Re-thinking *Voir Dire*

By Steven P. Wood, Esquire

Superior Court Criminal Rule 24(a) explicitly permits attorneys to participate in the *voir dire* process by directly questioning prospective jurors.[1] Despite the plain language of the Rule, in 1971, the Delaware Supreme Court's opinion in *Parson v. State* effectively ended the practice of allowing attorneys to question jurors during *voir dire*.[2] Since that time, nearly all of the available relevant empirical research about jury selection practices has concluded that jury selection practices such as those now used in Delaware, during which only the judge questions the venire, and does so primarily using "yes/no" leading questions, is the least effective way of empaneling an impartial and unbiased jury, which was described by the *Parsons* court as the "true purpose" of *voir dire*.[3] It should thus be no surprise that Delaware is now in the extreme minority of jurisdictions in the United States that persist in prohibiting attorneys from directly questioning jurors during *voir dire*. The time has come to conform our jury practices to those that are demonstrably effective, used nearly everywhere else, and are recommended by national professional organizations.

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According to a 2007 study by the National Center for State Courts, Delaware ranked 3rd in the United States for having the most "judge-dominated" *voir dire* practices.[4] Delaware is one of only six states that entirely prohibit attorneys from questioning the venire in felony criminal cases.[5] By contrast, in four states, judges are entirely prohibited from questioning the jurors during *voir dire*. In the other 40 states, and in the District of Columbia and Puerto Rico, both judges and attorneys directly question the venire.[6] Judge-only *voir dire* is now also a minority practice in the Federal Courts. A 1994 study showed that a "majority of Federal District Court judges were now permitting attorneys to ask questions during *voir dire*."[7] The Federal Judicial Center has concluded that in Federal courts attorney participation in *voir dire* has roughly doubled over the past few decades.[8]

The empirical data gathered by social scientists across the United States over the last several decades almost universally supports the conclusion that Delaware's style of *voir dire* is the least effective method of detecting biased jurors. Judge-only questioning has been empirically studied and compared to attorney-conducted *voir dire* in order to test its efficacy in producing honest and accurate self-reports of attitudes and beliefs from prospective jurors.[9] Those studies have consistently demonstrated that judge-only *voir dire* produces considerably less candid responses from prospective jurors than is the case with attorney-conducted *voir dire*.[10] Several researchers have theorized that judge-only *voir dire* was comparatively ineffective because "prospective jurors viewed the judge as an authority figure" which prompts them to be "much more guarded" in their responses.[11] At least one study, conducted by a District of Columbia Superior Court judge, concluded that the process of allowing individual *voir dire* only after a juror first indicates "yes" to a general *voir dire* question was demonstrably ineffective in detecting bias among prospective jurors. The study found individual questioning of all jurors as "indispensable."[12] In fact, pursuant to current practice in Delaware, unless a juror has a "yes" answer to one of the Court's preliminary leading questions, he or she may be seated as a juror without the parties ever hearing that juror utter a single word — and this happens routinely.[13] Other researchers have reached the same conclusion:

1. Rule 24(a) provides in pertinent part that "[t]he court shall permit the defendant or the defendant's attorney and the attorney general to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

2. *Parson v. State*, 275 A.2d 777, 784 (Del. 1971).

3. *Id.* at 784.

4. Hon. Gregory E. Mize, Paula Hannaford-Agor, Nicole L. Waters, The National Center for State Courts, *The State of the States Survey of Jury Improvement Efforts: A Compendium Report* 79 (2007).

5. U.S. Dept. of Justice, Bureau of Justice Statistics, *State Court Organization 1998*, 273–276 (2000). At the time of the study, seven states utilized "judge only" voir dire. In 2014, one of those states, Massachusetts, adopted lawyer-conducted *voir dire* by statute.

6. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.-Kent L. Rev. 1179, 1184 (2003).

7. Hans & Jehle, *supra* at 1184.

8. John Shapard & Molly Johnson, *Memorandum From the Federal Judicial Center, to the Advisory Committee on Civil Rules and Advisory Committee on Criminal Rules* (Oct. 4, 1994); quoted in Valerie P. Hans & Alayna Jehle, *supra* at 1201.

9. *E.g.* Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 No.2 Law And Human Behavior 131 (1987).

10. *Id.* at 13.

11. *Id.* at 14; David Suggs and Bruce D. Sales, *Juror Self Disclosure in Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 245 (1981); Neal Bush, The Case for Expansive Voir Dire, 2 Law and Psychology Review 9, 17 (1976). *See also* Defendant's Motion at ¶ 9.

12. The Hon. Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, Ct. Rev., Spring 1999, at 10. *See also* The Hon. Gregory E. Mize, *Be Cautious of the Quiet Ones*, Voir Dire, Summer 2003, at 1.

13. It is the personal experience of the author, based upon more than thirty years of jury trial experience in the Superior Court, that in most non-capital trials roughly one-third to one-half of the jurors are seated without ever being heard to speak a single word during *voir dire*.

"limited *voir dire* encourage[s] a lack of candor."[14]

There is virtual unanimity of opposition to "judge only" *voir dire* as an effective method of juror selection as evidenced by policy positions of national organizations such as the American Bar Association, the National Institute for Trial Advocacy, the Association of Trial Lawyers of America, and the National Association of Criminal Defense Lawyers — all of whom have explicitly urged the judiciary to permit greater participation in jury selection by the attorneys who represent the parties whose interests are at stake in litigation.[15] In 2005, the House of Delegates of the American Bar Association adopted Principles for Juries and Jury Trials, a set of 19 "best practice" principles as recommended by the A.B.A.'s American Jury Project. Among these was the recommendation that:

> Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors' legal qualifications to serve in the case. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.[16]

It may be true that attorney participation in *voir dire* in Delaware would modestly increase the amount of time consumed by the *voir dire* process. And, that is a good thing. Delaware is currently the third-fastest state in the nation when ranked by the median length of *voir dire* in felony criminal cases.[17] Since there is overwhelming evidence suggesting that perfunctory *voir dire* is ineffective in ferreting out prospective jurors who are biased, the speed with which juries are currently selected in Delaware should rightly be viewed not as a point of pride, but rather as a symptom of a problem that must be addressed. Given the importance of effective *voir dire*, the prospect of adding a few hours to the process must not be allowed to stand in the way of improving it. Whatever concerns might exist about the possibility that lawyer-conducted *voir dire* will take "too much time" can be significantly ameliorated by imposing time limits on the process, as in other jurisdictions and by appellate courts.[18]

Attorney participation in *voir dire* through the questioning of jurors is the most commonly employed method of jury selection in the United States. Delaware's adherence to judge-only *voir dire* has become an extreme anachronism, given that attorneys now conduct *voir dire* in 44 other states, the District of Columbia, Puerto Rico, and also before a majority of Federal judges. The empirical data gathered by social scientists over decades has proved, with virtually unanimity, the judge-only *voir dire* employing "yes/no" questions is the worst possible way of detecting biased jurors. It is time for Delaware to join most of the rest of the United States by adopting jury selection practices that elevate efficacy over expediency.

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14. Valerie P. Hans & Alayna Jehle, *supra* at 1197. *See also* Reid Hastic, *"Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?" 40 Am. U.L. Rev. 703, 703-04* (1991).

15. *See generally* Richard K. Gabriel, *Jury Selection Strategy and Science* §15.7 (3rd.ed.).

16. A.B.A., American Jury Project, *Principles for Juries and Jury Trials*, Principal 11.B

17. Mize, Hannaford-Agor, and Waters, *supra* at 73.

18. *E.g. see State v. Adams*, 45 N.E.3d 127 (Ohio 2016); *People v. Steward*, 110, 950 N.E.2d 480 (N.Y. 2011); *People v. Lenix*, 187 P.3d 946, 963 (Cal. 2008); *Linder v. State*, 485 N.E.2d 73, 77 (Ind. 1985). *See also* C.J. Williams, *supra* at 63.