BRADFORD LAW OFFICES, P.L.L.C.
1601 North 7th Street, Suite 400, Phoenix, Arizona 85006
602-955-0088

Michael E. Bradford
Specialist in Personal Injury and Wrongful Death Litigation

May 3, 2021

Sent via email: Fox, Yolanda <yfox@courts.az.gov>
Arizona Supreme Court
Re: Petition R-21-0020
Amendment to Criminal Rules 18.4, 18.5, & Rules of Civil Procedure 47
Attention: Yolanda Fox
Staff Attorney's Office
Arizona Supreme Court

To: Arizona Supreme Court

I am writing to lend my voice to those attorneys who wrote in opposition to Petition R-21-0020. I initially added my signature to the astute comment submitted by Cory Tyszka of the Jones, Skelton Firm on behalf of The Mutual Insurance Company of Arizona and Honor Health. However, having re-read the Petition and the letter in opposition from Phoenix attorney Bill Sandweg, I decided to do more to express my strong objection to the proposed amendment to the Rules of Civil Procedure-Rule 47(c)(3). It has been so long since I practiced Criminal Law I don't have anything to say about the Criminal Rules.

I have been an Arizona trial lawyer for fifty years. In the late 60's I was a Deputy County Attorney in Maricopa County. When I left the County Attorney's Office, I briefly defended criminal cases, including one murder case. In January 1971, I joined the Burch Cracchiolo Firm, where I defended personal injury cases for almost a decade. One year I tried thirteen jury cases to verdict in the Superior Court. In 1979 I was appointed a Superior Court Judge in Maricopa County. When I returned to practice in the early 80's, I specialized in medical malpractice defense with an occasional foray into plaintiff's work in product liability. I was co-chairman for two years of the sub-committee, which drew up the rules of specialization for personal injury and wrongful death litigation.

I am absolutely opposed to the proposal to end peremptory challenges in Civil Jury Trials. It would do a disservice to the litigants as well as the jurors themselves. I find the language on page 8 of the Petition (cited below) encapsulates a fundamental misconception of the jury selection process:

"anyone who has competently tried a case in the last century knows that the practical use of peremptories is to achieve some (perhaps illusory) partiality in the final jury. Lawyers can justify such aims to themselves by pointing to the equal opportunity that both sides have in Arizona to distort the jury pool."

I cannot reconcile that argument with my experience.

One case, in particular, comes to mind when I consider the argument that trial lawyers use voir dire in an attempt to achieve some advantage.

In November of 1980, a fire occurred at the MGM Grand Casino Hotel in Las Vegas. The fire killed eighty-five people, including fourteen Las Vegas firefighters. Over a thousand lawsuits followed and were referred to multi-state litigation in Federal Court. The property owners became concerned that they were underinsured with only thirty million dollars in coverage and succeeded in buying one hundred and twenty million dollars of additional liability insurance despite the fact that the liability and cause and event had already occurred. The Judge handling the multi-state litigation pushed the case to settlement in two years. The various retro insurers who had expected that they would have from two to five years to invest their premium dollars before paying anything refused to pay. MGM sued for bad fq11aith in State Court in March of 1983. There were thirty "retro insurers" sued along with various other carriers. I represented the liability insurer for an Arizona contractor that was doing remodeling at the hotel/casino at the time of the fire.

The trial began in early 1985 in an eleven thousand square foot basement room below the Thomas and Mack Basketball Arena on the campus of the University of Las Vegas. Jury selection was expected to be onerous, at least because the trial was predicted to last at least eight months.

In mid-March of 1985, forty-nine seasoned trial lawyers and a multitude of trial consultants gathered in the Thomas and Mack basement to begin jury selection. Voir dire was expected to last two weeks. A series of venire groups of prospective jurors were seated in the jury box and questioned. The Judge then would retire to chambers with the attorneys who wanted to make challenges for cause, and the other attorneys remained in the courtroom. The jury groups were then returned to the Court Room for peremptory challenges. After peremptory challenges, the process was repeated multiple times over the next two weeks. What developed in the courtroom was horse-trading of peremptory challenges (We will strike Ms. White if you strike Ms. Jones).

By the second week of the jury selection, it became clear to me that the attorneys and the trial consultants they hired wanted essentially the same jury. The case was settled after the jury was selected and four days before opening statements were to begin. *1

Here were forty-nine experienced trial lawyers from across the country whose attitude towards jury selection was exactly the opposite of what Petition R-21-0020 would predict.

**1 In 2000, Bill Shernoff, who was probably the premier Bad Faith plaintiff attorney in Southern California at the time, wrote a blog describing his firm's experience entitled: The Cases We Remember: "MGM Grand ' Retroactive Insurance Case."*

The suggestion in the Petition that the elimination of peremptory challenges will be cured by challenging for cause is erroneous. Time and again, I have seen Trial Judges rehabilitate jurors challenged for cause by simply asking them if they could be fair and impartial. The juror, of course, answers yes, and the Judge denies the challenge for cause.

In response to lawyer questioning jury members frequently respond to the question with something to the effect "I am sure I can be fair and impartial, however ..." What follows is an expression of cognitive-dissonance which will probably never be cured by evidence introduced by one party or the other.

Jury selection is a misnomer. Voir dire is a culling process not a selection process. Attorneys are successful when they can get the jury talking. In my experience, the jury panel will not do that in response to questions from a judge.

Respectfully,

/s/ Michael E. Bradford
Michael E. Bradford
State Bar # 1873

MEB/td