



Preserve The Right To Pick An Unbiased Jury

Critics of individual voir dire ignore research, human nature

By **RICHARD SILVER**
and **AMANDA WHITMAN**

Individual voir dire is an important constitutional and statutory right in Connecticut that provides the litigants an opportunity to discover a potential juror's bias and prejudices.

The fundamental purpose of voir dire is not to select appropriate jurors, but rather to eliminate potential jurors who have strong bias and prejudices that will be harmful to a party's case. Individual voir dire is a vital mechanism to ensure that each party will gain meaningful information to predicate a decision whether to exercise a peremptory challenge or a challenge for cause.

The Connecticut Constitution establishes a party's right to individually question potential jurors: "In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate." (Article 1, Section 19).

The manner for conducting individual voir dire is also proscribed by state statute. General Statutes section 51-240 provides: "Either party shall have the right to examine, personally or by his counsel, each juror outside the presence of other prospective jurors," and that the "right of examination shall not be abridged by requiring questions to be put to any juror in writing and submitted in advance of the commencement of the action."

Some members of the bench and bar have suggested that the current practice of individual voir dire in Connecticut is time consuming and unnecessary, and have called for statutory amendments to allow for questioning of potential jurors in groups. These op-

ponents argue that conducting voir dire of potential jurors in groups is sufficient and will expedite the jury selection process. They also note that the Connecticut Constitution and statutory protection is unique.

While group voir dire may lead to shorter jury selections, the primary concern should be assembling a fair and impartial jury. Individual voir dire is the best method of ferreting out jurors who would be unsuitable for the case due to bias or lack of impartiality. These constitutional and statutory guarantees should not be abandoned simply to save time.

The so called panel examination or box voir dire, which can be conducted by agreement of the parties, has been utilized on a very limited basis and has not been widely accepted by the Connecticut trial bar. This lack of acceptance is founded on the experience of the trial bar that box voir dire is ill-suited for detecting actual bias and prejudice of an individual due to the pres-



RICHARD SILVER



AMANDA WHITMAN

ence of other panel members. In individual voir dire, jurors can be asked more personal questions, for which the responses expose juror bias and prejudice, which would not be volunteered in a group setting with other venirepersons present.

For example, in a medical malpractice case, if a juror had an adverse experience with a physician concerning a personal medical problem, the potential juror would likely be uncomfortable revealing such an experience in an open courtroom before a panel of 20 other potential jurors. In contrast, the current individual voir dire examination is conducted on a one to one basis, without other jurors present, which gives the juror an opportunity to candidly respond to

Richard Silver is the senior partner of Silver Golub & Teitell and past president of the Connecticut Trial Lawyers and the Connecticut Chapter of the American Board of Trial Advocates. Amanda Whitman is an associate in the firm who is engaged in civil litigation, including medical malpractice and personal injury.

specific questions that often lead to further investigation. Thus, a juror's potential conflicts or bias is readily pursued, protecting both the plaintiff and defendant.

In-Depth Study

Studies show that group voir dire fails to reveal potential jurors who are excusable for cause when compared with individual voir dire conducted outside the presence of other jurors. An in-depth study was performed to determine whether venirepersons are more forthcoming while individually sequestered or while questioned *en masse*. The authors concluded that bias in potential jurors is best revealed when venirepersons are examined while individually sequestered. (See Michael T. Nietzel and Ronald C. Dillehay, "The effects of variations in voir dire procedures in capital murder trials," *Law and Human Behavior*, March 1982.)

Another study by Gregory Mize, a former trial judge of the Superior Court of the District of Columbia, and co-chair of the D.C. jury project, examined the extent to which individual voir dire resulted in the discovery of juror bias warranting excusal for cause, which had been missed during group voir dire. ("On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room," *Court Review*, spring 1999.)

Mize found that individual voir dire of potential jurors resulted in more complete and candid responses than voir dire in the open courtroom, without any significant increase in the consumption of time. Furthermore, Mize found that individually questioning every potential juror revealed

background data and beliefs that ultimately avoided the danger of mistrials caused by impaneling biased jurors.

Box voir dire is simply inadequate at detecting juror bias. Panel voir dire requires the use of primarily leading questions, as opposed to open-ended questions. However, the substance of a person's belief is best perceived by letting the juror respond to open-ended questions, e.g., "What is your feeling about [the relevant issue]?" and follow-up questions such as, "Please tell me about that."

The leading questions that are characteristic of group voir dire, instead, rely on potential jurors to identify their own biases and come forward with them, in front of other potential jurors. The panel procedure is inadequate because individuals are not always self-aware enough to appreciate their own bias, or willing to directly admit to their own bias, particularly in front of other potential jurors.

Inappropriate Comments

In addition, there are inefficiencies inherent in the group voir dire method. Group voir dire allows for the potential tainting of an entire panel due to one juror's inappropriate comments or opinions. If one juror makes inappropriate comments in front of the other jurors in the box, it may require dismissal of the entire panel as a result of the other members being exposed to the inappropriate comments. Group voir dire also requires that a judge be present during the entire proceeding, whereas the individual voir dire utilized under our present system in civil cases only requires judicial intervention if a specific issue arises that might affect the panel.

Concerns about the time required to conduct individual voir dire can be addressed with other measures. In individual voir dire, pre-screening of potential jurors by the court prior to examination based on questions submitted by counsel eliminates potential disqualifications and saves an enormous amount of time. The effective utilization of an individual voir dire requires that the jury panel to be pre-screened, that counsel begin examining the jurors promptly each morning, and that there are sufficient venirepersons to examine for the entire day.

Significant delay in jury selection has been caused in some Connecticut jurisdictions where there were an insufficient number of venirepersons presented to consume an entire day. Instances have occurred where there were no additional panel members available after 11:30 a.m. Such significant delays in jury selection are directly attributable to lack of adequate number of jurors, not to counsel's length of examination.

In 2007, the Connecticut Trial Lawyers Association presented a demonstration of both individual voir dire and box voir dire. The demonstration clearly revealed the difficulty counsel has in conducting box voir dire and the lack of adequate exposure of bias.

Clearly, any potential time saved by abandoning the constitutionally and statutory protected right of individual voir dire cannot justify the likely prejudice of allowing jurors with inappropriate bias and prejudice to sit on the jury. ■