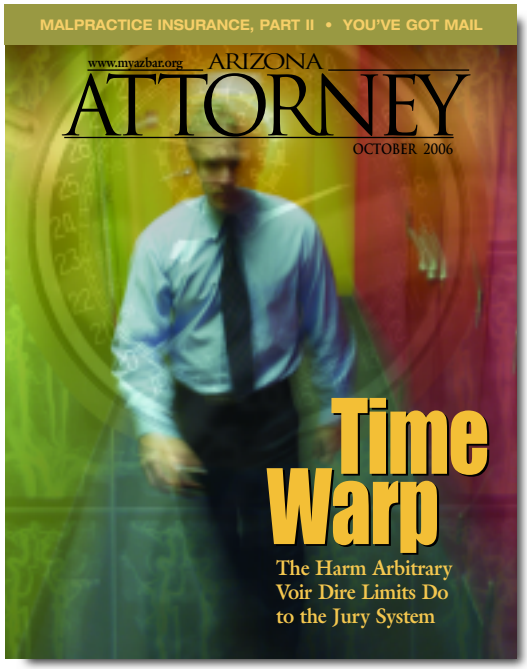
PARTIAL TO UNPREJUDICED JURIES

Kudos to Howard M. Snyder for making the case that arbitrary time limits violate the right to "a reasonable time" to conduct *voir dire* (*Time Warp: How Arbitrary* Voir Dire *Limits Harm the Jury System,* ARIZ. ATT'Y, October 2006). By definition, what is arbitrary cannot be reasonable. And because it is impossible to know beforehand the level of candor and the answers of prospective jurors, no safe prediction of the time required for *voir dire* can be made in advance.



We should remember what the State Bar stated in its petition of October 23, 1990, proposing the amendment that created the right to a reasonable time to conduct *voir dire:*

"*Voir dire* examination of prospective jurors by counsel is an important procedural right, which should be preserved, and that examination of prospective jurors by the court is all too frequently an ineffective and inadequate substitute." *See, e.g.,* Gerald Maltz & Thomas G. Hippert, *Should There Be A Right To Lawyer-Conducted* Voir Dire? ARIZ. ATT'Y, Dec. 1989, at 19.

The cited article addresses empirical evidence and research by social scientists that candid self-disclosure requires what psychologists refer to as "reciprocity." That exists when a prospective juror responds to an acknowledged advocate. It cannot exist when the symbol of impartiality—the judge—questions prospective jurors.

Arbitrary time limits and other judicial hostility to attorney-conducted *voir dire* does not impact both parties equally. Because of pre-existing juror bias, it hurts the plaintiffs in personal injury cases and defendants in criminal cases significantly more than their opposition.

Lawyers can do their part in decreasing judicial hostility by using that precious time for the purpose intended, not to argue the case, or to condition or pander to the panel. If the judge trusts the lawyer, that should mitigate arbitrary actions that deprive the client of a critical right.

—Gerald Maltz
Haralson, Miller, Pitt, Feldman & McAnally, PLC

Thank you for running Howard Snyder's excellent article on *voir dire* and its crucial role in ensuring that all parties can have confidence that they are trying their case to a fair and impartial jury. A jury that is not fair and impartial is worse than worthless; it is downright dangerous to plaintiffs and defendants, as well as to the justice system that we all have pledged to protect. Fair and impartial judges and juries are the cornerstone of the American court system, and the recent trend toward limiting or even eliminating the parties' rights to question jurors is doing real damage to the rights of our clients and to the credibility of a system already under attack. This issue concerns everyone who has a stake in convincing an increasingly skeptical public that our court system is fair.

Unfortunately, some judges are jeopardizing those interests in an understandable, but misguided, attempt to move cases along. Some judges have an unrealistic view of their ability to "read potential jurors by looking into their hearts," and divine what is in their souls. They do not. No one does. The only way to find out about potential jurors' beliefs, prejudices and tendencies is to ask them and then listen to what they have to say. That usually cannot be correctly done without investing both time and energy. We all have an overriding obligation to deliver to our clients and the public the most fundamental part of our justice system: a fair and impartial jury. Study after study (including one done by the Pima County courts and Duke University) have shown that jurors are not always honest about their backgrounds, motives, beliefs and prejudices.

As Mr. Snyder's examples demonstrate, it takes a skillful lawyer asking probing questions to discover juror prejudices, particularly when they are not readily apparent to the jurors themselves. The desire for efficiency should not eliminate the need for fairness. We strongly urge the Bench and the Bar to come together on this issue and permit lawyers to question their own juries.

—John J. Bouma, Snell & Wilmer
Jeff Bouma, Gilcrease & Gorski

I applaud Howard M. Snyder for his excellent and well-researched article on the importance of attorney *voir dire*. Recently I was limited to 15 minutes to *voir dire* in a medical negligence case. The judge was telling me that my time was up before I had completed following up with the prospective jurors who had responded to her questions and was given another five minutes for additional *voir dire*, which was woefully inadequate considering the issues for tort reform, runaway juries, the so-called malpractice crisis, etc.

I was one of several attorneys invited to speak to the Arizona Judicial Conference in September 1990. I spoke on the topic "Lawyer or Judge *Voir Dire*." My research and presentation was very consistent with that of Mr. Snyder. One of the most important considerations is that prospective jurors will not be as candid with judges as with attorneys, which is well documented. In 2000 I tried a helicopter crash case before

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the Honorable Matthew W. Borowiec (retired) in the Cochise County Superior Court. At pretrial conference I asked if there would be attorney *voir dire* and would there be limitations. He informed the six attorneys present that he had heard my presentation at the Judicial Conference approximately 10 years prior and he did not believe that prospective jurors would not answer him truthfully. He said that he had decided to run a test, and for the next several jury trials he would ask a certain series of questions and then have the attorneys ask the same questions. To his amazement he found the panel answering him one way and giving the opposite answer to the attorneys on the same question. Since that date until his retirement he allowed the attorneys unlimited *voir dire*.

A RUSH to justice can only result in injustice.

—Dale Haralson, Esq.
Haralson, Miller, Pitt, Feldman & McAnally, PLC

After reading the October edition of ARIZONA ATTORNEY and Howard Snyder's article on time limitations on attorney *voir dire*, I decided to write what I think is my first letter to the magazine.

Howard is absolutely right, and I say that from the perspective of a "retired" superior court judge and defense attorney who has been picking juries in this state for longer than I now readily admit.

The attack on the *voir dire* system that occurred some years ago was based primarily on information out of the state of New York, where judges have traditionally not participated in the *voir dire* process at all. That led to *voir dire* procedures that, in the words of one commentator at the time, "trespassed on eternity." That, of course, has nothing to do with procedures in Arizona, where most of the delays in jury selection are occasioned by jurors who are trying to get out of service because of personal commitments. You would be amazed at how many stories about nonrefundable plane tickets you hear when you are trying to pick a jury in a long trial.

I don't know why this concept of limiting attorney *voir dire* is having a renaissance. However, I do not think it's based on a complete understanding of the issue. I tried a case last October in which the judge stopped my *voir dire* examination and told me my inquiry was improper because it could not lead to a challenge for cause. It did not seem wise at that point to ask if the judge had ever read Rule 47(d), so I politely and timidly went on to another subject.

Somewhere around here is a relevant article from a psychological journal. I can't find the article, but the premise is that jurors are more responsive and open to attorneys' inquiries than they are to inquiries from the court. I can cite an example.

A long, long time ago I watched part of a product liability case in federal court involving a child who had lost an eye. The attraction was that the late Melvin Belli was plaintiff's counsel. The case was tried before the late William Copple, who is not only the father of two very good friends, but one of the finest judges and finest men I have ever met. He, however, did all his own *voir dire* in a relentless monotone.

The case hung 11–1 for a defense verdict, given the unanimity rule applied in federal court. The lady who refused to agree to the defense verdict had lost an eye in an accident when she was a child. The subject never came up during jury selection.

After reading Howard's article, I did a little computer research on *voir dire*. I came up with an article that confidently asserted, "The true yet unstated purpose of every attorney … is to find jurors predisposed to their position." This is the legal version of the urban legend. Perhaps its constant repetition has something to do with continued attacks on attorney *voir dire*.

In trial after trial the practical purpose of *voir dire* is to identify individuals on the panel who have prejudged the case *in favor of your opponent.* Attorneys may dream about picking a jury with a ringer on their side who they (somehow) nurtured through the jury selection process. As a practical matter, it is impossible. Jury consultants who suggest otherwise are selling snake oil. Under usual circumstances, both sides of a lawsuit will settle for the same jurors if they could just be confident of getting rid of the outliers.

That was brought home to me years ago in an insurance coverage jury trial in Las Vegas. This case involved so many lawyers it had to be tried in the basement in the Thomas and Mack Center at UNLV. Proposed jury members were brought in in groups of 20 for a *voir dire* examination that went on for two weeks. There were dozens of lawyers who grouped relative to the various interests of their clients. After about two days of selection, the plaintiffs and the various groups of defendants began horse-trading strikes along the lines of "If you take off juror 8, we will take off juror 7." The four involved jury consultants, to a person, were beside themselves. Legal heresy was being committed before their very eyes. The ad hoc empirical approach that developed among the lawyers apparently violated every preconception the consultants had about how juries should be selected. On the other hand, it neatly reflected the realities of the situation.

To return to Arizona and our procedure, a jury selection system that requires attorneys to address their basic questions to the panel at large and only question individual jurors when a juror singles himself or herself out is perfectly adequate as a means of avoiding overlong jury selection and satisfy the reasonable time requirements of Rule 47(b)(2). If the process takes a while, even then it is because panel members have something to say. Letting them have their say is what leads to fair trials. I believe that is the goal that our society was striving for when those structures we call "court houses" were built.

—Michael E. Bradford
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