity action. This is a matter of federal law within the broad discretion of the trial court and is not delineated by the stricter requirements of *Barrett v. Peterson* and other Utah decisions.

## **VOIR DIRE RE LIABILITY INSURANCE**

- *Balle vs Smith*, 17 P.2d 224 (Utah 1932): A plaintiff is entitled to know if a potential juror has any connection with an insurance company that has an interest in the action. The inquiry must not be intended to or actually convey the impression that defendant is insured.

- *Saltas v. Affleck*, 105 P.2d 176 (Utah 1941): Voir dire inquiry inappropriately made references to defendant's insurance carrier. It was error to ask each juror as to his or her connection with a specific insurance company so as to tip-off the jury to the real party in interest.
- *King v. Fereday*, 739 P.2d 618 (Utah 1987): Trial court's asking potential jurors if they had "any stock ownership in a business and, if so, the nature of the business" was enough in conjunction with asking employment questions to bring to light any connection with defendant's insurance carrier.
- *Broberg vs Hess*, 782 P.2d 198 (Utah Ct. App.1989): Discusses the insurance issue but dodges it because counsel failed to object to the failure to give proposed written voir dire on the record.
- *Doe vs Hafen*, 772 P.2d 456 (Utah Ct. App. 1989): Under some circumstances, parties have a right to establish a juror's relationship or interest in the insurance company that will pay the damage award. However, that limited inquiry into liability insurance must be made in good faith and not meant to inform the jurors that an insurance company is involved.
- *State v. Pascoe*, 774 P.2d 512 (Utah Ct. App. 1989): Trial court refused to ask the prospective jurors whether they had directly or indirectly worked with insurance agencies or claims adjustment bureaus, but they were asked where they worked. Plaintiff failed to prove bias on the part of any panelist and the trial court did not abuse its discretion in disallowing the question.
- *Evans vs Doty*, 824 P.2d 460 (Utah 1991): Plaintiffs must conduct any insurance-related inquiry in good faith.

## INQUIRY INTO RELIGIOUS BACKGROUND

- *Depew v. Sullivan*, \_\_\_\_\_ P.2d \_\_\_\_\_, 2003 UT App 152: In an auto-accident case where defendant was on an LDS mission, trial judge committed reversible error in refusing to ask panel whether they had children on missions. The judge characterized this as one about religious affiliation and stated that "religious affiliation has nothing to do with jury service." Court instead asked "Would the fact that . . .the defendant is on a religious mission at the present time give you any problem in applying the facts in the law as you find it from the evidence in this case?"
  - When proposed voir dire questions go directly to the existence of an actual bias, trial court has no discretion and must ask those questions.
  - This proposed question was *not* about religion but simply whether jurors had children on missions. Not all "missions" are LDS Church missions.
  - It is permissible to inquire into venire members' associations with people who are of the same profession as someone connected to the case and this was analogous.

- Inquiry into religion is sometimes permissible where religion may be a source of bias. (Many cases cited.) Even if this proposed question was deemed “related to religion” is was still proper and should have been asked.
- *Hornsby v. Presiding Bishop*, 758 P.2d 929 (Utah Ct. App. 1988): Voir dire on religious affiliation is appropriate when a religious organization is a party.
- *State v. Ball*, 685 P.2d 1055 (Utah 1984): Voir dire on religious affiliation was appropriate in drunk-driving trial.
- *United States v. Affleck*, 776 F.2d 1451, 1454-55 (10<sup>th</sup> Cir. 1985): Trial court correctly inquired into membership in LDS Church by venire members and degree of credibility that the would assign to a Mormon witness on the stand.

### DUTY TO REHABILITATE?

- Advisory Committee Note to the 2001 amendments to Rule 47:
  - *“In determining challenges for cause, the task of the judge is to find the proper balance. It is not the judge’s duty to seat a jury from a too-small venire panel or to seat a jury as quickly as possible. Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, **it is not the judge’s duty to extract the “right” answer from or to “rehabilitate” a juror.** The judge should accept honest answers to understood questions and, based on that evidence, make the sometimes difficult decision to seat only those jurors the judge is convinced will act fairly and impartially.”*
- *State v. Baker*, 884 P.2d 1280 (Ut. Ct. App. 1994): Trial court has a duty to expend significant effort in rehabilitating a juror to whom even an inference of bias has attached. However, while mere "inferences" of bias can be overcome, indications of "actual" bias cannot be overcome and a juror demonstrating actual bias may not sit. This case was reversed on appeal, 935 P.2d. 503 (Utah 1997), in a decision in which the Supreme Court adopted the "cure-or-waive" rule but did not address the need for rehabilitation attempts of potentially biased jurors by the trial court.

### SEQUESTRATION OF JURORS

- Sequestration is the procedure whereby a jury panel is kept under lock and key during the trial. See *Utah Code Ann. §77-17-9*.
- New York was the only state in the Union to require mandatory sequestration and this has recently changed. In the federal system, and in all state courts, sequestration is discretionary with the trial judge.

- Sequestration is very rare in Utah. The author has never heard of it in any civil case in Utah. Normally, jurors are allowed to go home at the close of the trial day with careful instructions not to discuss the case with anyone.
- CJA 4-405, URCP 47, and URCrimP 17 contemplate the possibility of sequestration of the jury but the standards for doing so are nowhere provided.
- *State v. Bishop*, 753 P.2d 439, 460 (Utah 1988)
- *KUTV, Inc. v. Wilkinson*, 686 P.2d 456 (Utah 1984).