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Voir Dire in Texas

JOSH P. DAVIS
Josh Davis Law Firm
1010 Lamar, Ste. 200
Houston, Texas 77002
713-337-4100
josh@thejdfirm.com

Co-Authored with:
MITCHELL A. GREENE
Josh Davis Law Firm
5107 N. College Avenue
Indianapolis, IN 46205
713-205-4595
Mitchell.a.greene@gmail.com

VOIR DIRE IN TEXAS

By Joshua P. Davis
and Mitchell A. Greene

I. INTRODUCTION

Voir dire—the process by which jurors are selected and empaneled—plays a key role in the trial process by allowing parties to eliminate unfavorable jurors as well as provide an all-important first impression of key issues that will arise over the course of the trial. There can be no question that the composition of the jury can have a major impact on a trial, and voir dire is the mechanism by which trial practitioners can ensure the most favorable jury members possible are chosen. Despite voir dire's obvious importance, it remains an often overlooked aspect of trial practice. This paper provides a detailed summary of voir dire procedures and practice from the beginning of the process through jury empaneling and will hopefully aid trial lawyers in conducting effective voir dire in future trials.

II. PURPOSE OF VOIR DIRE

The Bill of Rights in the Texas Constitution guarantees litigants a right to trial by a fair and impartial jury.[1] Voir dire examination protects this constitutional right "by exposing possible improper juror biases that form the basis for statutory disqualification."[2] Accordingly, "the primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath."[3] Given the important constitutional rights underlying voir dire, courts must allow "broad latitude" to counsel "to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised."[4] Further, because of the inherently subjective nature of jury selection, "the scope of the voir dire examination quite obviously cannot be bound by inflexible rules of thumb."[5]

The mandate that counsel be afforded broad latitude and that voir dire not be bound by inflexible rules has resulted in relatively few strict procedural rules governing jury selection. Thus, in addition to understanding the statutory and common law associated with jury selection, trial lawyers must also always consult the local rules of their jurisdiction and their judge's courtroom procedures for any case- or court-specific voir dire rules.

III. PRELIMINARY PROCEDURES

Many lawyers assume voir dire begins after the jury panel is seated and the parties begin their examinations. However, there are a small number of preliminary procedures

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[1] Tex. Const. art. I, § 15.
[2] *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006).
[3] *Id.*
[4] *Id.*
[5] 4 Roy W. McDonald & Elaine A. Grafton Carlson, Texas Civil Practice, § 21:19 at 116 (2d ed. 2001).

that can take place before examination by counsel. While these preliminary matters are relatively uncommon and certainly not appropriate in every case, it is important that practitioners familiarize themselves with these procedures and are able to recognize situations in which they are appropriate.

A. Challenging the Array

Very rarely, circumstances may be present in which the array of potential jurors was selected improperly. In these instances, a party should seriously consider challenging the array. Such challenges are limited to situations in which:

1. The jurors were not selected by jury commissioners or by drawing the names from a jury wheel;

2. The challenge is made before the jury is drawn;

3. The challenge is made on the grounds that the officer summoning the jury has acted corruptly, and has willingly summoned jurors known to be prejudiced against the party challenging or biases in favor of the adverse party.[6]

A challenge to the array must be in writing and must distinctly set forth the grounds of the challenge.[7] The challenge must also be supported by an affidavit or other credible witness.[8] If an array challenge is not made in the time prescribed by Rule 221, it is waived.[9]

After a challenge to the array is properly made, the court must hold an evidentiary hearing and decide without delay whether or not the challenge should be sustained.[10] If the challenge is sustained, the summoned array is discharged, and another array is summoned in their place by someone other than the officer accused of impropriety.[11] Given the limited bases on which a challenge is proper—i.e. corruption by the officer selecting jurors and willingly selecting biased jurors—it is extremely difficult to successfully challenge an array in practice.[12]

B. Jury Shuffling

After the jury panel has been seated, but before the parties' examination, it is possible for a party to request a jury "shuffle" in which the names of the potential jurors

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[6] TEX. R. CIV. P. 221.
[7] *Id.*
[8] *Id.*
[9] *Martinez v. City of Austin*, 852 S.W.2d 71, 73 (Tex.App.—Austin 1993, writ denied); *Garcia v. Texas Employers' Ins. Ass'n* 622 S.W.2d 626, 630 (Tex.App.—Amarillo 1981, writ ref'd n.r.e.).
[10] TEX. R. CIV. P. 221.
[11] TEX. R. CIV. P. 222.
[12] *See Mann v. Ramirez*, 905 S.W.2d 275 (Tex.App.—San Antonio 1995, writ denied) (unsuccessful challenge to array based on jury selection clerk's admitted intimate relationship with adverse party); *Miller v. Burgess*, 154 S.W. 591 (Civ. App. 1913) (unsuccessful array challenge based on jury being summoned by mail rather than orally).

are shuffled and seated in a new random order.[13] A jury shuffle may be requested by any party, but any such request is waived unless it is made prior to voir dire examination.[14] Notably, Rule 223 restricts jury shuffles to one per case, rather than one per party.[15] However, the one shuffle per trial likely has not occurred if the initial shuffle is not complete in compliance with Rule 223, i.e. the names were not drawn from a "receptacle."[16]

C. Length of Voir Dire

Another issue that should be addressed with the trial court prior to voir dire examination is the amount of time each party will have to question the panel. The amount of time that is appropriate will vary from case to case depending on the court and the facts, however it is well-established that courts possess the authority to limit the time spent on voir dire to help avoid duplicitous or unnecessary questioning.[17] While it may seem practical to attempt to acquire as much time as possible for voir dire examination, it is usually more prudent to limit voir dire to roughly the minimum time required. Excessive questioning during voir dire can result in an annoyed judge or, still worse, an annoyed jury.

Of course, situations will arise in which attorneys feel they need more time to examine the panel. In these circumstances, it is important to establish a clear record of the questions the objecting lawyer intends to ask the panel. If a lawyer is unable to get to certain topics during examination, they may have no remedy on appeal if they did not put the court on notice of the additional areas to be covered.[18]

D. Equalization of Peremptory Challenges

In general, each party is entitled to six peremptory challenges, or "strikes," during voir dire.[19] However, this default rule is only applied in cases where there is only one plaintiff and one defendant.[20] In multi-party actions, the equalizations of strikes is a more complex issue and should be addressed with the trial court prior to the beginning of voir dire examination. For example, in a case with multiple defendants, it is always possible

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[13] *See* TEX. R. CIV. P. 223.
[14] *Id.*; *see also BNSF Ry. Co. v. Wipff*, 408 S.W.3d 662, 666-67 (Tex.App.—Fort Worth 2013,) (although jury shuffle demand was made after panel had completed case-specific questionnaire that was reviewed by counsel, demand was timely because it occurred prior to voir dire examination).
[15] TEX. R. CIV. P. 223.
[16] *See Whiteside v. Watson*, 12 S.W.3d 614, 618 (Tex.App.—Eastland 2000, pet. w'drawn).
[17] *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92 (Tex. 2005) (holding "voir dire examination is largely within the discretion of the trial judge" and trial judges "may place reasonable limits on questioning that is duplicative or a waste of time.").
[18] *See Odom v. Clark*, 215 S.W.3d 571, 574 (Tex.App.—Tyler 2007, pet. denied) (trial court's refusal to allow more time for voir dire questioning was not error where counsel failed to specify the areas he would cover if allowed more time).
[19] TEX. R. CIV. P. 233.
[20] *Id.*

that all defendants are aligned and are pursuing common defenses. In these circumstances, it would be unfair to allow a single plaintiff six strikes while allowing each defendant six strikes.

In multi-party actions, it is the duty of the trial judge to determine the extent to which parties share common interests on matters with which the jury is concerned.[21] The judge must then "equalize" the strikes available to each party such that no side is given an unfair advantage.[22] According to Rule 233, any litigant may move to equalize strikes at any time before strikes are exercised.[23] However, as previously mentioned, it is the best practice to address strike equalization prior to examination of the panel. After all, the number of strikes available to the parties will likely affect examination strategy.

Finally, in cases involving multiple defendants, it is also prudent to address the issue of collaboration in the use of each defendant's strikes. If defendants are permitted to confer prior to exercising strikes, they can ensure that no duplicate strikes are made. Texas courts recognize the significant disadvantage to the plaintiff caused by such collaboration.[24] It is important to note, however, that collaboration in making strikes is not prohibited; rather, it is a factor that courts should consider in fairly equalizing strikes.

IV. Challenging Jurors

Perhaps the most important function of voir dire is to prevent biased or otherwise unfavorable jurors from being selected. This goal is accomplished by properly challenging potential jurors. Juror challenges fall into two general categories: (1) challenges for cause and (2) peremptory challenges. The specifics of each type of challenge are discussed below.

A. Challenges for Cause

1. Strikes Made on Statutory Grounds

The Texas Government Code set forth certain minimum requirements that potential jurors must satisfy, regardless of the case. Specifically, a person cannot serve as a juror unless the person:

- Is at least 18 years of age;
- Is a citizen of the United States;
- Is a resident of Texas and of the county in which the person is to serve as a juror;

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *See In re M.N.G.*, 147 S.W.3d 521 (Tex.App.—Fort Worth 2004, pet. denied) (trial court erred in awarding defendants twice as many strikes as plaintiff in light of fact that defendants were allowed to collaborate and ensured no duplicate strikes); *Van Allen v. Blackledge*, 35 S.W.3d 61 (Tex.App.—Houston [14th Dist.] 2000, pet. denied) (holding same).

- Is qualified under the constitution and laws to vote in the county in which the person is to serve as a juror;
- Is of sound mind and good moral character;
- Is able to read and write;
- Has not served as a juror for six days in the preceding three months in the county court or during the preceding six months in the district court;
- Has not been convicted of misdemeanor theft or a felony; and
- Is not under indictment or other legal accusation for misdemeanor theft or a felony.[25]

The Government Code also sets forth grounds for disqualification that apply based on the facts of a particular case. Specifically, a person may not serve as a juror in a particular case if the person:

- Is a witness in the case;
- Is interested, either directly or indirectly, in the subject matter of the case;
- Is related within the third degree of consanguinity to a party in the case;
- Has served as a juror in a former trial of the same case or in another trial involving the same questions of fact; or
- Has a bias or prejudice in favor of or against a party in the case.[26]

With the exception of the last ground for disqualification listed—bias or prejudice—the statutory grounds for disqualifications are relatively black and white. Many of these grounds are prescreened by courts and further inquiry by the parties is unnecessary. However, it is still recommended that trial attorneys familiarize themselves with the statutory grounds for disqualification in the event an unqualified individual makes it into the jury panel. If an unqualified juror is identified for any reason, a challenge for cause under Rule 229 should be issued. Disqualification based on bias or prejudice for or against a party is significantly more complicated and is discussed in detail in the section below.

2. *Strikes Based on Juror Bias or Prejudice*

There is no statutory definition for "bias" or "prejudice" as those terms are used in the juror disqualification statute. However, the Texas Supreme Court has defined those terms as follows:

> "Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not of did not act with impartiality. Prejudice is more easily defined, for it means prejudgment, and consequently embraces bias; the converse is not true."[27]

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[25] TEX. GOVT. CODE § 62.102
[26] TEX. GOVT. CODE § 62.105
[27] *Vasquez*, 189 S.W.3d at 751 (*citing Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963).

In other words, bias relates to inclinations, while prejudice is associated with prejudgment.[28] While the statutory disqualification is limited to bias or prejudice against a specific party in a particular case, the Texas Supreme Court has recognized that implicit bias can exist.[29] For example, a potential juror who believes all medical malpractice claims are frivolous is obviously prejudiced against any medical malpractice plaintiff, even if they have never met.

If any potential juror expressed bias or prejudice consistent with the above definitions, a motion to strike the juror for cause should be made. However, a potential juror's expression of bias does not automatically disqualify them. If bias is exposed, counsel for either party is entitled to question the potential juror further to attempt to "rehabilitate" them.[30] In *Cortez*, the Texas Supreme Court offered much needed guidance on the permissible scope and sufficiency of rehabilitation questioning. First, the court held that when the record "clearly shows that a veniremember was materially biased, his or her ultimate recantation of that bias at the prodding of counsel will normally be insufficient to prevent the veniremember's disqualification."[31] In other words, simply pressuring a potential juror to "take back" there statement expressing bias is not permissible rehabilitation. However, the court also held that "if a veniremember expresses what appears to be bias, we see no reason to categorically prohibit further questioning that might show just the opposite or at least clarify the statement."[32] The rule set forth in *Cortez* is quite logical: if the potential juror is actually biased then further questioning will only reinforce that fact. However, if the juror misspoke or misunderstood the question he or she was answering, further questioning is necessary to glean the individual's true opinions. Ultimately, the trial judge has broad discretion in ruling on challenges for bias or prejudice because he or she is actually present during voir dire and in a better position to evaluate the potential juror's sincerity and demeanor.[33]

The rules for exposing bias and prejudice also include restrictions on the scope of attorney questioning. These restrictions are primarily designed to avoid confusing jurors and to preserve the juries right to reach a verdict based on the evidence.[34] First and foremost is the prohibition against questioning prospective jurors what their verdict would be if certain facts were proved. As the Supreme Court stated in *Vasquez*:

> "Fair and impartial jurors reach a verdict based on the evidence, and not on bias or prejudice. Voir dire inquiries to jurors should address the latter, not their opinions about the former."[35]

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[28] *Id.*
[29] *Id.*
[30] *See Cortez*, 159 S.W.3d at 91-92 (holding a veniremember can be rehabilitated after an expression of bias, overturning previous rule that disqualification occurred immediately upon the expression of bias).
[31] *Id.* at 92.
[32] *Id.*
[33] *Id.*
[34] *See Vasquez*, 189 S.W.3d at 751-52.
[35] *Id.*

Additionally, it is improper to ask potential jurors about the weight they will give relevant evidence. This line of questioning "should not become a proxy for inquiries into jurors' attitudes, because the former is a determination that falls within their province as jurors."[36] Similarly, it is improper to question the jury panel about whether they can be fair after isolating a relevant fact. This type of questioning "confuses jurors as much as an inquiry that previews all the facts."[37] While the above rules may seem overly restrictive, by no means do they prevent parties for examining potential jurors on issues ***related to*** the facts. To use a previously discussed example, there is nothing impermissible about questioning a panel in a medical malpractice case about whether they have any opinions about medical malpractice claims.[38]

3. Preserving Error

There are several specific conditions that must be met in order to preserve error for a trial court's denial of a challenge for cause. Specifically, one must:

- Assert a clear and specific challenge for cause that is denied by the trial judge;
- Use a peremptory challenge on the complained-of venire member;
- Exhaust all of his or her peremptory challenges;
- Request and be denied additional peremptory challenges; and
- Be forced to accept an objectionable juror on the jury.[39]

It is immediately apparent that these qualifications center on the issue of whether the challenging party was harmed by the trial judge's denial of the challenge for cause. It is important to note that sufficient harm occurs when ***any*** objectionable juror sits on the jury as a result of the judge's failure to sustain a proper challenge for cause. This can include venire members who could not have been struck for cause, but for whom a party would have exercised a peremptory strike if not forced to use the strike on the challenged venire member. For example:

> A plaintiff challenges jurors A and B for cause, which the judge denies. The plaintiff therefore uses two peremptory strikes on A and B. However, because the judge did not grant additional peremptory strikes, the plaintiff was unable to strike jurors Y and Z, who the plaintiff wanted to strike because they expressed some unfavorable views during examination.[40]

In the above example, the plaintiff has satisfied her right to appeal the judge's denial of the two challenges for cause either juror Y or Z is ultimately selected for the jury.

B. Peremptory Challenges

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[36] *Id.*
[37] *Id.*
[38] *Cortez*, 159 S.W.3d at 92.
[39] *Green v. State*, 934 S.W.2d 92, 105 (Tex.Crim.App. 1996).
[40] *Sullemon v. U.S. Fidelity & Guar. Co.*, 734 S.W.2d 10, 13-14 (Tex.App.—Dallas 1987,).

Unlike strikes for cause, peremptory challenges allow parties to strike any potential juror without a stated reason.[41] Peremptory challenges generally occur after voir dire examination and only if there are at least 24 remaining jurors after challenges for cause have been decided.[42] Deciding which members of the panel to strike on this basis is sometimes obvious, but can sometimes be more of an art than a science. In general, however, practitioners will want to strike any member of the panel who they believe are unfavorable to their position. Naturally, any successful challenges for cause do not count against a party's total number of peremptory challenges.

While a party need not state its reasons for making a peremptory strike, that is not to say that prospective jurors may be struck for any reason at all. On the contrary, strikes cannot be made based on certain characteristics protected under federal and state civil rights laws, e.g. race, gender, national origin, etc.[43] Because no reason is given for peremptory strikes, the burden is on the opposing party to raise a challenge to a peremptory strike it believes was made on an improper basis. Challenging a party's peremptory strike is known as a "*Batson*" challenge based on the United States Supreme Court case *Batson v. Kentucky*, 476 U.S. 79 (1986).

The procedures for making and prevailing on a *Batson* challenge are quite similar to the burden shifting procedures associated with discrimination claims under Title VII of the Civil Rights Act of 1964 and the Texas Commission on Human Rights Act: (1) the challenging party must prove a prima facie case of discrimination; (2) the burden then shifts to the party exercising the strike to offer a legitimate non-discriminatory reason for the strike; and (3) the burden then shifts back to the challenging party to prove intentional discrimination.[44] Proving a prima facie case of discrimination is not burdensome, and it would be rare for the striking party to be unable to articulate a legitimate reason for the strike. Thus, most *Batson* challenges hinge on the court's determination of the third step: whether the challenging party can prove intentional discrimination. In making its determination, the trial court will typically consider factors such as:

- Whether the legitimate explanation relates to the facts of the case;
- Whether there was a lack of meaningful questioning of the struck juror;
- Whether there was disparate treatment, i.e. members of a non-protected class were not struck;
- Whether there was disparate examination of veniremembers, i.e. questioning a challenged juror to evoke a certain response without asking the same question of other veniremembers; and

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[41] TEX. R. CIV. P. 232.
[42] *Id.*
[43] *Powers v. Palacios*, 813 S.W.2d 489, 490 (Tex. 1991) (holding potential juror's equal protection rights were denied because race was considered in decision to issue peremptory strike).
[44] *Goode v. Shoukfeh*, 943 S.W.2d 441, 445-46 (Tex. 1997).

- Whether the legitimate explanation is based on a group bias not specific to the challenged juror.[45]

While the presence of any one of the above factors weighs in favor of discrimination, the factors are not dispositive, and the final determination of the *Batson* challenge is within the trial judge's discretion.[46]

V. CONCLUDING REMARKS

The voir dire process is certainly challenging and undoubtedly important to providing one's client with the best possible chance of success at trial. Understanding the number of rules and procedures associated with the voir dire process forms the foundation of an effective voir dire strategy.

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[45] *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 917 (Tex.App.—Houston [14th Dist.] 2002, pet. denied).
[46] *Id.*