The Basics of Jury De-Selection in State Court

Francis J. Carney[1]

Picking a jury has nothing to do with jury *selection*. Disabuse yourself now of any notion that we pick juries by aiming to pick those whom we guess are "best" for our case. Instead, what we do is *de-select* the worst, and settle for the rest. If you remember nothing else from this program, remember this.

This paper is intended for the novice who has never tried a civil jury case in state court and hasn't a clue about how to do it. I won't cover the more advanced techniques in uncovering bias, and there are dozens of articles and books on that point by writers more skilled than I.[2] There's nothing in that to be ashamed of. No one learns this in law school nor is there anything out there that explains it.[3]

The Venire

The jury panel or venire (va-NYE-ree) is called into court for the first morning of trial. The size of the venire varies, depending on the perceived difficulty of selecting impartial jurors because of the notoriety, length, or difficulty of the case. (As well as what counsel and the trial court decided upon in the pretrial conference.) The usual size of the venire in a routine state

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[1]Revised and adapted from "The Basics of Jury Selection," VOIR DIRE, Summer 1995, by Francis J. Carney.

[2]I can recommend David Ball's *Theater Tips & Strategies* (NITA, 3rd Ed. 2012); Judge Ralph Adam Fine's superb *The How-To-Win Trial Manual* (JurisNet, LLC, 4th Ed. 2008) and Jeffrey T. Frederick's *Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting your Jury* (ABA Publishing, 3d Ed. 2012). All are available on Amazon.

[3]Utah Rule of Civil Procedure 47 provides an outline but not much more.

court trial is around twenty-five to thirty[4]; for a complex, lengthy, or publicity-bound matter, it may be a hundred or more.[5] These people are selected from a master jury list kept by the clerk of the court.

This is a topic that you must anticipate and discuss at the pretrial conference (or before), as you do not want to end up with too few panelists[6] after challenges for cause are exercised. More subtly, a judge's willingness to excuse borderline potential jurors for cause will be influenced by the size of the panel; if you started with twenty-five panelists, and seven have already been stricken for cause, it's going to be that much more difficult for the court to excuse any remaining "close" cause strikes, because there must be enough panelists left to pick a jury and allow for peremptory challenges. In a state court trial with one alternate, that's seventeen. (Nine needed for the jury with the alternate, add four plaintiff's peremptories, add four defendant's peremptories, and you get to seventeen panelists minimum after cause strikes.) In our example, there's no more room for any cause challenges once eight have been stricken. So you can see it gets tougher to strike for cause as the numbers diminish.[7]

The Process Begins

It's the first morning of trial. Counsel usually meet with the judge briefly before the

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[4]Thirty is getting to be more common because of an increasing problem with "no-shows."

[5]The master jury list is drawn from voter registration and driver's license records. The procedures followed to select the panel are set forth in Rule 4-404, *Utah Code of Judicial Administration* and more generally in Utah Code §§ 78B-1-101 *et seq*.

[6]The former term, "veniremen," is sexist and "venirepersons" is too awkward, so use "panelists."

[7]Surprisingly, attorneys continue to flub this counting process, thus wasting peremptories, and the judge may not do it for you. See my paper elsewhere in the materials, *The Supernumerary Juror and Peremptory Challenges*, for examples on how to do it correctly.

action starts to work out any last-minute problems. Then all return to the courtroom. The judicial assistant (formerly “courtroom clerk”) goes to the jury assembly room and brings the panel into the courtroom. The J.A. gives each counsel the list of the jury panel, with names and identifying numbers of the people who appeared, and the names of the no-shows crossed off. This is nowadays "pre-randomized" by a computer program.[8] Often you can get this list a day or two in advance– if possible, certainly do so– it will make your job of keeping track that much easier and sometimes allow you to identify potential problems in advance. The panel files into the courtroom and is seated by the bailiff in the order generated by the computer randomizer. Everybody settles down and the judge greets the panel and has counsel introduce themselves and their clients.

Each judge has a different way of seating the venire, and it's useful to find out in advance by asking the judge’s judicial assistant. A few even have preprinted charts of the seating arrangements. For example, the first called, Number 1, is usually seated in the first seat in the jury box. Then the rest of the jury box is filled up with the next ten or eleven, or however more it holds. As their names are called, the rest of the panelists take their seats in order around the courtroom.

It's critical to keep track of where everyone is seated, and it's easy to get confused. There is no one correct method of keeping track; use what works for you. I've tried several systems, including using a computer. None has proved entirely satisfactory, as it's a constant battle

[8]In former times, and maybe still in some rural courthouses, the names were written by the courtroom clerk on slips of paper, then put into a jury "wheel" or box and mixed up. One by one, the names would be blindly drawn out and read aloud to set the panel. These old jury wheels or boxes are mostly now just cherished antiques.

between needing a "visual" to keep track of who is who, and having enough space to write some comments and assessments. What I last used was a combination of both a visual "map" and a separate details sheet.

Using my visual map, I note the name of the first panelist, with a few comments on appearance. As the first panelist is called. I write his name in my first column, and a description: "Gray suit, bolo tie, beard." Then the next one is called, and the next. This happens quickly, and you have to work to keep up. (It really helps to have an assistant in voir dire.) Once the seating in order is finished, the judge has the panelists stand and take the "oath of the panel." Then the voir dire starts.

Voir Dire[9]

The trial judge will usually give a brief statement of the nature of the case. For example:

Ladies and gentlemen of the jury panel. We are here for the trial of a case brought by the plaintiff, Mr. Jones, represented by Mr. Humpherys, against the defendant, Big Medicine Hospital, represented by Mr. King. Now, this is not a criminal case but rather a civil case seeking money damages arising out of alleged medical negligence. Mr. Jones had an injection into the right buttocks on May 12, 2009 for pain relief purposes, and he claims that this injection caused permanent damage to what is known as the sciatic nerve. The hospital denies that it was negligent or that it caused this injury or these damages. (etc.)[10]

The judge will ask a list of questions on statutory disqualifications, such as being under the age of 18 or not speaking English. (These are found in Utah Code Section 78B-1-105.) Other exemptions from jury duty are also raised, such as physical or mental disability.[11] The judge will

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[9]It doesn't really matter how you pronounce it- most locals say "dyer" and those who took French say "deer."

[10]These brief-and-neutral case descriptions are almost always jointly prepared by counsel.

[11]This might include a disability that prevents a panelist from hearing or concentrating on the evidence for the period of the trial.

also inquire whether any panelist will suffer undue hardship if they are selected. Typically this hardship must arise to the level such that it would interfere with the ability to concentrate on the evidence.[12]If no impediments are found, the judge will ask counsel to stipulate to the statutory competence of the panel.

The judge will then usually have each panelist in turn stand up, state his or her name, address, employment, marital status, spouse's employment, and level of schooling. Often some "easy" questions are asked to relax the panel a bit. When that first round is finished, more specific voir dire is done.

Who Asks the Questions?

In former days, most state court judges conducted the rest of the jury questioning themselves and allowed attorneys little or no role in it. That's changing. Many state-court judges now allow attorney-conducted voir dire, at least in part, either in open court or in chambers.[13] This is preferable to court-conducted voir dire, although there remains considerable reluctance among some judges.

A power figure in a black robe sitting on a high bench in an intimidating courtroom, asking closed-ended questions to which the appropriate answer is obvious engenders neither candor nor honesty. "Despite the fact that your brother, sister, and father are doctors, do you

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[12]Judges make these determinations on a case-by-case basis. Common reasons for excusing people for undue hardship include responsibility for care of a terminally ill family member; the panelist is the sole proprietor and employee of a business that provides a family's sole means of support. Ordinary inconvenience, such as the need to arrange for child care or to re-schedule appointments, does not constitute "undue hardship."

[13]I recommend the thoughtful article by Lauren I. Scholnick, *Efficiency and Efficacy of Voir Dire in Utah: A Prescription for Change*, Summer 2009 UTAH TRIAL JOURNAL at 20, which includes a survey of state court judges on this issue. Also be sure to consult the "Bench Book" on your trial judge, found on the Utah State Bar's Litigation Section web page, http://litigation.utahbar.org/benchbooks.html.

believe, Ms. Jones, that you can follow my instructions and decide the issues fairly based only on the evidence that you hear?" This sort of "stark little exercise," as the Utah Supreme Court has called it,[14] can hardly be expected to reveal jury bias.

Here's another example. The trial judge asks the panel, "Do any of you have any *problem* awarding money damages for the death of another?" There might be a few responses, but lurking behind those who respond are those who have concerns about the issue but remained quiet, out of intimidation or peer pressure. The question itself implies that it is a "*problem*" for people to have concerns about awarding money damages; thus, under the circumstances of public exposure and questioning from an authority figure, many people will remain quiet. The other problem with such questions is that they are closed-ended in that they simply ask for a yes/no answer. The better way to ask would have been open-ended, "How do you feel about awarding money damages for the death of another?" This, obviously, requires either individual questioning or the use of a questionnaire.

Utah Rule of Civil Procedure 47(a) leaves it entirely up to the discretion of the trial court.[15] If the judge conducts the voir dire, the court must consider supplemental questions from counsel. There are still some judges who insist that the attorneys ask the questions to the judge, not to the panel. So the odd result can be something like this: "Your honor, I wonder if the court might ask Mrs. Schwartz, Juror #23, in what capacity she knew Dr. Mann. Was she an employee

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[14]"The term 'stark little exercise' referred to the all-too-prevalent practice of avoiding any real inquiry into possible bias by a trial judge's asking a prospective juror if he or she could decide the case fairly and follow the law given by the judge and then taking a prospective juror's affirmative answer as dispositive of the issue of bias." *State v. Saunders,* 992 P.2d 954, 962 (Utah 1999); *see also Depew v. Sullivan*, 71 P.3d 601, 610, 2003 UT App 152.

[15]*See*, *Barrett v. Peterson,* 868 P.2d 96 (Utah Ct. App. 1993).

at his clinic?" To which the judge says, "Yes, that's an appropriate question, counsel. Mrs. Schwartz, you heard the question, how is it that you know Dr. Mann?"

However it's handled, there will be additional questions that the attorneys and the judge have agreed upon. (That's the "proposed voir dire" you were supposed to submit in writing.) For example, "Has any member of the panel ever been a party in a civil action seeking damages? Please raise your hands."

If It Is Allowed, How Do I Conduct Attorney Voir Dire?

Finding yourself before the minority of Utah judges that allow full or partial attorney-conducted questioning can be a novel experience even for old hands, so here are some suggestions. Start with honesty and open-ended questions, perhaps taking off from answers to written questionnaires. For example, to address the issue of reluctance to award damages, it would be best to select an apparently-extroverted member of the jury, let's call him Mr. Smith. You would then ask Mr. Smith, "Some people think that money damages shouldn't be awarded for the death of another. How would you feel about that, Mr. Smith?" The first thing you notice is that you have *validated* those people who feel that money damages *shouldn't* be awarded for the death of another; therefore, we imply that it would be appropriate for others to agree. Then we have an open ended question: "how do you feel" or "what do you think about"? This prompts the person to speak and to disclose. From those answers, important information can be gleaned, and further lines of questioning appear.

If Mr. Smith says that he personally has a problem with it, that he thinks many deaths are unfortunate, but not due for compensation, then you ask him to explain that in further detail; i.e.

"*tell me more about that*."[16] This is done without *any* judging by your voice, word, or body language. Even if the answer is entirely "inappropriate" in your view, you must be careful never to show any sign of disapproval. You've asked the jurors to speak honestly, and you can't punish them for doing so, or the rest will be reluctant to speak freely. So no matter what the answer, *never* show disapproval. Simply thank the juror for his honesty, and move on.

The next useful technique is called a "takeoff," or "loop." Remember Mr. Smith said that he did not believe that anyone should sue for the death of another. You're watching the other jurors (at least out of the corner of your eye) and you notice Mrs. Higbee slightly roll her eyes in response to Mr. Smith's comments. Now you have a natural takeoff: "Mrs. Higbee, you heard Mr. Smith say that he did not believe in awarding damages for death, do you have a different view on this? Tell us about it." Of course, if you're the plaintiff's lawyer, you may not *want* to ask Mrs. Higbee that question, hoping that the defense lawyer did not notice her eye movements. But you see the point in the technique. Start with an extroverted juror, asking open-ended question, and always validate.

And never, never cross examine a panelist. By cross-examine I mean challenge a juror on his statements and attempt to convince him otherwise. That is suicidal for you: you will not change the juror's opinion, and you will alienate the others, including the trial judge.

And please do not try to overtly "sell" your case. Twenty years ago, I remember watching a video presentation entitled "Winning Your Case on Voir Dire," but the time for that technique is long over. First, at this early stage in the action, you have zero credibility with the potential

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[16]Many Utah judges, perhaps most, would cut off further inquiry of Mr. Smith before this, and have further questioning conducted in chambers.

jurors, and their willingness to be persuaded by you is nonexistent. Your job at this time is to be honest and credible. Second, you will offend the trial judge and she will cut you off. This is precisely the reason why many judges do not allow attorney conducted voir dire, because of a fear (sometimes based on experience) that attorneys will use the time as an additional opening statement. In this regard, do not attempt the old technique of "gaining commitments" from potential jurors in voir dire. Even if they give you the sought "commitment," they are likely to feel bullied and resentful.

The court will likely limit your time for jury questioning, perhaps to only a half-hour per side. Use it wisely for the purpose for which it was designed– to uncover hidden biases and attitudes so that you may effectively exercise your peremptory challenges.

Here is a checklist for attorney-conducted voir dire:

- ☐ Ask for it! (It's surprising how many lawyers decline the opportunity.)
- ☐ Smile, if you can do it honestly
- ☐ Be self-effacing, but not phony ("I'm just a country lawyer.")
- ☐ Understand that as a lawyer, you start with ZERO credibility with the jury
- ☐ Explain why it's important to ask what may seem to be personal questions
- ☐ Explain that there are no right or wrong answers, only answers– and mean it
- ☐ Use an assistant; you cannot take notes and keep eye contact at the same time
- ☐ Ask open-ended questions
- ☐ Start with easier, less-controversial areas
- ☐ Start the questioning with the apparent extroverts
- ☐ Use your seating chart and get the names right, including pronunciations

- ☐ Use takeoffs to link the conversation from one juror to the next
- ☐ Be aware of the judge's level of tolerance for "taint" or inflammatory answers in open court
- ☐ Validate in the form of your questions: "some people think..."
- ☐ Validate in the response to remarks: "thank you for your honest response."
- ☐ Never cross examine
- ☐ Never show disapproval (and learn your own facial reactions)

In this regard, many of us are unaware of our own body language and subtle verbal cues. It seems the more self-confident we are, the more boneheaded we can be about this. So have someone you respect– and who can speak with you honestly without being fired- watch your jury questioning and give you feedback.

Handling Problem Responses

All those raising their hands are noted. Then the judge will explore the specifics. There's some artistry in this. Normally a judge won't take the time to individually question each panelist privately so there's always some concern of an inflammatory answer "tainting" the panel. An experienced judge will usually cut short anyone who seems about to express inflammatory answers and question them privately with counsel in chambers. And don't be afraid to suggest to the court that some areas of inquiry might be better addressed in private.

A true-life example from a medical malpractice trial. The judge asks, "Do any members of the panel have any strong opinions about medical malpractice lawsuits?" Five or six, including Mr. Jensen, raise their hands. Many judges think the right way to do it would have been to question privately, in chambers, those who raised their hands. The wrong way, according to this

school of thought, is to ask, in open court, “Tell us about those opinions, Mr. Jensen.” Mr. Jensen is of course only too happy to let everyone know that there are too many lawyers and too many malpractice suits, and that the plaintiff’s lawyer is notorious for filing frivolous suits.

I have gone back and forth on whether to allow open-court expression of bias. I used to dread the thought of "tainting" the others but at one point came around to the belief that opinions are not infectious, and that for some matters I'd rather get it out in open court. (Thinking that I wanted to see the reactions of the other panelists to controversial statements, and have the chance to follow up.) You will find prominent lawyer-authors recommending this “let it hang out approach.” But now I have come back to where I started thirty-four years ago, and again prefer in-chambers conferences with problematic jurors. I’ve concluded that this method prompts a much easier, more open exchange, with jurors much more likely to relax and open up. It also prevents the occasional “free-for-all” phenomenon that results in nearly the entire panel being stricken, and the whole process having to begin anew.[17]

Questionnaires

I've included a separate paper in the materials on the use of jury questionnaires. Used properly, these are an excellent way of getting more out of voir dire. I recommend them for nearly all cases– if your judge will allow it.

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[17] *See Pellicer v. St. Barnabas Hosp*., 974 A.2d 1070, 1084-85 (N.J. 2009) (reversing a $71,000,000 verdict in a brain-damaged baby case because trial judge allowed open expression of ill-feelings of panelists toward the hospital and doctors generally, instead of using chambers or sidebars: “We assume that the trial court intended to impanel a jury that was both fair and impartial, but the repeated expressions of anger, resentment, bitterness, and dissatisfaction, much of it directed at the very facility where the tragic events that were about to be considered had taken place, could not have been ignored by the jurors who overheard them. . . Permitting potential jurors to give vent to deep feelings of bias as an educational technique for those who do not already have such biases is simply inappropriate. Although an unexpected expression of bias by a juror may be unavoidable, intentionally exposing jurors to expressions of such bitterness, anger, resentment, and bias serves no legitimate purpose.”

Challenges to the Panel

Once in a rare while you may encounter a challenge to the panel (or, in the quainter language of an earlier time "to the array".) Suppose every one of the twenty-five people seated around you is under 25 and a student. There's something strange about it, but there's nothing to warrant a "cause" challenge to any one of the group. Nevertheless, the panel as a whole isn't representative.

This is where the "challenge to the array" comes into play. Read Rule 47(d) and Section 78B-1-113. The challenge to the panel is justified for a "material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn." This may be such a case.

Methods of Exercising Challenges

Rule 47(g) now expressly describes two ways to conduct challenges: the "strike and replace" method and the "struck" method. The "struck" method is the one I will describe in detail in this paper, as it is the method generally used in Utah civil trials. You may occasionally encounter the "strike and replace" system, in which the number of jurors equal to the size of the trial jury, including any alternates, plus the number of peremptory challenges allowed by law, are called and seated in order. Only *those panelists* are examined by the judge and counsel; others not called will wait in the courtroom. Requests to excuse jurors for cause and hardship are made, heard, and ruled upon. A panelist stricken for cause is immediately replaced by another from the group that had not been called up, and then in turn examined "for cause." This process continues until all challenges for cause have been exhausted. At that point, the required number of panelists to make up the jury and to account for peremptory challenges remains. Peremptory

challenges are then taken. The extra jurors in the courtroom who were not called upon to participate are thanked and excused.

Challenges for Cause

Rule 47(f) lists the grounds for cause challenges, including financial interest in the matter at hand, relationship to one of the parties, and most importantly, "*Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly*."

There are dozens of reported decisions on the bases for cause challenges. Counsel should review not only those cases annotated at Rule 47 of the Civil Rules but also those following Rule 18, Utah Rules of Criminal Procedure. Also key is the 2002 amendment to Rule 47, as explained in the Advisory Committee Note, which makes clear that the judge must be convinced that a potential juror can act impartially, and mere recitation of the rote formula "Given all that, do you think you can be fair?" is not good enough. Any doubts should be resolved in favor of striking the panelist for cause.[18]

When the voir dire is finished, you "try" the challenges for cause. That means you approach the bench again, or to chambers, and discuss with the court (out of the hearing of the panel) which jurors ought to be stricken for cause.[19] And many judges do these cause challenges

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[18]Please see my paper in the materials on attorney-conducted voir dire for further analysis on this issue of juror self-qualification and also my *Outline of Civil Jury Selection in Utah* for the cases under the heading, "Superficial Judicial Voir Dire Under Attack.".

[19]Although in some states, like Idaho, this is actually done in open court, right in front of the other panelists.

as you go along, right after talking to the panelist.

For example, a juror ought to be stricken for cause because he harbors a state of mind which will keep him from being impartial. Or maybe someone has a must-keep business trip or in three days other undue hardship. Those sorts of panelists will be stricken for cause.

When that's done, you go back to your table. The judge asks each counsel in turn: "Counsel, do you pass the panel for cause?" You reply, "Yes, subject to the matters we discussed at the bench." *Make sure that you've made a good record of any challenges for cause which weren't granted or have been given permission to make a record later on.*

Peremptory Challenges

Then the peremptory (not "*pre*-emptory") challenges start. The judicial assistant has kept a thick-paper "blue sheet" with the names and numbers of all the panelists. She has crossed through those stricken for cause. (So have you on your chart.) The bailiff gives the blue sheet to the plaintiff's lawyer first. While this is underway, the judge gives the panel a stock speech to keep them occupied while the attorneys are busy making their peremptories.[20]

Here's where keeping score pays off. Suppose you are picking a jury of eight with no alternates out of a panel of thirty. Five panelists have been stricken for cause, Numbers 1, 8, 13, 23, and 29. You've crossed them off your chart. Each side gets three peremptories, for a total of six. Therefore, you're going to choose your jury from the *first* fourteen remaining on the panel,

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[20]Some of these stock harangues were quite entertaining. Judge Stewart Hanson, Sr.'s was one such and has been handed down to successive generations of Third District Judges. David Dee's talk on the history of the City-County Building was more interesting than worrying about the peremptories but is now, sadly, obsolete. But a judge can go too far. *See State v. Harris*, _____ P.3d _____, 2012 UT 77, n. 3 (mildly rebuking trial judge for reading dated article to the panel filled with "old-timey" offensive ethnic advice on picking jurors) and *State v. Fouse,* _____ P.3d _____, 2014 UT App 29 (judge's experience as prosecutor and potential juror shared with jury panel).

working down from the top. (If there is an alternate, each side gets one extra peremptory, and we would use the first sixteen.)

Go down to Number 17. Cross out everyone *below* her: *they are now irrelevant*. In other words, your jury is going to be picked *from the top fourteen remaining after strikes for cause.* That means everyone above Number 18. No one below Number 17 can possibly be chosen, so *do not* waste any of your peremptories on them. They are called "supernumeraries." (Trust me, this really happens. Again, please see my paper elsewhere in the materials, *The Supernumerary Juror and Peremptory Challenges*.)

The idea is not to pick the *best*, but instead to strike the *worst*. Plaintiff's counsel, P.Q. Humpherys, goes first. He decides Number 9 is tight-fisted. So he takes the blue sheet, crosses through the name of Number 9, and writes "P's #1-PQH." The bailiff hands the blue sheet over to defense counsel, B.A. King. He has a bad feeling about Number 2. So he crosses out Number 2, and writes "D's #1- BAK." And so on, until each side has exercised their three peremptories.[21]

There's some strategy in this. Suppose Number 4 strikes you as unfriendly. But he's also (you surmise) unfriendly to the other side as well. The game is to force *them* to use *their* peremptory to strike Number 4. So even though Number 4 is the one *you* most want to strike, you'll save that strike for last, hoping that your opponent will bounce him first. (And if you represent the defense, this will often work because you get the final shot.)

A few words of caution. First, don't be obvious about your strikes. You can discuss the merits of a panelist without you and your associates staring at them and whispering to each other.

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[21]*See*, *Randle v. Allen*, 862 P.2d 1329 (Utah 1993) holding that multiple defendants have a total of only three peremptories unless there is a "substantial controversy" between them. This is now reflected in the revised Rule 47(e).

Second, don't belabor the process. Take a few minutes, and no more, for each peremptory. Finish up before the court completes its jury speech. I guarantee that your hunches will be as likely wrong as right no matter how many times you've done this exercise. Dawdling over it isn't going to make it any better or easier.

When the defense has made its third peremptory, it's over. The bailiff takes the blue sheet to the judicial assistant, who gives it to the judge, who gives it back to the judicial assistant. The judicial assistant then reads out the names of the eight chosen jurors. The judge will ask counsel if this is the jury that they have chosen. The judge thanks all those not chosen and excuses them. Then the eight chosen are reseated in the jury box, in order, as Jurors 1 through 8. (Alternates are seated starting at number 9, and are usually not told that they are alternates until the end of the trial, when the jury is excused for deliberations.) The judge or judicial assistant gives them their oath as jurors, then in turn swears the bailiff to his oath to take charge of the jury. Then there's a break, with opening statements on your return.

Making the Record

I would hope that it goes without saying that you must make a record of any challenges for cause you made that were not sustained. If there was an objection, and the court overruled it incorrectly, you will still lose if the proof of your of your objection does not appear in the trial transcript.[22]

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[22]*See*, *e.g.*, *State v. King,* 2006 UT 3, 131 P.3d 202. (counsel has duty to raise objection to jurors' qualifications and to make potential cause challenges; failure to do so waives the issue under the "preservation rule" unless the trial court committed plain error); *State v. Winfield*, 128 P.3d 117, 2006 UT 4 ("invited error" doctrine barred appeal on grounds of jury bias where *pro se* criminal defendant stated he had no objection to the jury, nor any further questions of them; party must challenge a juror for cause or waive the point); *State v. Harris*, ____ P.3d _____, 2012 UT 77, Pars. 14- 21 (Party must raise and press *Batson* challenge before jury is sworn and venire dismissed).

And just because you make the record, and establish that the judge was wrong on not striking a panelist for cause, you still may not win a reversal on appeal.[23] Nevertheless, making a good record is the first and necessary step to correcting judicial error.

FJC

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[23]*See State v. Worthen,* 765 P.2d 839, 845 (Utah 1988); *Depew v. Sullivan*, 71 P.3d 601, 2003 UT App 152; and my *Outline on Civil Jury Selection in Utah* under "Appeals on Failure to Grant Challenge for Cause."