

How Arbitrary Voir Dire Limits Harm the Jury System

The fundamental purpose of voir dire is to determine whether potential jurors have fixed attitudes and biases that would deprive litigants of their right to a fair and impartial jury. Despite that purpose, more and more courts have begun to impose almost draconian limits on this vital trial tool. And those limits are occurring across the nation.

This article discusses how arbitrary time limitations defeat that purpose. Although the examples contained in this article focus on medical malpractice cases, the problems with limited attorney voir dire likely extend to most areas of trial practice.

BY HOWARD M. SNYDER

Howard M. Snyder is a shareholder in the Phoenix law firm Snyder and Wenner, P.C. He represents patients and their families in medical negligence actions throughout the country. He is a judge pro tem of the Maricopa County Superior Court and a 1974 graduate of Villanova University School of Law.

Iraqi national Ibrahim Musabab remained in the United States after his student visa expired. Years later, he suffered a sudden onset of intense chest pain and went to the emergency room, where he was misdiagnosed and sent home. Later that day, he suffered a second myocardial infarction and died. He is survived by his wife and by a son who has a recent felony conviction.

The case proceeds to trial. After the prospective jurors are sworn in, the trial judge explains the voir dire process and the importance of jury service. Each panel member recites his or her name, occupation, marital status, number and age of children, and prior jury experience. This process reveals several prospective jurors who are employed in the health care industry, two with children in the armed services, and three who work in law enforcement. Several potential jurors are dismissed due to medical or financial hardship. Thirty prospective jurors remain on the panel.

Some of the topics that plaintiff's counsel wants to cover during voir dire are biases against the Iraqi decedent and his survivors, attitudes on "tort reform" issues such as "frivolous" medical negligence lawsuits, feelings about wrongful death cases and families who bring them, and whether the prospective jurors will follow the law on such critical issues as the burden of proof and the measure of damages.

The trial court previously denied counsel's request for a jury questionnaire. Worse yet, the court has allotted only 15 minutes per side for voir dire. Counsel thus has about 30 seconds to examine each juror for juror bias.

Why Attorney Voir Dire Is Important

Arizona Rule of Civil Procedure 47(b)(2) sets forth the parameters of attorney-conducted voir dire in civil cases:

Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective

jurors, giving due regard to the purpose of such examination. In addition, the court may terminate or limit voir dire on grounds of abuse.¹

Thus, each party has the right to ask questions that would elicit relevant information from and about the jurors, subject to the court's authority to set reasonable limitations to prevent abuse.²

The problem is that counsel and the trial court often have different notions of what constitutes "a reasonable time to conduct [an] oral examination of the prospective jurors."³ The trial court's interest in quickly impaneling a jury often conflicts with counsel's need to fully delve into attitudes, biases and beliefs, which affect how jurors will process, evaluate and decide the case.

Whereas trial courts often place arbitrary time limitations on attorney voir dire, appellate courts carefully review the record to determine whether the attorney "directly solicited" juror information being challenged on appeal,⁴ and those courts criticize the attorney for failing to take the time to ask questions that would demonstrate juror bias.⁵ It is thus incumbent upon counsel to ask the right questions to elicit juror bias,⁶ because jurors "do not have the duty to volunteer information or respond to questions not posed to them."⁷ The failure to ask the right questions may lead to devastating results for the client.

In a recent case involving the termination of parental rights, counsel asked the panel if anyone "donate[d] money to be used for the protection of children." A juror who donated his time and Christmas trees, but not money, to a children's organization, remained silent. After an adverse verdict, counsel claimed that the juror's failure to reveal his non-monetary donations constituted juror misconduct. The court of appeals disagreed. Because counsel never asked about non-monetary donations, the juror properly remained silent and thus did not "conceal facts pertaining to his qualifications or bias on proper inquiry during voir dire."⁸

In another case,⁹ the trial court refused to excuse prospective jurors who were observed talking to the plaintiff prior to empanelment of the jury. Division One held that defendant could not show prejudice because defense counsel failed to



inquire during voir dire about the nature of the conversation.

A similar result was reached in *Brooks v. Zalim*.¹⁰ After the jury returned a defense verdict, plaintiff's counsel learned that during deliberations, one of the jurors, a retired nurse, discussed her personal and professional nursing experiences with the medical condition at issue. Plaintiff sought a new trial because the nurse stated during voir dire that she had no experience with that medical condition. In affirming the denial of a new trial, the court of appeals noted:

During voir dire, [counsel] could have questioned [the juror] about her nursing and personal experience and the impact of that experience upon her view of the issues involved in the litigation, but chose not to do so. The proper time for a party to raise the issue of the potential impact of a juror's specialized knowledge is during voir dire, not after the party accepts the juror with full knowledge that she does or may possess specialized knowledge.¹¹

An even more striking example of faulting trial counsel is found in *People v. Johnson*,¹² a criminal case involving domestic violence and kidnapping. A prospective juror disclosed during voir dire that she had been the victim of an assault. After the trial concluded, counsel learned that the assault involved domestic violence. Counsel argued that he would have challenged the juror for cause if she had revealed that she had filed a domestic violence complaint against her husband. The court rejected that argument:

[I]n our view, the juror's history as a victim of domestic violence was there for defense counsel to discover through further questioning. Defendant correctly argues that jurors have a duty to reveal relevant information, even though the information is personal or embarrassing. Nevertheless, [the juror] truthfully answered the trial court's question. That defense counsel did not ask more specific questions to learn the full details of the juror's past experiences did not, in our view, constitute concealment on her part.¹³

The court criticized counsel's failure to thoroughly question the juror about her assault:

We simply do not consider defense

counsel's failure to inquire further, on learning that the juror had been the victim of violence in the past, as diligent.¹⁴

[D]efendant could have challenged [the juror] for cause if he had posed further inquiry regarding the nature of the admitted assault.¹⁵

That [the juror] did not articulate specifically that she was the victim of a *domestic* assault is attributable more to defendant's failure to specifically question her in this regard, rather than to any intentional concealment on her part.¹⁶

We cannot accept a process that would excuse a defense attorney for failing to ask follow-up questions.¹⁷

Such criticisms are appropriate only if trial counsel has sufficient time to question prospective jurors about their backgrounds and their biases. Trial courts must be mindful that the purpose of voir dire is to secure a fair and impartial jury by unveiling juror prejudice.¹⁸ That purpose cannot be accomplished if counsel is deprived of an adequate opportunity to elicit information to support cause challenges,¹⁹ to permit the intelligent exercise of peremptory strikes,²⁰ and to develop constitutional challenges to peremptory strikes and waivers of peremptory strikes.²¹

Voir Dire To Support Cause Challenges

Jurors swear or affirm that they will render a verdict "according to the law and the evidence."²² Arizona Rule of Civil Procedure 47(c) sets forth six grounds for challenging prospective jurors for cause.

Information to support certain of the challenges may be obtained in a minimal amount of time by questioning the entire panel. The following types of jurors can be questioned as a group:

- Jurors who lack the qualifications prescribed by statute
- Jurors who have certain specified relationships with a party
- Jurors who were jurors or witnesses in a previous trial between the same parties in the same action.²³

Other biases, however, are not so easy to uncover. The following types of bias

often require individualized voir dire:

- Jurors who have formed or expressed an unqualified opinion or belief as to the merits of the action or whose state of mind precludes them from rendering a just verdict
- Jurors whose state of mind evinces enmity or bias for or against either party²⁴
- Jurors who are disqualified under A.R.S. § 21-211²⁵

Many prospective jurors will not volunteer that they are biased or that they will be unfair and partial. Many simply do not view themselves that way. The procedure used during voir dire thus "must provide a reasonable assurance for the discovery of prejudice," and "must not be so general that it does not adequately probe the possibility of prejudice."²⁶

Although the scope and extent of voir dire is left to the trial judge's discretion,²⁷ attorneys must be permitted to inquire whether a prospective juror's attitudes would prevent him or her from making an impartial decision.²⁸ Jurors with fixed and settled opinions on an issue in the case should be disqualified.²⁹

Counsel must be given sufficient time to examine prospective jurors on any subject that gives rise to "a possibility of bias."³⁰ That includes all relevant, case-specific issues that will be considered at trial.³¹ For instance, where a defendant in a murder prosecution had once been in a psychiatric institution, the trial court was required to give counsel "considerable latitude" to ask prospective jurors about their medical histories and general backgrounds.³² Counsel also has the right to inquire into whether prospective jurors have any interest in the case that would influence their verdict,³³ to ask about religious beliefs³⁴ and racial or religious prejudices³⁵ when relevant to the issues in the case, and to inquire whether jurors are predisposed to favor the testimony of one witness over another.³⁶ Accordingly, "it is rarely, if ever, that the allowance of a question [on voir dire] is reversible error, though the refusal to permit one to be asked may sometimes be."³⁷

Of course, there are many other issues that are appropriate subjects for voir dire in a medical negligence trial. Two of the more important ones are burden of proof and tort reform.



Voir Dire on the Burden of Proof

One issue that goes to the heart of every trial is the burden of proof. During voir dire, counsel may inquire concerning the different burdens of proof in civil and criminal cases.³⁸ It is critical to determine whether prospective jurors will follow the court's instruction on burden of proof or will apply their own impermissible standard to plaintiff's claim.

Some jurors will reject the court's instruction and hold plaintiff to a higher burden of proof. This was demonstrated during voir dire in a medical negligence claim tried in Maricopa County Superior Court. After plaintiff's counsel explained the difference between the burdens of proof in civil and criminal cases, the following exchanges occurred:

PLAINTIFF'S COUNSEL: [D]oes anyone feel you cannot find in favor of the plaintiff unless you are absolutely certain that the defendant committed malpractice. [Juror No. 1], what do you think?

JUROR NO. 1: I have to be certain.

COUNSEL: You would have to be absolutely certain?

JUROR NO. 1: Yes.

COUNSEL: Even if the judge instructed you that the law does not require you to be absolutely certain, [and that] you only have to think it is more likely than not that the defendant was negligent? Would you still require, in your own mind, absolute certainty?

JUROR NO. 1: I think so. My own conscience wouldn't let me do otherwise.

COUNSEL: Regardless of what the judge told you?

JUROR NO. 1: Yes.

THE COURT: Even if [defense counsel] said you don't have to be absolutely certain ... you would still want absolute certainty?

JUROR NO. 1: Yes.

COUNSEL: [to Juror No. 4] Would you follow the judge's instructions, [that] you don't have to be absolutely certain?

...

JUROR NO. 4: I think it would be kind of hard. I would have to really think about it.

COUNSEL: You are not certain? This is a

very important point in this case. Do you feel sitting here today that you might require the plaintiff to prove more to you than what the law requires us to prove?

JUROR NO. 4: Yes, sir.

...

COUNSEL: So you would feel, then, if I understand you, that you would not follow the judge's instructions that [plaintiff] only has to prove [his claim] more likely than not. You would want absolute certainty?

JUROR NO. 4: Yes, sir.

COUNSEL: What do you think, [Juror No. 3]?

JUROR NO. 3: I would have to be certain.

COUNSEL: Absolutely certain?

JUROR NO. 3: Yes.

COUNSEL: You would not follow the judge's instruction in that regard concerning the burden of proof?

JUROR NO. 3: Pardon? Probably not.

COUNSEL: ... We know this is not a criminal case and nobody is going to jail for what happened here, no matter what the result is. In the context of a civil case, you would still want absolute certainty?

JUROR NO. 3: Yes, sir.

...

THE COURT: [S]uppose ... you [think] the plaintiffs have not proved their case to eliminate all doubt. There is still some doubt in [your] mind, but ... it was just more likely than not that [the doctor] was negligent. You would agree that it was more likely than not, but yet you still had doubt about it. That is, you had a reasonable doubt. What would you do then? Would you urge the jury to vote or return a verdict in favor of the plaintiffs or urge the jury to return a verdict in favor of the defendant?

JUROR NO. 5: In favor of the defendant.

THE COURT: Okay.

COUNSEL: Anybody else feel that they could never find the defendant to be negligent unless the plaintiff proved beyond a reasonable doubt that he was negligent?

Parties should not have to present their case to biased jurors who remain on the jury only because their biases are undisclosed due to arbitrary time limitations on attorney voir dire.

JUROR NO. 9: Uh-huh.

COUNSEL: You would hold us to a criminal standard of proof in this case?

JUROR NO. 9: Yes, because I think you have somebody's livelihood at stake and I don't think [that] money should be awarded unless he truly is found [to be] at fault.

...

COUNSEL: Okay. Would you then reject the judge's instructions and refuse to follow his instructions on the burden of proof in this case?

JUROR NO. 9: In my own mind, I would have to be absolutely certain that he was at fault.

COUNSEL: Okay. But understand the reason I am asking this ...

JUROR NO. 9: Yes, I would go against the judge.

COUNSEL: Okay. You would not follow the judge's instructions?

JUROR NO. 9: Correct.³⁹

Five prospective jurors revealed that they would "go against the judge" by not following the law on burden of proof. They simply could not find a physician at fault unless they were "absolutely certain," "convinced beyond a reasonable doubt," or sure "beyond a shadow of a doubt." For these



jurors, nothing short of an admission of fault by the defendant or the defense expert would support a plaintiff's verdict. Testimony by a qualified defense expert that the defendant complied with the standard of care or did not cause plaintiff's injury would "justify" a defense verdict. Of course, that is an insurmountable burden for the plaintiff.

Nonetheless, these jurors would insist that they are fair and impartial; plaintiff just did not prove her case under their onerous and improper standard. These biases were revealed only because the trial judge permitted plaintiff's counsel to thoroughly examine prospective jurors without being limited by artificial and arbitrary time limitations.⁴⁰

Voir Dire on "Tort Reform" Issues

Counsel requires sufficient time to question prospective jurors on whether they have definite, fixed opinions and biases against personal injury cases⁴¹ or personal injury claimants,⁴² and whether they will follow the law and the judge's instructions⁴³ on damages. A prospective juror who insists on applying a "cap" on non-economic damages regardless of the evidence would disregard the court's instruction to "decide the *full* amount of money that will reasonably and fairly compensate" plaintiff for his damages.⁴⁴ Such a juror would improperly impose his view of what the law should be by applying an artificial limit on damages, which could never be exceeded regardless of the evidence.

Courts permit voir dire on this issue. For example, in *Geehan v. Monahan*,⁴⁵ the court held that it was permissible for plaintiff's counsel to ask whether prospective jurors "have any hesitancy of returning a verdict commensurate with the injuries you find [plaintiff] has, even though it might run many thousands of dollars." Similarly, in *Atlantic Zayre, Inc. v. Meeks*,⁴⁶ plaintiff's counsel asked prospective jurors whether they would hesitate to award as much as \$600,000 for personal injuries if warranted by the evidence. The court approved that inquiry because it "sought to probe the jurors' minds for prejudice." In *Scully v. Otis Elevator Co.*,⁴⁷ plaintiff's counsel inquired during voir dire whether \$600,000 was a figure the prospective jurors "could not possibly consider under any circumstances,"

whether that amount "scared" them, and whether a verdict of that amount would be "too much money for anybody." The court held those inquiries were permissible because they were "designed to expose any latent prejudice against large verdicts." And in *Kinsey v. Kolber*, the court held it was proper for plaintiff's counsel to ask during voir dire if "a figure in excess of \$2,000,000 as a damage request, would ... make you feel you couldn't partake as a juror in that kind of a verdict—if it were justifiable under the law?"⁴⁸

This is no mere theoretical concern. For many years the insurance industry, the medical profession, and politicians have engaged in a concerted effort designed to influence public opinion on personal injury cases in general, and medical negligence cases in particular.⁴⁹ The public has been bombarded with advertising campaigns and political speeches trumpeting "caps" as the panacea for "runaway" jury verdicts and problems with the health care system.

For example, President Bush urged "medical liability reform" in his last four State of the Union addresses. In 2003, he told the nation that in order "to improve our health care system we must address one of the prime causes of higher cost, the constant threat that physicians and hospitals will be unfairly sued. Because of excessive litigation, everybody pays more for health care, and many parts of America are losing fine doctors." The next year he spoke about "wasteful and frivolous medical lawsuits." In 2005, the president promised that "reform" would "reduce health care costs and make sure patients have the doctors and care they need." This year, he informed the public that "lawsuits are driving many good doctors out of practice—leaving women in nearly 1,500 American counties without a single OB/GYN."

Senator Jon Kyl's office distributes publications that discuss the "medical liability crisis," "runaway lawsuits," and the "need" for "reforms" such as "caps" on non-economic damages in medical negligence cases.⁵⁰ For years, numerous articles promoting "tort reform" have appeared in the *New York Times*,⁵¹ *Time*,⁵² *Newsweek*⁵³ and the *Arizona Republic*.⁵⁴ The American Medical Association distributes similar information throughout the nation.⁵⁵ This prompted one court to comment:

In tort cases, and more particularly in

medical malpractice cases, we cannot ignore the reality that potential jurors may have developed tort-reform biases as a result of an overall exposure to such propaganda. Reason suggests that exposure to tort-reform propaganda may foster a subconscious bias with certain prospective jurors ...

In light of the pervasive dissemination of tort-reform information, and the corresponding potential for general exposure to such information by potential jurors, a plaintiff is entitled to know *which* potential jurors, if any, have been so exposed. Plaintiff is entitled to such information ... for the purpose of showing potential prejudice.⁵⁶

Counsel must be given sufficient time to examine prospective jurors in medical negligence cases about their knowledge of advertisements and publicity referring to the jury system, the "lawsuit crisis" and the alleged exodus of physicians from the practice of medicine. Plaintiff's counsel has the right and need to know juror attitudes on these subjects to determine whether they will be biased against the plaintiff.⁵⁷ The trial court's refusal to permit plaintiff's counsel to refer to the alleged "medical malpractice crisis" and delve into these areas during voir dire deprives the plaintiff of the right to trial by a fair and impartial jury.⁵⁸

General questions such as "Can you be fair?" are no substitute for focused, individualized voir dire on these issues. That became apparent during voir dire in another recent medical negligence trial.⁵⁹ Juror No. 8, an emergency room technician, stated that she could be a fair and impartial juror. Although she worked with physicians whom she considered friends, and talked to them about "frivolous" lawsuits and patients who threatened "inappropriate" lawsuits, she insisted that she would not give the defendant physician the benefit of the doubt and that she would decide the case on the evidence. She denied that she would limit plaintiff's damages to avoid having to "answer for it at the hospital" and claimed she was not biased against medical negligence claimants. She even viewed jury service as a "learning opportunity."

The questioning moved on to other prospective jurors, who were asked



whether they were personally affected by verdicts in medical malpractice cases and, if so, whether that would cause them to minimize the verdict. Juror No. 1 opined that malpractice awards caused higher malpractice premiums, the cost of which was passed on to patients.

COUNSEL: Well, does that make it more difficult for you to sit on this case?

JUROR NO. 1: I guess, as I ponder it further, it probably does bias me a little bit more.

COUNSEL: It would bias you in favor of the defendant in this particular case?

...

JUROR NO. 1: ... yes, I would have to say that would be that.

Juror No. 5 revealed that he likewise believed "high jury verdicts reflect upon the cost to patients for medical attention and care." In his view, "Limitations on pain and suffering [awards] would be appropriate."

COUNSEL: I want to understand what you're saying. Intangible damages, like

pain and suffering, and sorrow and that type of thing—

JUROR NO. 5: Should be capped ...

COUNSEL: Knowing that ... this case is about intangible damages—grief, pain, suffering, those types of things—you have a limit as to how high you would go, regardless of what the evidence is?

JUROR NO. 5: I personally would.

Another prospective juror asserted that obstetricians and other specialists have had to leave their practices due to the impact of malpractice verdicts on the cost of insurance. The discussion then returned to Juror No. 8, the emergency room technician, who declared:

JUROR NO. 8: ... what I get paid is not very much. Because my hospital, when there's a lot of lawsuits with high amounts, they have to budget a certain amount aside for insurance claims and medical malpractice, and so it directly affects what I get paid.

COUNSEL: You said it directly affects how you get paid. So you would have a direct interest in hoping that malpractice verdicts are kept relatively low; wouldn't you agree with that?

JUROR NO. 8: Yes.

It was only after Juror No. 8 was examined at length by plaintiff's counsel and had the opportunity to listen to the responses of other panel members that she finally revealed her belief that she was financially affected by medical negligence verdicts. The court properly dismissed Juror No. 8 and the others for cause.

Voir Dire for Peremptory Challenges

Each side in a civil action is entitled to four peremptory challenges.⁶⁰ Voir dire enables attorneys to ascertain facts about individual jurors that may serve as a reason for peremptory challenges.⁶¹

Peremptory challenges are made when an attorney "has some reason to believe a juror may be less desirable than other jurors who may be called."⁶² Because peremptory challenges are viewed as another means to assure selection of a qualified and unbiased jury,⁶³ the trial court must allow voir dire to be broad enough so that the parties' right of peremptory challenge is meaningful.⁶⁴

In any particular case, juror attitudes on issues such as plaintiff's psychiatric history, criminal background, marital history, obesity,

endnotes

1. Rule 47(b)(2), ARIZ.R.CIV.P., 16 A.R.S. ____.
2. Committee Notes to 1991 and 1995 amendments to Rule 47(b)(2), ARIZ.R.CIV.P.
3. Rule 47(b)(2), ARIZ.R.CIV.P.
4. *Brooks v. Zabn*, 826 P.2d 1171, 1175 (Ariz. 1991).
5. See e.g., *Ingrum v. Tucson Yellow Cab Co.*, 642 P.2d 868, 872 (Ariz. Ct. App. 1981).
6. *Brooks*, 170 Ariz. at 550, 826 P.2d at 1176.
7. *Id.*
8. *LaShonda M. v. Ariz. Dep't of Econ. Sec.*, 107 P.3d 923, 929 (Ct. App. 2005).
9. *Ingrum*, 642 P.2d at 872.
10. 826 P.2d 1171 (Ariz. Ct. App. 1991).
11. *Id.* at 1178.
12. 631 N.W.2d 1 (Mich. Ct. App. 2001).
13. *Id.* at 7.
14. *Id.* at 7 n.3.
15. *Id.*
16. *Id.* at 8 n.4.
17. *Id.*
18. *State v. Endreson*, 506 P.2d 248, 253 (Ariz. 1973); *Young v. State*, 299 P. 682, 685 (Ariz. 1931); *Wilson v. Wiggins*, 94 P.2d 870, 871 (1939); *State v. McDaniel*, 665 P.2d 70, 75 (1983), cert. denied, 499 U.S. 952 (1991); *State v. Finch*, 46 P.3d 421, 427 (Ariz. 2002).
19. Rule 47(c), ARIZ.R.CIV.P.
20. *Evans v. Mason*, 308 P.2d 245, 249 (Ariz. 1957); ARIZ.R.CIV.P. 47(d).
21. *State v. Paleo*, 22 P.3d 35, 37-38 (Ariz. 2001).
22. Rule 47(a)(3), ARIZ.R.CIV.P.
23. *Id.* at Rule 47(c)(1), (2), (3).
24. *Id.* at Rule 47(c)(4), (5), (6).
25. A.R.S. § 21-211 provides that the following people are disqualified to serve as jurors: (1) witnesses; (2) persons directly or indirectly interested in the matter; (3) certain persons related by consanguinity or affinity to a party; and (4) persons biased or prejudiced in favor of or against either of the parties.
26. *Waldorf v. Shuta*, 3 F.3d 705, 709, 710 (3rd Cir. 1993).
27. *State v. Rose*, 589 P.2d 5, 13 (Ariz. 1978).
28. *Colfer v. Ballantyne*, 363 P.2d 588, 592 (Ariz. 1961) (attitudes toward plaintiff's occupation as an insurance adjuster).
29. *State v. Norten*, 407 P.2d 81 (Ariz. 1965), cert. denied, 384 U.S. 1008 (1966). In *Wasko v. Frankel*, 569 P.2d 230 (Ariz. 1977), our Supreme Court held that a juror should have been dismissed for cause based on his statements that a person who undergoes disk surgery and is "up and about" should be thankful and not sue his surgeon, and that it would be difficult to disregard his opinions and give fair consideration to the evidence.
30. *State v. Taylor*, 451 P.2d 648, 653 (Ariz. Ct. App. 1969).
31. *State v. Evans*, 584 P.2d 1149, 1152 (Ariz. 1978).
32. *State v. Jordan*, 320 P.2d 446, 449 (Ariz. 1958), cert. denied, 357 U.S. 922 (1958).
33. *Dunipace v. Martin*, 242 P.2d 543, 545 (Ariz. 1952).
34. *State v. Via*, 704 P.2d 238, 248 (Ariz. 1985).
35. *State v. Lee*, 708 P.2d 102, 105-106 (Ariz. Ct. App. 1985).
36. *Lindley v. Northwest Hosp. & Med. Ctr., Inc.*, 791 P.2d 659, 661 (Ariz. Ct. App. 1990) (where juror was a patient of an expert who would testify in a medical negligence action, and would give more weight to that expert's opinions than to the opinions of other experts, the juror must be stricken).
37. *Young v. State*, 299 P. 682, 685 (Ariz. 1931).
38. *Bender v. Burlington-Northern R.R. Co.*, 654 S.W.2d 194, 198 (Mo. Ct. App. 1983). In the Philadelphia Court of Common Pleas, prospective jurors answer a standard questionnaire that asks whether they will follow the law on burden of proof. *Capoferri v. Children's Hosp. of Philadelphia*, 2006 PA Super. 16 (Pa. Super. 2006).

drug use, alcohol consumption, smoking or cosmetic surgery may have a significant bearing on how they view the evidence. Counsel must be given sufficient time to uncover such attitudes in order to intelligently exercise peremptory strikes.

Voir Dire To Support or Oppose *Batson* Objections

The Equal Protection Clause of the Fourteenth Amendment prohibits peremptory strikes of prospective jurors based on race, gender, ethnic background, national origin and, possibly, religion.⁶⁵ The United States Supreme Court has articulated a three-step process for proving such constitutional violations. The party opposing the strike must make a prima facie showing of prohibited discrimination. The proponent of the strike then must provide a neutral, legitimate explanation for the strike. Ultimately, the trial court decides whether that explanation is pretextual.⁶⁶ This analysis also applies to waivers of peremptory strikes, at least in criminal cases.⁶⁷

The quantum of evidence needed to support or refute a *Batson* challenge is beyond the scope of this article. But what is clear is that the trial attorney challenging the peremptory strike must be afforded a mean-

ingful opportunity to develop evidence needed to prove purposeful discrimination and pretext, because the constitutional rights of both the party and the excluded juror are at stake.⁶⁸ Likewise, the attorney making the strike must have an opportunity to elicit information that would support a constitutionally permissible explanation for that strike. Thorough voir dire is necessary to ensure that the constitutional rights of the parties and the jurors are protected.


Conclusion

The parties are entitled to an even playing field and a fair trial. Neither is likely to be attained with limited attorney voir dire. After engaging in extensive and expensive investigation and discovery, the parties should not have to present their case to biased jurors who remain on the jury only because their biases are undisclosed due to arbitrary time limitations on attorney voir dire.

What is the minimum amount of time that should be provided to counsel to conduct voir dire examination so that cause challenges, peremptory strikes and *Batson* objections can be made and opposed in a meaningful way? There is no precise answer to this question. Rule 47(b)(2) provides that the trial court “shall” permit a party who

requests attorney voir dire “a reasonable time” to examine prospective jurors and that limitations on questions may be imposed only after “giving due regard to the purpose of such examination.” Because each case is uniquely dependent upon the parties, facts, claims, defenses and issues presented, the trial judge should consider each of these factors in determining how much time is “reasonable.”

Trial courts violate the rule and may deprive the parties of a fair trial when they conclusively presume that 15 minutes (or any other set time) is sufficient in all cases. Allocating 15 minutes per side for voir dire in all cases makes about as much sense as allocating 15 minutes per side for cross-examination of experts in all cases. Because the purpose of voir dire is to secure a fair and impartial jury, trial courts should err on the side of giving too much, rather than too little, time for attorney-conducted voir dire.

Trial judges should terminate or limit voir dire when the attorney argues his case, seeks “commitments,” interjects prejudicial or irrelevant matters, or wastes time.^{lxix} But voir dire intended to reveal attitudes, biases and beliefs that may affect juror decision-making should be encouraged and not subject to artificial time limitations. 

39. *Rivers v. Snegireff*, No. CV 94-09308 (Maricopa County Super. Ct.) (R.T. Aug. 20, 1996).
40. The trial judge dismissed all of these jurors for cause.
41. *State v. Juengel*, 489 P.2d 869, 874-875 (Ariz. Ct. App. 1971) (permitting voir dire examination on whether prospective jurors were employed as accident investigators or claims adjusters since such persons may develop biases in regard to the issues of liability and damages).
42. *Wasko*, 569 P.2d at 232.
43. *State v. Anderson*, 4 P.3d 369, 375 (Ariz. 2000).
44. RAJI (Civil) 4th Personal Injury Damages 1, 3.
45. 382 F.2d 111, 115 (7th Cir. 1967).
46. 390 S.E.2d 398, 401, 402 (Ga. Ct. App. 1990).
47. 275 N.E.2d 905, 914 (Ill. App. Ct. 1971).
48. 431 N.E.2d 1316, 1325 (Ill. App. Ct. 1982).
49. A recent Google search reflects more than 3.6 million refer-
- ences to “tort reform.”
50. U.S. Senate Republican Policy Committee, *The Medical Liability Crisis and its Impact on Patients* (Feb. 5, 2003); U.S. Senate Republican Policy Committee, *Doctors Leaving Their Practices: The Medical Liability Crisis* (Feb. 27, 2003).
51. See e.g., N.Y. TIMES: Jan. 26; Mar. 5, 7, 14; May 28; July 6; Sept. 15; Dec. 21, 2003; May 22, 26; June 5, 2004.
52. TIME, Jan. 13, 2003.
53. NEWSWEEK, Feb. 6, July 28, Dec. 15, 2003.
54. ARIZ. REP., July 5, 2002; Feb. 20, 2003.
55. WALL ST. J. (online), Sept. 19, 2003; see American Medical Association Web site at www.ama-assn.org/ama/pub for various articles on “medical liability” reform.
56. *Barrett v. Peterson*, 868 P.2d 96, 101 (Utah Ct. App. 1993).
57. *National Cty. Mut. Fire Ins. v. Howard*, 749 S.W.2d 618, 620-621 (Tex. App. 1988).
58. *Babcock v. Northwest Mem. Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989); *Capoferri*, 2006 PA Super. at 16.
59. *Golub v. Medoff*, No. CV 03-0020901 (Maricopa County Super. Ct., June 15, 2004).
60. Rule 47(e), ARIZ.R.CIV.P.
61. *State v. Taylor*, 451 P.2d 648, 653 (Ariz. Ct. App. 1969).
62. *United States v. DeJesus*, 347 F.3d 500, 505 (3rd Cir. 2003).
63. *State ex rel. Romley v. Superior Court*, 889 P.2d 629, 632 (Ariz. Ct. App. 1995).
64. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2483, at 124 (1995).
65. *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (race); *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127 (1994) (gender); *Hernandez v. New York*, 500 U.S. 352 (1991) (ethnicity); *State v. Purcell*, 18 P.3d 113, 119, 120 (Ariz. Ct. App. 2001) (holding that the *Batson* analysis encompasses peremptory strikes based upon religious membership or affiliation but that religious beliefs may render a prospective juror unsuitable for service in a particular case. Cf. *DeJesus*, 347 F.3d at 500 (permitting strikes based on jurors’ “heightened religious involvement” or “religious beliefs”). The racial difference between the litigant and the juror is irrelevant for the purpose of opposing a *Batson* challenge. *Powers v. Ohio*, 499 U.S. 400, 416 (1991).
66. *Batson*, 476 U.S. at 96-98. The *Batson* analysis applies to civil cases. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991); *Lopez v. Farmers Ins. Co. of Arizona*, 868 P.2d 954, 958 (Ariz. Ct. App. 1993).
67. *Paleo*, 22 P.3d at 37-38.
68. *Batson*, 476 U.S. at 86-87; *Paleo*, 22 P.3d at 36.
69. Rule 47(b)(2), ARIZ.R.CIV.P.