Voir Dire: How and Why We Can Participate

by Patrick M. Kinnally

Every attorney who litigates civil or criminal cases wants to know whether a trial court judge is going to pick the jury by himself or herself, let the trial attorneys perform that task, or make a decision about jury selection which reflects a little of both. The Illinois Supreme Court has now told us that in both the civil and criminal courts it is the latter.[1]

Illinois Supreme Court Rule 234 states:

> The court shall conduct the *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate touching upon their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, and *shall permit the parties to supplement the examination* by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of the examination by the court, the complexity of the case, and the nature and extent of the damages.[2]

For some time now, a debate has occurred about whether attorneys must, in all instances, be permitted to inquire of the prospective venire. In *People v. Allen*,[3] a Kane County criminal case, the Illinois Appellate Court, Second District, held the highlighted language was not directory and did not require in every case that an attorney be permitted to participate in the direct questioning of jurors before selection to the jury panel. The *Allen* court interpreted the Supreme Court rule applicable in criminal cases, Rule 431(a),[4] which contains very similar language to that appearing in Supreme Court Rule 234.

Notwithstanding, in the civil context the Illinois Appellate Court, First District, interpreting Rule 234 held the provision is mandatory and attorneys empanelling a jury must be permitted to conduct direct inquiry of jurors during voir dire.[5] Citing an amendment to Supreme Court Rule 234, which inserted "shall permit" for "may permit" the court concluded the former is indicative of a mandatory intent or obligation and a trial court's refusal to permit counsel (both plaintiff's counsel as well as defense counsel) to ask questions of prospective jurors is reversible error. Although the Grossman tribunal acknowledged the Allen interpretation that the word "shall" can be directory and not mandatory, it rejected that construction even though it was based on almost identical language.

In *People v. Garstecki*,[6] the Illinois Supreme Court has quelled this apparent appellate court conflict. It declared:

> Again, the relevant portion of the rule states that the trial court "shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges." . . . Thus, what the rule clearly mandates is that the trial court consider: (1) the length of the examination by the court; (2) the complexity of the case; and (3) the nature of the charges; and then determine, based on those factors, whatever direct questioning by the attorneys would be appropriate. *Trial courts may no longer simply dispense with attorney questioning whenever they want.*[7]

Justice Thomas concluded that the *Allen* and *Grossman* trial courts erred when they did not comply with the rule since they did not permit any questioning by the attorneys and did not exhibit any adherence on the record to the factors to which the rules says they must abide. In *Garstecki*, a DUI case, the court permitted defense counsel to ask follow up questions of any jurors the court had already examined, as well as submit questions to the court, originally. The court rejected the notion that an attorney has an unfettered right to question every juror in every case where the court has weighed the factors the rule mandates the trial court consider before curtailing attorney questioning.

To get to that result, the *Garstecki* court needed to examine some statutory language with which courts are asked to divine with increasing frequency.[8] Namely, when does the auxiliary verb "shall" mean the verb to which it is coupled leaves a trial court without any discretion in implementing the legislature's, or in this case the Illinois Supreme Court's, intent?

The court reviewed it's decision in *People v. Robinson*,[9] and its explanation of what it has defined as the "mandatory permissive and mandatory directory 'dichotomy.'"[10] The court explained the mandatory permissive interpretation of the verb "shall," and therein if the statute or Supreme Court Rule under review, generally denotes "whether a government official is required to perform a specific duty or whether the official

has discretion whether to perform it."[11] The court noted the other inquiry--whether the statute is mandatory as opposed to directory--is whether the "failure to comply with the particular procedural step will 'have the effect of invalidating the governmental action to which the procedural requirement relates.'"[12]

The court concluded that a statutory obligation could be both mandatory as opposed to permissive and directory as opposed to mandatory. And, the court said, "shall" may not be determinative of either. In other words, it is the nature of the mandatory obligation imposed on the decision maker which tells him/her how to decide. In *Garstecki*, the court did not resolve the issue of whether Rule 431 was mandatory or directory because the trial court considered the rule's factors in *voir dire*. Said another way, there was no procedural default by the trial court; namely, not permitting any *voir dire* attorney inquiry without consideration of the rule's precepts which required the Supreme Court to assess whether the failure to comply with the rule was directory or mandatory.

At first blush it may seem that an interpretation that says a government act "shall" do a certain thing, but then does not, is nothing less than a sophism. If a person shall perform an act then a person upon whom that act operates would infer the task must occur. Perhaps an argument should be made consistent with the Illinois Supreme Court's rule-making authority,[13] as opposed to its *ad hoc* adjudicatory role[14] that its "mandatory permissive and mandatory director" analysis should not be interpretive in nature. This view, however, is myopic.

In our imperfect world, trial judges need discretion to analyze not only a given array of facts but also the opportunity to adhere to a rule that incorporates a wide range of elements to ensure the efficiency and fairness of a trial. This makes sense since it vests in the trial court the ability to assess what should occur at voir dire between examination by the court as well as counsel. It would be unfortunate if Rule 234, or Rule 431 for that matter, required that one size fits all. Thankfully, trials were never contemplated to proceed that way.

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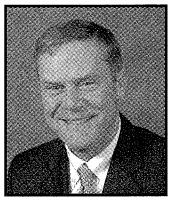
[1] *See People v. Garstecki*, No. 106714, 2009 WL 3063434 (Ill. Sept. 24, 2009).
[2] 177 Ill. 2d R. 234 (emphasis added).
[3] 313 Ill. App. 3d 842 (2000).
[4] 177 Ill. 2d R. 431.
[5] *Grossman v. Gebarowski*, 315 Ill. App. 3d 213 (2000).
[6] No. 106714, 2009 WL 3063434 (Ill. Sept. 24, 2009).
[7] *Garstecki*, 2009 WL 3063434, at *9 (emphasis added) (quoting 177 Ill. 2d R. 431).
[8] *See, e.g., People v. DeLeon*, 387 Ill. App. 3d 1035 (2009), *petition for leave to appeal granted*, No. 2-07-0926 (May 2009).
[9] 217 Ill. 2d 43 (2005).
[10] *Robinson*, 217 Ill. 2d at 52-53.
[11] *Garstecki*, 2009 WL 3063434, at *8.
[12] *Id.* (citing *Robinson*, 217 Ill. 2d at 51-52, *quoting Morris v. County of Marin*, 559 P.2d 606, 610-11 (Cal. 1977)).
[13] 177 Ill. 2d R. 3.
[14] 177 Ill. 2d R. 234; 177 Ill. 2d R. 431.



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