17-CV-C

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Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Suggested Changes to Fed. R. Civ. P. 47(a)

Dear Members of the Committee:

The American Bar Association (ABA) respectfully requests that the Advisory Committee recommend Fed. R. Civ. P. 47(a) be amended to require that the parties at trial or their counsel be allowed the opportunity to question prospective jurors directly during the voir dire process under the supervision of the court and subject to reasonable time limits.

BACKGROUND INFORMATION AND REASONS
FOR PROPOSED CHANGE

In 2004, a special ABA committee completed an extensive study known as "The American Jury Project." The co-chairs of that committee were the chairs of the ABA's Criminal Justice Section, Litigation Section, and Judicial Division. Committee members included judges and members of both the plaintiffs and defense bar. Among the *Principles for Juries and Jury Trials* developed by this committee was Principle 11(B)(2), which states:

> Following initial questioning by the court, each party should have the opportunity, under supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. In a civil case involving multiple parties, the court should permit each separately represented party to participate meaningfully in questioning prospective jurors subject to reasonable time limits and avoidance of repetition.

At its next meeting, the ABA House of Delegates adopted this precise language. It was reviewed in 2013 and currently remains official ABA policy. At its Fall 2016 meeting, the ABA's Tort Trial and Insurance Practice Section resolved that this request to amend Rule 47(a) be initiated to seek the implementation of the Principles for Jury Trials, including Principle 11(B)(2).

Rule 47(a) presently states the court "may permit the parties or their attorneys to examine prospective jurors or may itself do so . . . ." While some federal district court judges permit direct questioning by counsel, others often exercise their discretion under the

current Rule to conduct all direct questioning themselves, precluding questioning by counsel. Citing an empirical study comparing federal judges with state court judges regarding their willingness to permit direct questioning by counsel during voir dire, Mark W. Bennett, U.S. District Court Judge for the Northern District of Iowa, has stated: "federal district courts generally allow far less attorney involvement in voir dire than state courts." The study he refers to shows that, of the federal judges responding to a survey, 45% permitted only limited attorney involvement and 25% totally precluded counsel from questioning jurors. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 159 (2010).

THE IMPORTANCE OF PERMITTING COUNSEL TO QUESTION PROSPECTIVE JURORS

The Sixth Amendment of the United States Constitution provides that "the accused shall enjoy the right to . . . trial by an impartial jury." This right to jury impartiality extends to civil cases. In *McDonough Power Equipment, Inc. v. Greenwood et al*., 464 U.S. 548, 554 (1984), a civil action for damages based on product liability, the Supreme Court stated:

> One touchstone of a fair trial is an impartial trier of fact—"a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.

It is important to recognize that a trial judge likely knows far less about a given case at the time of voir dire than the lawyers who have prepared the case for months or years. The potential bias of a juror may be with respect to a particular witness, a piece of evidence or a fact issue that might arise. Busy though diligent judges cannot be expected at the outset of trial to appreciate all the significant matters on which jurors should be examined for bias. As stated by the Fifth Circuit Court of Appeals in *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977):

> [We] must acknowledge that voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties. A judge cannot have the same grasp of the facts, the complexities of the case and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weaknesses of each litigant's case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed.

The court further noted with approval that the ABA's Commission on Standards of Judicial Administration had formally proposed affording trial counsel "reasonable

opportunity for direct questioning of jurors individually" as an important means of restoring impartiality. *Id.*

While the court's lesser familiarity with the case at the outset of trial renders the judge less able to anticipate developments that might subject a party to obvious bias, such as prejudice based on race, gender, sexual orientation or political affiliation, the court is even less able at that time to appreciate the potential "implicit bias" of jurors that could affect the outcome of the case. Judge Bennett defines implicit bias as "the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious" of which "social scientists are convinced that we are, for the most part, unaware." Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, at 149. He goes on to state that while judges can generally inquire about explicit biases, "For a variety of reasons, judges are in a weaker position than lawyers to anticipate implicit biases in jurors and determine how those biases might affect the case." *Id.* at 150. "Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand." Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1179 (2012).

Still another danger of judge-only juror questioning involves a recognized difference between the way jurors react to questions from the court and how they react to attorney questioning. Research shows that potential jurors respond more candidly and are less likely to give merely socially desirable answers to questions from lawyers than from judges. Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Jury Candor*, 11 LAW & HUM. BEHAV. 131 (1987).

THE PURPORTED REASONS FOR PRECLUDING DIRECT ATTORNEY QUESTIONING IN VOIR DIRE ARE NOT CONFIRMED AND ARE OUTWEIGHED BY ITS IMPORTANCE

The primary arguments against permitting counsel to directly question jurors are that: (1) questioning by both the court and counsel would take up too much trial time; (2) counsel can abuse the voir dire process by asking self-serving, argumentative questions; and (3) direct questioning is unnecessary because, under existing rules, counsel can submit written questions in advance for the court to ask.

Regarding the time used for attorney questioning, the policy adopted by the ABA referred to above and our proposed change would provide that direct questioning by counsel be "under the supervision of the court and subject to reasonable time limits." There is credible research indicating that under court supervision attorney-conducted voir dire does not take substantially more time than when it is conducted only by the court. The National Center for State Courts and the State Justice Institute completed a study in 2007 that analyzed the time required for voir dire under various systems. The study found that voir dire conducted primarily by judges with some limited involvement by attorneys did not increase the time required for voir dire at all, and that voir dire conducted with equal participation between the judge and counsel increased the time for voir dire by approximately only forty-five minutes when compared to voir dire conducted exclusively

by a judge. GREGORY E. MIZE ET AL., *THE STATE-OF-THE STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT* 30 (2007), *available at* http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx; 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, 1196 (2003). A similar survey of one hundred and twenty-four federal judges conducted by the Federal Judicial Center showed that the extent of attorney involvement "bore no relationship to the reported amount of time typically spent on voir dire." Hans & Jehle at 1185.

With regard to abuse of the voir dire process by counsel, it should not be assumed in advance that such conduct will occur. Experienced attorneys can appreciate that it would be counterproductive. Counsel can be advised of what is not allowed and what sanctions are available for abuse. An attentive judge monitoring counsels' questioning can control the process accordingly. As noted in *Harold v. Corwin*, 846 F. 2d 1148, 1153 (8th Cir. 1988) (concurring op.):

> If a trial judge concludes that a lawyer is abusing the process by either prejudicing the jury or abusing time limitations, the judge can effectuate reasonable rules of procedure to curtail the abuse. Proper and experienced judicial oversight is exercised continually in the course of a trial. The court provides reasonable control in discovery, in opening statements, excessive and repetitive direct examination, abusive cross-examination and in limitation of content and time of closing argument. The conduct of voir dire is no different.

The right to submit in advance questions for the court to ask does not suffice. The need to follow up on those questions would be likely, and often the reasons or occasions for important questions do not arise until voir dire is already in progress. Finally, while Rule 47(a) now states that if the court examines the jurors, it must permit counsel to make further inquiry the court "considers proper," it gives the court the option to ask any such questions itself, precluding counsel from doing so.

CONCLUSION

The participation in voir dire by counsel is well within the context of existing federal rules. Permitting that participation by rule is an important aspect of a litigant's right to reasonable protections against jury bias. Its benefits far outweigh the concerns its opponents have expressed.

Thomas M. Sullivan

cc. Committee on Rules of Practice and Procedure