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March 2, 2017

### VIA USPS FIRST CLASS

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

RE: Proposed Revision to Fed. R. Civ. P. 47(a), Docket No. 17-CV-C

Dear Committee Members:

I write this letter as president of The American Board of Trial Advocates (ABOTA) and on its behalf. We are a national association of experienced trial lawyers and judges, currently numbering 7600, with our attorney membership evenly divided between plaintiffs' counsel and defense counsel. We are advised The American Bar Association has recently submitted the above proposed revision to Fed. R. Civ. P. 47(a) seeking to have it amended to require that trial counsel be allowed to directly question prospective jurors during the voir dire process. ABOTA supports this proposed revision and respectfully requests that it be given favorable consideration.

While under Rule 47(a), in its present form, the court "may" allow counsel to directly question jurors, the court has the discretion to conduct all juror questioning itself, precluding direct questioning by counsel. In the experience of many of our members, the court often exercises that discretion, denying counsel the opportunity to question jurors.

It is recognized and confirmed by the U.S. Supreme Court that "One touchstone of a fair trial" is the litigant's right to "an impartial trier of fact" and that "voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors". See *McDonough Power Equipment, Inc. v. Greenwood et al.*, 464 U.S. 548,554 (1984), citing *Smith v. Phillips*, 455 U.S. 209, 217

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Advisory Committee on Civil Rules  
*Proposed Revision to Fed. R. Civ. P. 47(a)*  
March 2, 2017  
Page 2

(1982). The problem is that the potential bias of jurors is often with respect to the anticipated testimony of a witness, a piece of evidence or a fact issue that might arise during trial. As compared to trial counsel who have conducted the discovery and prepared the case for trial, busy though diligent judges cannot be expected at the outset of trial to appreciate all the significant matters on which the jurors should be examined for bias. Questions submitted in advance for the court to ask often cannot suffice because of the need for follow-up questions or because the issue arises after voir dire has already begun.

Direct questioning by counsel is important and often needed as a protection against jury bias. Because, as proposed in the requested revision, it would be conducted under the supervision of the court and subject to reasonable time limits, perceived problems such as excessive delay or potential abuse of the voir dire process by counsel can be avoided. Accordingly, ABOTA believes the requested revision to Rule 47(a) is both reasonable and necessary.

Sincerely yours,



F. Dulin Kelly  
President

FDK:pmm

cc: Thomas M. Susman, Director, ABA Governmental Affairs Office