

# **Attorney Conducted Jury Voir Dire Is Coming in This Century**

**By Frederic N. Halström**

Frederic N. Halström is a member of the Boston and American Bar Associations, and a Governor of the Association of Trial Lawyers of America and the Massachusetts Academy of Trial Lawyers. He participated in the drafting of the jury voir dire legislation.

Voir dire, from the French, to speak the truth, (1) is a tool designed to eliminate jury bias. Jury voir dire conducted by an attorney as a matter of right is unknown in the Commonwealth. (2) The majority rule in America holds that an attorney may conduct, in civil and criminal cases, jury voir dire for a reasonable period of time.

House 3017 is based on legislation presently pending in the United States Congress. House 3017 would allow for attorney conducted voir dire for a period not to exceed thirty minutes per party. The attorney or the party may conduct this examination.

The purpose of jury voir dire is to insure that the jury truly stands indifferent on the matter to be tried before them. Much has been written and discussed about the effectiveness of attorney conducted jury voir dire. It is generally accepted that attorneys are much more familiar with the case they are to try than is the judge. The attorney, with or without the aid of trained psychologists, can elicit information from a potential juror that will enable the litigants truly to determine the prejudices of that juror. Many times it is the manner in which the juror answers a question rather than the answer itself that gives the litigants true insight into the juror's viewpoint.

There is ample evidence showing that judge conducted voir dire is less effective than attorney conducted voir dire in discovering bias. A study entitled "Report of the Committee on Jurors of Judicial Council of the Second Circuit, August 1984" examined the series of experiments conducted by the district judges of that circuit and found that statistically the greatest number of successful challenges for cause occurred when there was attorney conducted voir dire. The study found that most district judges in the circuit favored attorney conducted voir dire because it gives them the greatest amount of information upon which the court can exercise its power to strike jurors from the case.

The American Bar Association has adopted a standard for the conduct of voir dire examination by attorneys. (3)

Those that oppose attorney conducted voir dire claim that attorneys will either abuse the system of voir dire, or else that voir dire will be too time consuming.

The court should always exercise control on all aspects of a case. There is potential for abuse in cross-examinations, opening statements, and closing statements, but the court is able to control these. Similarly, there is no reason why a judge could not control attorney conducted voir dire. House 3017 and the ABA Standard set forth that the "court may

impose reasonable limitations with respect to the questions allowed during such voir dire examination." Such examination might consist of a written questionnaire given to the jury members to fill out or it might consist of other methods by which the thirty minutes allotted to the party can be effectively used. The judiciary will be able to prevent any potential abuses which may arise from attorney conducted voir dire in civil or criminal cases.

House 3017 only allows thirty minutes of examination per party. The bill gives latitude to the court to determine how that examination would actually be conducted. According to the most important aspect of the bill, the court shall allow such examination by the attorney. Many judges today allow some type of limited voir dire in criminal cases and even in civil cases. This should not be a matter of judicial lottery, however, and makes House 3017 necessary.

It has been predicted that attorney conducted voir dire would greatly burden the trial court. The bar has been informed that there is presently a crisis in the trial court with regard to manpower, courtrooms, and other resources. This writer is not optimistic about this situation's ever substantially changing. The so-called 'Massachusetts Miracle' has come and gone, and the judiciary and the judicial system never experienced it before it was over. None of us wants to see our court system grind to a halt, yet we must keep in mind that the system exists for the benefit of the citizenry. The voters certainly would not vote against attorney conducted voir dire. The bar and legislature are overwhelmingly in favor of it.

A proposed solution to the present conflict would have the judiciary support House 3017 with the caveat that the bill not go into effect for perhaps two years after its passage. This solution would provide a period of time for the judicial system to weather the temporary crisis. It would also allow the bar and the judiciary time to educate themselves on the jury voir dire process. Overall, this solution would allow for the manpower and budget adjustments that may be necessary to ensure the voir dire system's working effectively. The judiciary should cooperate with the bar in this effort to improve the quality of justice in the Commonwealth. Jurisdictions that already use the attorney conducted voir dire system have not -round to a halt; neither will Massachusetts jurisdictions grind to a halt.

Attorneys will indeed be conducting jury voir dire in the Commonwealth in this century.

#### *NOTES*

1. Black's Law Dictionary.
2. M. Gen. L. C. 234, sec. 28, CT NY, NJ, R1, VT allowed attorney conducted voir dire.
3. ABA Standards for Criminal Justice, Trial by Jury, sec. 15-2.4.