TRENDS IN JURY SELECTION 2005

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OVERVIEW OF PAPER

Jury selection involves many different facets. The Rules of Civil Procedure and case law establish the ground rules while forensic consultants suggest strategic approaches. New strategic considerations result from the "tort reform" legislation contained in House Bill 4 as well as the recent events that have affected juror attitudes.

The objective of this paper is to give the lawyer both the legal framework and the latest thinking on jury selection strategies.

I. Review of the Legal Basics of Jury Selection

A. Texas Rules of Civil Procedure 221-235 pertain to the jury selection process. These rules control how challenges are made, when a shuffle is allowed, and instructions that are to be given to the jury at the time of voir dire.

1. A challenge to the array may be made before jury selection begins, if the jury has not been properly selected according to the procedures for random selection. TRCP 221

2. If the court hears evidence and sustains the challenge to the array, the jurors shall be discharged and new ones will be summoned. TRCP 222

3. Upon demand, prior to voir dire, the jurors' names can be shuffled to change the order in which they are seated. There will be only one shuffle allowed. TRCP 223

4. Potential jurors must be sworn to tell the truth before the voir dire begins. TRCP 226

5. All instructions to be given to the jury are set out verbatim in Rule 226a.

6. Jurors may be challenged for cause or peremptorily. TRCP 227

7. Challenge for cause is defined in two ways: (1) objection is made alleging some fact that as a matter of law disqualifies the juror; or (2) objection is made that in the opinion of the court, renders the juror unfit to sit on the jury. TRCP 228

8. Jurors can NOT be questioned about any conviction of an offense that disqualifies him or about any offense of theft or a felony. TRCP 230

9. If challenges reduce the number of jurors to less than 24, the court shall request additional jurors be summoned. TRCP 231

10. If there are 24 names on the list, the parties shall proceed to make their peremptory challenges. Peremptory challenges do not require any reason therefore. TRCP 232

11. General rule is that each party to a civil action gets six peremptory challenges in district court and three in county court. In multiple party cases, upon motion of any litigant made before the exercise of peremptory strikes, the court will equalize the number of challenges so that no litigant receives an unfair advantage. TRCP 233

B. Statutory Provisions for Juror Qualifications. This section of the government code provides the framework for juror qualifications.

1. The general rule is that individuals are qualified to serve unless there is a specific statutory disqualification. Tex. Govt. Code 62.101.

2. The general rule is that a juror is disqualified unless he or she is:

a. at least 18 years old;
b. is a citizen of the county and state where the jury service is to occur;
c. is qualified to vote;

d. *is of sound mind and good moral character;*
e. is able to read and write;
f. has not served on a jury for six days in the preceding six months in district court (or 3 months in county court);
g. has not been convicted of a felony; and
h. is not under indictment or other legal accusation of misdemeanor or felony theft or other felony. Tex. Govt. Code 62.102

3. Under certain circumstances, a judge may suspend the requirement that a juror is required to be able to read and write, hear, or see. Tex. Govt. Code 62.103, 62.104, 62.1041.

4. A juror may be disqualified for a particular case if he or she:
a. is a witness in a case;
b. is interested directly or indirectly in the subject matter of the case;
c. is related within the third degree of consanguinity;
d. has a bias or prejudice in favor of or against a party in the case; or
e. has served as a juror in a former trial involving the same questions of fact. (Tex. Govt. Code 62.105)

5. A district court judge can permanently or for a specified time period exempt an individual from jury service due to a physical or mental impairment or with an inability to comprehend or communicate in English. Tex. Govt. Code 62.109

6. A court may hear any reasonable sworn excuse of a prospective juror but may only excuse a prospective juror for economic reasons if all parties of record agree. Tex. Govt. Code 62.110.

II. The Comprehensive Checklist for Voir Dire

There are several threshold decisions that have to be made as voir dire approaches, jury selection begins, the trial commences and the juror's conduct is reviewed.

A. Juror Questionnaire. Some counties have local rules that require that written juror questionnaires have to be submitted prior to trial. In order to have the questionnaire ruled on and printed for the veniremen, you have to decide early. Do you want a questionnaire or not?

If you do decide to use a questionnaire, be sure to read Carr v. Smith, 22 S.W.2d 3d 128 (Tex. App. –Fort Worth, 2000, pet. denied). The trial court granted the defendant's motion to shuffle and plaintiff appealed. Plaintiff contended that the defendant's motion was not timely because the panel had been sworn in and the panel had filled out a 13 page questionnaire with 63 questions. The appellate court ruled that the motion to shuffle should have been denied because such a motion must be filed before voir dire "begins." In the court's view, the questionnaire constitutes the beginning of voir dire because, "the distinction between oral and written questioning is virtually meaningless, especially where each party has already had the opportunity to view the panel."

B. Shuffling the Panel. You are allowed one shuffle of the panel. If you choose to shuffle the panel members names will be randomly selected for a second panel list. You have to make this decision before voir dire begins, so you have to make a quick statistical guess: Is the number of problem jurors higher in the first third of the panel or the last third? It is not enough to look at the first segment. The last segment of the panel could potentially be worse and a shuffle would simply move the problem jurors to the front. Analyze the odds.

C. Equalization of the Strikes. If you haven't addressed the alignment of the parties during pretrial, you need to raise the issue if there is a need to equalize the strikes among the different parties. The must read cases for equalizing strikes is Garcia v. Central Power & Light Co., 704 S.W.2d 734 (Tex. 1986); Van Allen v. Blackledge, 35 S.W.3d 61 (Tex. App. –Houston [14th Dist.] 2000, pet. denied) (holding that parties who have been told to make their strikes without collaboration can not agree that one party will strike from top of the list and other will strike from the bottom in order to circumvent the court's ruling.). In multiparty

litigation, the trial judge determines whether any of the litigants on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. In the interest of J.T.G., et al. 121 S.W.3d 117 (Tex. App. – Fort Worth 2003, no pet.). The determination must be made before the exercise of peremptory challenges. Id. In making the determination about equalization, the trial court may consider pleadings, discovery, presentations made in voir dire, and any other information brought to the court's attention before the exercise of peremptory strikes. Garcia, 704 S.W.2d at 737.

D. Qualifications of Jurors. The baseline qualifications are set out in the Tex. Govt. Code 62.102 (see above). As a general rule, these qualifications must be raised before the panel is sworn. See Jenkins v. Chapman, 636 S.W.2d 238 (Tex. Civ. App. –Texarkana 1982, writ dism'd) (holding that a party could not wait until after an unfavorable verdict to complain of juror who could neither read nor write.) A recent case considered whether a juror was qualified because he had been convicted of a felony but after serving probation had his conviction set aside. The court of appeals held that the statute that allowed the conviction to be set aside allowed the individual to have his right to serve as juror restored, indicating that a felony conviction may not always be a disqualification. Volkswagen v. America v. Ramirez, 79 SW3d 113 (Tex. App. –Corpus Christi 2002, rev. granted).

E. Disqualifications of Jurors. The general statute regarding disqualifications for a particular jury is Tex. Gov. Code 62.105 (See above).

1. Interest in the litigation. If a potential juror has an interest in the litigation, whether direct or indirect, he or she is disqualified from serving. A taxpayer's interest in litigation involving a city is too remote to disqualify the taxpayer from jury duty. City of Hawkins v. E.B. Germany and Sons, 425 SW2d 23 (Tex. Civ. App. –Tyler 1968, writ ref'd n.r.e.) Being a shareholder in a company that is a party, disqualifies a potential juror. Guerra v. Wal-Mart Stores, 943 S.W.2d 56 (Tex. App. –San Antonio, writ denied) (while being a shareholder in Wal-Mart would disqualify a potential juror, being a Sam's Club member would not.)

2. Bias or Prejudice in favor of or against a party. The cases talk about bias or prejudice as matter of law but also indicate that the court has the ability to make a factual determination of bias or prejudice based on the specific answers of a panel member.

a. Bias or Prejudice as a Matter of Law. Two recent cases address the standard for bias or prejudice as a matter of law. One is currently pending before the Texas Supreme Court and the other has a petition for review pending. In Cortez v. HCCI-San Antonio, 131 S.W.3d 113 (pet. granted), the court declined to strike an insurance adjuster who was on the panel for a nursing home negligence case. The adjuster stated that he had "preconceived notions" on the nature of the case and that he would "feel bias." After making these statements, the opposing counsel rehabilitated the insurance adjuster by asking whether he could try to listen to the evidence and be fair. The adjuster gave equivocal answers about being fair. The court then denied the challenge for cause. The court of appeals upheld the trial judge's ruling stating that it had to review the evidence in the light most favorable to the trial court's finding. Since the adjuster's responses were equivocal, the appellate court upheld the trial court in denying the challenge for cause. The Texas Supreme Court granted the petition for review and oral argument occurred on December 2, 2004.

Compare the Cortez case with the Corpus Christi Court of Appeals ruling in Baker v. Salah 2004 WL 1921232 (Tex. App.-Corpus Christi, 8/30/04, pet. for review filed). In this case, the court held that as a matter of law it was reversible error to deny a challenge for cause when a venire member revealed that he had spent most of his legal career defending malpractice suits and that he would "tend to favor defense counsel in this medical malpractice case" and it would be "natural for him to look at the case from the perspective of defense counsel." (As of the publication date of

this article, the Texas Supreme Court had not yet granted or denied the petition for review.)

Prior to the Cortez case, the standard for establishing bias or prejudice as a matter of law appeared to be clear. In fact the Court of Appeals cited Sosa v. Cardenas 20 S.W.3d 8, 11 (Tex. App. –San Antonio 2000, no pet.) for the proposition: "To disqualify a potential juror for bias as a matter of law, the record must conclusively show that the potential juror's state of mind led to the natural inference that he or she would not act with impartiality. A juror's indication that he cannot be fair and impartial because his feelings are so strong in favor of a party that he will base his verdict on those feelings and not the evidence supports a successful challenge for cause." It has also been the accepted wisdom that once a venireman admits bias or prejudice, the venireman may not be rehabilitated. White v. Dennison, 752 S.W.2d 714, 717 (Tex. App. –Dallas 1988, writ denied)[citing Gum v. Schaefer, 683 S.W.2d 803, 808 (Tex.App.--Corpus Christi 1984, no writ)]. The trial court has no discretion once a venireman admits bias or prejudice. Carpenter v. Wyatt Construction Company, 501 S.W.2d 746, 750 (Tex. Civ. App. –Houston [14th Dist.] 1973, writ ref'd n.r.e.).

Challenging a juror for cause is an extremely important aspect of voir dire. As a result, all litigators should keep watch for the Supreme Court's impending rulings in the Cortez case and potentially the Salah case.

In a previous case – one of the last times the Texas Supreme Court addressed the issue – the court held that the trial court should have disqualified this juror as a matter of law because juror admitted that he would put the plaintiff ahead of the defense because of his life's experience. Shepherd v. Ledford, 962 S.W.2d 28 (Tex. 1998). By way of contrast see Kiefer v. Continental, 10 S.W. 3d 34 (Tex. App.-Houston [14th] 1999, pet. denied) (holding that the trial court did not abuse its discretion in denying a strike for cause when panel member says was more inclined to give the benefit of her doubt to the defendant on the issue of damages for pain and suffering. The court viewed the panel member's statements as an approximation of the proper burden of proof (i.e. if all things were equal, the defense was supposed to win.)

b. Factual Finding of Bias or Prejudice. The trial court can make a fact finding that the panel member has sufficient bias or prejudice that disqualification is warranted. Because the trial court can judge the sincerity and demeanor of the panel member, the appellate courts will not disturb the factual determination unless there is an abuse of discretion. Swap Shop v. Fortune, 365 S.W. 2d 151 (Texas 1963) (holding that the friendship of the panel member and the son-in-law of the petitioner was not "bias" because the juror did not testify that the friendship would affect his verdict.)

i. Definition of Bias. Compton v. Henrie, 364 S.W.2d 179 (Tex. 1963) Read this case if you are ever tempted to voir dire by asking the question, "Are any of you biased or prejudiced in any way against such suits as this? If you are, please raise your hand." In Compton, no one responded to this broad question. The plaintiff took it by their silence that all panel members could be fair – only to discover that one juror repeatedly told the others during the deliberations, he "didn't believe in such lawsuits."

The court defines bias as "an inclination toward one side of an issue rather than to the other" and holds that to disqualify a juror, it must appear that the state of mind of the juror leads to the natural inference that he will not act with impartiality.

ii. General Questions do not establish bias. See Gant v. Dumas Glass and Mirror, 935 S.W.2d 202 (Tex. App. –Amarillo 1996, no writ) In this case, a general question about mental anguish was insufficient to lay a foundation for a finding of bias or prejudice.The court held that, "Neither bias nor prejudice is presumed. Nor is either shown by general questions, which are usually insufficient" to show bias or prejudice. You have to give the definition applicable to the case and ask if the jurors can evaluate the facts under the specific definition. (Without providing the specific

definition of mental anguish, the attorney could not determine that the jurors were biased against awarding such damages as defined by the court.) Also see Buls v. Fuselier, 55 S.W.3d 204 (Tex. App. –Texarkana 2001, no pet.). One venireman revealed that he had known defense counsel for over twenty years in a professional and social capacity. He stated that his relationship with defense counsel would create "a problem" and that he would "certainly" like to be excused. The appellate court did not consider this bias because the venireman was not asked whether he could listen to the evidence and reach a verdict based on the evidence not his feelings.

iii. Question about hypothetical damage limits did not create basis for juror bias. Houghton v. Port Terminal Railroad Association, 999 S.W.2d 39 (Tex. App. – Houston [14th] 1999, no pet.) Lawyer asked veniremen to assume a hypothetical change in damage law. Assuming there were limits placed on damages, three jurors said they would agree with such caps. The court held that the general agreement with a hypothetical change in the law did not constitute bias as a matter of law. Lawyer must show bias against present law.

iv. Admissions of a little bias not enough. Sanchez v. Mica, 107 S.W.3d 13 (Tex. App. – San Antonio 2002, judgment vacated in part): Panelmember said that he was sympathetic to the plaintiff and that he was probably "a little biased." He also indicated that he understood that he was expected to listen to the evidence. The appellate court said that the trial court made a factual determination based on the credibility of the panelmember and it was not abuse of discretion to refuse a challenge for cause.

F. Procedural Parameters of Voir Dire. Several cases have addressed the procedural limitations on voir dire.

1. Latitude in Voir Dire. TEIA v. Loesch, 538 S.W.2d 435 (Tex. Civ. App. –Waco 1976, writ ref'd, n.r.e) This case stands for three simple propositions: (1) counsel will be allowed broad latitude on voir dire; (2) if counsel fails to object during voir dire to improper questions, the issue is waived on appeal; and (3) if an objection is sustained, the objecting party must also ask for an instruction telling the panel to disregard the impermissible question.

2. Latitude to Question About Liability Crisis. Babcock v. Northwest Memorial Hospital 767 S.W.2d 705 (Tex. 1989) The proposition that counsel will be allowed broad latitude is explained as essential to preserve a constitutional right to trial by a fair and impartial jury. Once elevated to a constitutional right, the Texas Supreme Court found that it was an abuse of discretion to refuse the plaintiff the right to question the panel about their views of the lawsuit crisis and the liability insurance crisis.

3. Commitment Questions Prohibited. Campbell v. Campbell, 215 S.W. 134 (Tex. Civ. App. –Dallas 1919) Ever wonder why we can't just ask the jurors, "Will you award damages to the plaintiff, if the defendant manufactured the tire whose tread separated just before the plaintiff's car went off the road?" To see why you can't just ask the jurors how they will vote, read this case.

a. Rationale for No Commitment questions: The court explains the rationale behind the rule which "forbids any examination the purpose of which is to have the juror indicate his views on certain facts, and thereby commit him to certain views or conclusions." The court states:

"All material and admissible facts ought and are presumed to influence the juror, notwithstanding some will outweigh and exercise greater influence than others. He is supposed to consider and necessarily be influenced by every fact, and from them all draw the inferences and deductions they warrant, and reach a conclusion from the whole. To require him to say that he will or that he will not let a given material fact influence him in reaching a conclusion, if chosen, is simply to commit him to or against that material fact in advance."

Campbell, 215 S.W. at 137.

b. Is it a commitment Question or Not? This critical statement of voir dire policy has become the focus of a case currently before the

Texas Supreme Court. In Hyundai v. Vasquez, 119 S.W.3d 848 (Tx. App. –San Antonio 2003, pet. granted), the court held that a question that specifically mentions a critical fact and asks in light of the fact, can the jurors be fair, is a permissible question, and is not in fact a prohibited commitment question. The Vasquez case involved an auto collision that triggered the airbag which killed the four year old occupant who was not wearing her seatbelt. The question that plaintiffs' counsel wanted to ask was:

"Is there anyone sitting there among you that believes that one fact alone, that Amber was not wearing her seatbelt, that one fact alone would prevent you from following your oath and that you would not decide this case on all of the evidence?"

Vasquez, 119 S.W. 3d at 852. The San Antonio Court of Appeals distinguished the Campbell case from the Vasquez case. In Campbell, the question at issue was whether certain evidence would influence the potential juror. In the San Antonio Court's mind there is a distinction between asking a potential juror whether evidence would influence him/her and asking whether the juror can be fair. The "will it influence you" questions ignore the fact that evidence is supposed to influence juror members. In contrast, the "can you be fair" questions ascertain whether a potential juror can listen to and sort through all of the evidence---regardless of how they ultimately weigh such evidence.

Vasquez was scheduled for oral argument on January 6, 2004. For an excellent overview of the law, pre-Vasquez see *Voir Dire: What Constitutes an Impermissible Attempt to Commit a Prospective Juror to a Particular Result*, 48 Baylor L. Rev. 857 (Summer 1996).

c. Exception to the Commitment Prohibition?: On the very day that this paper was being finalized, the Houston Court of Appeals recognized an exception to the "no commitment" questions in Grey Wolf Drilling Company v. Boutte, 2004 WL 1784 (Tex. App. –Houston [14 Dist.] December 14, 2004). The question at issue was as follows:

"Denfer Boutte knew he was working in slippery drilling mud and he continued to try to finish the Halliburton job. Anyone given those undisputed facts could not consider the rest of the evidence that will be presented to you regarding the urgency of the situation he was in?"

In considering this question, the Court determined that this was not a commitment question because it "sought to discover any prejudice or bias on the part of the potential jurors, i.e., whether potential jurors would 'listen to all the evidence' and 'consider the rest of the evidence' before making a decision."

Grey Wolf Drilling Company v. Boutte, Id.

4. Permissible to Conduct Voir Dire with a Party in Handcuffs. Allowing the jury panel to see the plaintiff in handcuffs was not reversible error. Carson v. Gomez, 14 S.W.3d 778 (Tex. App. –Houston [1st] 2000, pet. denied); In the Interest of K.R., 63 S.W. 3d 796 (Tex. 2002) In the Carson case, a prisoner bringing a civil rights claim against the guards was brought into the courtroom in shackles. He complained on appeal that the handcuffs impaired his ability to pick a jury. The Court of Appeals didn't believe he was really handcuffed during the trial and didn't believe the handcuffs affected voir dire. Likewise, the Texas Supreme Court held, "Nothing in the record even hints that they would have reached a different verdict had they not seen Rodriguez in shackles." The Court held that a termination of parental rights case was not affected by having the father appear in handcuffs because in voir dire the jury committed to base their verdict on the evidence.

5. Trial court has discretion to limit time and cut-off questioning. McCoy v. Wal-Mart Stores 59 SW 3d 793 (Tex. App. – Texarkana 2001, no pet.) When trial court cuts off a parties questioning, the court of appeals will review the decision on an abuse of discretion standard and consider three relevant factors: (1) whether party's voir dire exam reveals an attempt to prolong voir dire (i.e questions were irrelevant, immaterial or repetitious); (2) whether questions were proper voir dire questions; and (3) whether

party was precluded from examining veniremembers who served on jury. This may sound harmless but when you read the court's opinion of "irrelevant" questions, most trial lawyers will be surprised.

G. Preserving Error for Appellate Review of Voir Dire. If you believe the judge has erred by refusing to strike a juror for cause, you must preserve the error. When trial court refuses to disqualify juror for bias or prejudice, complaining party must show that error was harmful by advising trial court, **before** exercising its peremptory challenges, that court's denial of challenges for cause would force party to exhaust its peremptory challenges and that, after exercising its peremptory challenges, specific objectionable jurors would still remain on panel. Shepherd v. Ledford, 962 S.W.2d 28 (Tex. 1998).

H. Batson Challenges. If you believe that your opponent has used his or her peremptory strikes in a racially discriminatory way, you must assert your challenge before the jury is seated. For a comprehensive discussion of the procedure and multiple legal issues involved in making a Batson challenge see Geoffrey Gannaway's article in the Spring 2002 Review of Litigation.

I. Juror Misconduct. In several cases, parties discover that jurors may have been less than candid in voir dire but their dishonesty may not be discovered until after the verdict.

1. Juror's failure to disclose that she doesn't believe in "lawsuits like that" or "awarding money for stuff like that" is not specific enough to constitute juror misconduct. Golden Eagle Archery v. Jackson, 24 S.W. 3d 362 (Tex. 2000) Before trial deliberations began, two jurors on a break had coffee together and one told the other that she had been on a jury before and hadn't awarded money in a death case. She said generally, she didn't believe in lawsuits like that or awarding money for stuff like that. The plaintiffs' lawyer argued that these attitudes should have been disclosed on voir dire in response to a general question that anyone who doesn't want to be a juror should come forward. The Texas Supreme Court reasoned that the juror could have been saying that she didn't believe in lawsuits that "lacked merit," in which case, she wasn't biased but expressing a legitimate opinion.

2. Failure to disclose bias during voir dire is juror misconduct but proof of such failure to disclose must come from some source other than deliberations. Chavarria v. Valley Transit, 75 S.W.3d 107 (Tex. App. – San Antonio 2002, no pet.) After a defense verdict, the plaintiff filed a motion for new trial on the grounds that a juror had concealed his bias concerning lawsuit abuse during voir dire. The appellate court acknowledged that such concealment would constitute juror misconduct but cited TEX. R. CIV. P. 327(b) as an absolute prohibition against admitting evidence of any matter discussed during deliberations. Accordingly, the court could not consider the evidence of the juror's concealed beliefs because they were disclosed during deliberations.

3. Even if a juror gives mistaken information during voir dire, unless such mistake was intentional or caused injury, there is no basis for a new trial. Greenpoint Credit Corporation 75 S.W.3d 40 (Tex. App. –San Antonio 2002)(53.7 f motion filed 4/11/2002) After jury rendered a verdict against a finance company on an unfair debt collection, the finance company filed a motion for new trial on the grounds that a juror had given an incorrect answer on voir dire. The juror failed to identify that the defendant finance company was in fact the company that provided financing for her mobile home and that she, too, was seeking legal recourse against the company. When questioned, she stated that she didn't realize that the defendant company was the same as the company that financed her home. She thought her company's name was Green Tree and that it was different than Greenpoint, the defendant company. The appellate court said that simply making a mistake does not show bias as a matter of law. Therefore, there was no juror misconduct.

4. Shadow juror's conversation with actual juror not misconduct. In Mercado v. Warner Lambert, 106 S.W. 3d 393 (Tex. App. –Houston [1st] 2003, rev. denied), the court found that one

of the parties had hired shadow jurors and during the course of the trial one of the shadow jurors asked one of the empaneled jurors for a quarter and a cigarette. The court found that there was not enough evidence of unfairness to justify a presumption of harm. The actual juror did not even understand which party was affiliated with the shadow juror.

5. Bailiff telling the jurors that they would have to deliberate another day is not misconduct. Rosell v. Central West Motor Stages, 89 S.W.3d 643 (Tex. App. –Dallas 2002, rev. denied). Bailiff's reporting the court's schedule does not constitute an outside influence and is not the basis for juror misconduct.

J. Attorney Misconduct. A recent case questioned the conduct of the attorneys.

1. Pre-trial Focus Group Not Material Misconduct. Primrose Operating Company, Inc. v. Walter James Jones, III, 102 S.W.3d 188 (Tex. App. –Amarillo 2003, pet. rev. filed): Plaintiff's lawyer conducted a focus group in a county that had a population of 300. Seven people participated in the focus group which concluded shortly before a high school football game. The seven million dollar damage figure reached by the focus group was the talk of the town. The defense lawyers objected before voir dire. The trial court took it under advisement. There was extensive voir dire done to determine the influence of the focus group. The parties were given the latitude to explore the issue throughout jury selection. At the conclusion of the trial, the defendants appealed and alleged jury misconduct. The Court of Appeals ruled that the defendants could not show that they were forced to accept any juror because they were denied additional strikes to deal with any influence of the focus group.

III. Historical Trends in Jury Selection

Ever wonder what jury selection was like in the 1800's? Ever wonder how Atticus Finch picked his jury? Ever think about jury selection during the last century?

Jury selection as a hot topic probably didn't evolve until the last 50 years. I suspect that there was a time when jury pools were homogenous so that differentiating between jurors wasn't necessary. We know that all jurors were once comprised of men –white men— probably between the ages of 21-65. We know that because there was a time period when jurors were drawn from voter registration lists, and back then only whites were allowed to vote, only men were allowed to vote and the life expectancy wasn't what it is today. Because of this homogenous nature, you didn't have cultural differences, generational variances, and gender disparity. Picking a jury under those circumstances must have been a lot easier.

In small towns, lawyers like the fictional Atticus Finch didn't need voir dire to know how people in the community felt about issues. There was probably no bias associated with knowing the parties or the lawyers. The jurors in small communities probably knew all the parties and all the lawyers.

As a consequence of America's growing diversity and size, jury voir dire became more important and complex. As the consequences of a changing population became clear so did the importance of developing a strategy for voir dire.

A. Early Strategies for Voir Dire. In 1953, Robert Keeton, professor at Harvard University, wrote:

> *"The interrogation of the panel is both a basis for selection of the trial jury and a part of the process of persuasion of the trial jurors."*

The goal of persuading the potential jurors in voir dire was considered a legitimate strategy. Arguing your case in voir dire was encouraged.

The basis for this strategy came from theories of primacy: the belief that the first one to argue their case would have an advantage with the jurors.

The shortcomings of this strategy eventually became apparent. Most succinctly the criticism was stated in McElhaney's Trial Notebook:

"*You can hardly suppose you will convince 18 people –whom you have never seen before – to set aside their beliefs built up over a lifetime by giving them a five minute exhortation and asking a few questions.*"

B. Application of Science to Voir Dire. In the 70's and 80's, there was a general trend to look for a more empirical method to pick a jury. The search for scientific methods led to an increased scrutiny of:

1. Demographics. Lawyers developed generalizations about how women, minorities, and different socioeconomic groups tended to vote on different issues.

2. Body Language. One school of thought said that a lawyer could infer jurors' attitudes by watching their body language. If they frowned during the plaintiff's voir dire, they were probably defense jurors –so the theory went.

3. Occupational Stereotypes. Similar to the study of demographics, lawyers placed a lot of credence on stereotypes about how people in different occupations would vote in a given case.

This belief that jurors could be scrutinized, categorized, and defined led to the emergence of the juror consultant industry. Various people of different training and backgrounds began to market themselves to lawyers as juror consultants. Some of these consultants were body language experts, some were psychologists, some were former lawyers, and some were acting coaches. These consultants developed different ways to apply their science, including:

a. Surveys of Communities. Research about attitudes in the communities helped identify perceptions and trends in attitudes. Do jurors believe that lawsuits are frivolous? Do jurors believe that corporations are unfairly targeted for litigation? Do jurors believe that juries award excessive damages?

b. Focus Groups. Mock trials are performed for mock jurors to determine if a specific set of facts will result in a finding of liability or a certain magnitude of damages. These experiments can yield helpful information in preparing for trial but also assist a lawyer in deciding the profile of the best and worst jurors.

c. Jury Questionnaires. Written questions that ask for information that a juror might not want to share in a room full of strangers have become very helpful to getting substantial amounts of information from jurors. Designing appropriate questions that yield useful information is not an easy task, but some juror consultants have come up with some excellent questionnaires.

C. The Emergence of Psychological Strategies. As the legal community adopted the belief that jury information was a matter of scientific method and hence a question of devoting resources to research, the realization set in that generalizations about populations did not work for jury selection. Demographic or occupational information did not provide sufficient information to predict a juror's beliefs with absolute certainty.

Most recently, the Texas Law Review published a study that confirmed what other studies have similarly concluded: "In state court trials, we again find no robust evidence (at traditional levels of statistical significance) that race, income, or urbanization substantial help explain award levels." *Trial outcomes and demographics: Is there a Bronx effect?,* 80 Tex. L. Rev. 1839 (June 2002).

Similarly, studies that explored juror attitudes demonstrated that "all women" did not have the same attitudes, neither did "all minorities." Furthermore, all school teachers and all taxi drivers did not fit well defined patterns either.

As a result, it became apparent that these categories might provide some direction but, ultimately, the only way to find out about a

specific juror was to ask them. The inherent difficulty in asking a juror about their biases and prejudices also became clear. This resulted in a surge in articles about how to:

1. Ask open-ended questions.

2. Create an atmosphere that is conducive to jurors sharing their opinions in voir dire.

3. Use one juror's answers to get others to provide similar information. ("Looping").

4. Encourage jurors to speak their mind no matter how negative their opinions.

5. Directly ask people about their opinions. (i.e. Do you believe people shouldn't bring lawsuits for personal injury damages? Do you believe that oral contracts shouldn't be enforced?)

6. Find out the juror's life experiences. (Have you ever entered into an oral agreement? Have you ever purchased a defective product? Have you ever contested a will?)

The psychology of asking questions is important but in and of itself will not tell you what to do with the information you receive when your artfully asked questions are answered. What do you do with the information? How do you evaluate the information? How do you know which jurors will like your case?

D. Current Thinking in Voir Dire Strategies. The days of showing up for voir dire and arguing your case are gone. To be properly prepared for voir dire, a lawyer must do substantial preparation before trial. Such preparation should include:

1. Plan a strategy for exploring the difficult facts in your case.

The Vasquez case demonstrates the difficulty in exploring how the potential jury will react to the most troubling facts in your case. In this regard, you may not ask, "Will this bad fact influence you?" Alternatively, the Texas Supreme Court, in Vasquez, will determine if you can ask "Given this bad fact, can you be fair?"

Even if the direct question cannot be asked, the questions that must be asked are those that reveal the panel members' life experiences. For example, in the Vasquez case, the lawyers need to know each panel members habits on wearing seatbelts, whether they own cars with airbags, whether they believe their airbags should protect them regardless of whether they have their seatbelt on, etc. Admittedly, it will be difficult to expose a bais strong enough to merit disqualification, but in the event you find someone who refuses to wear seatbelts, or has disconnected their airbag, you might find someone whose habits reveal a strong bias.

The other approach is to follow the example of the Grey Wolf question and ask if the "bad fact" prevents the juror from following the instruction to "listen to all of the evidence."

2. Prepare your jury charge and link your questions to the charge

As the case law makes clear, you cannot get a juror struck for bias or prejudice unless you can show that an attitude or belief that a juror has will affect an issue that is part of your charge.

General attitudes about "leaning for" a party are not bias as a matter of law but require the judge to make a factual determination. The lawyer has to show that the juror has a specific bias about an issue that will affect their verdict.

Consider the cases State v. Burke and Flowers v. Flowers. In State v. Burke, 434 S.W.2d 24 (Tex. Civ. App. –Waco 1968, no writ), the lawyer asked questions that indicated that the juror would reverse the burden of proof. Burke involved a condemnation case and the lawyer asked the juror if he thought that property is automatically damaged if a highway splits the property into two. The juror answered, yes. The lawyer followed up with the question, "Would it take evidence from the stand to prove to you it did not damage it?" The juror responded that it would. The lawyer established bias from the

fact that the juror would require evidence contrary to the burden of proof.

In Flowers v. Flowers, 397 S.W.2d 121 (Amarillo 1965, no writ), a custody battle required a jury charge focused on the "best interest of the children." In voir dire, the lawyer questioned a potential juror about her views on drinking. When the woman said she did not approve of drinking whether it was minimal or not, the lawyer was able to establish a bias.

When a juror has a strong opinion such that the juror will not consider all of the evidence or any of the evidence, then the lawyer has established bias. On the other hand, if the juror will give any weight to the evidence then that juror theoretically has complete discretion as to how much weight should be given. Remember the distinction between information that is needed to strike for cause and information that is helpful in exercising a peremptory strike.

The trick is to ask questions about opinions that apply specifically to the charge that will be used in your case. The most recent cases teach us the following:

a. General questions don't work. This means don't rely on the "Do you have a problem…; Do you lean…; Do you have an opinion about…" type questions to substantiate bias in a potential juror.

b. The juror must specifically be asked if their feelings prevent them from reaching a verdict based on the evidence. If their feelings interfere with their ability to evaluate the evidence, then you probably have bias.

c. You probably need the juror to quantify the strength of their feelings. A slight bias isn't enough. Goode v. Shoukfeh, 943 S.W.2d 441, 453 (Tex. 1997). Also see Sanchez v. Mica, 107 S.W.3d 13 (Tex. App. –San Antonio 2002, judgment vacated in part).

3. Identify Potential for Juror Problems Before Voir Dire

You need to have some idea what type of person will like your case and what type of person will appreciate your witnesses. For example, if you are trying a medical malpractice case involving obstetrical negligence, do you want women who have had babies or not? If you are trying a case involving an oral contract, do you want people who have entered into such arrangements themselves?

It is helpful to have thought out some of these issues before you get to the courthouse. Most courts allow 20-30 minutes to exercise your peremptory strikes and in that time you can't have the philosophical discussion about who will have the attitudes and experiences beneficial to your side.

Focus groups are useful in this regard. They let you see how people of different backgrounds respond to your case.

Alternatively, there is a lot of research that has been done to tell you about the types of attitudes people have and whether such attitudes make for plaintiffs or defense jurors. One such resource which is indispensable to any trial lawyer is Juror Attitudes and Biases: Detecting Land Mines in the Legal Battleground of Voir Dire by Dr. Douglas Keene. This is a must read.

Further research and analysis by Dr. Keene can be downloaded from his website: www.keenetrial.com.

4. Prioritize Your Time

Unfortunately, the more we learn about the importance of detailed voir dire, the more courts are imposing time restrictions. This means that we don't always have the liberty to talk to jurors about their bumper stickers, their childhood experiences, and their views on the O.J. Simpson trial. No doubt such information would be helpful but if limits are imposed, we have to prioritize.

See McCoy v. Wal-Mart, 59 S.W.3d 793, 797 (Tex. App. –Texarkana 2001). The trial court allowed thirty minutes for voir dire. The plaintiff's lawyer complained about the

limitation. The court was critical of the lawyer's voir dire technique:

> *Counsel asked other open-ended questions that elicited responses in the form of opinions and would sometimes ask a panel member to state his or her opinion about another's opinion they had just heard. After ten minutes of these exchanges ..., the trial court called counsel to the bench and gave McCoy's counsel a warning…"*

When the lawyer complained that he needed more time, the trial court denied the request. The appellate court stated,

> *Having wasted valuable time asking open-ended questions of individual veniremembers, counsel cannot now complain of being deprived of the opportunity for further questioning.*

There is also a human limit on how much information we can digest. If the court is willing to allow a 13 page written questionnaire with 63 questions, as it did in Carr v. Smith, then how do you follow-up on the information obtained with two hours to voir dire and 30 minutes to exercise peremptories. Don't be tempted to lose the forest for the trees.

Important in this process is to recognize when you need help. If the case warrants the expense, hire a juror consultant who can evaluate the volume of information that is available.

5. Keep Up With Changing Demographics.

Quite simply, our juries are changing. Generationally, the population breaks down as follows:

Depression Cohort (1912-21): Less than 7% of population

WWII Cohort (1922-27): Less than 6% of population

Post War Cohort (1928-1945): Approximately 20% of population

Baby Boomers (1946-1965): Approximately 40% of population

Generation X (1966-1986): Approximately 20% of population

The significance of this distribution is that approximately one-third of our jurors are now Generation X. With this shift in the population, there is a shift in the life experiences that our jurors have had. Our assumptions about jurors' values have to change.

Numerous articles have been written about the changing assumptions that go with the change in generations. One such article is Understanding Generation X, by Elizabeth Foley published in Trial Magazine, June 2000.

Eric Oliver, juror consultant, sent a quote from a Generation X member as an example of the underlying assumptions typical of a Generation X member:

"We grew up learning that there were no external institutions we could – or should –fully trust to take care of us. Marriage, Government, Health Care, Upper Management, Schools, Hospitals, have all let us down. Since we all know you can't trust other people or institutions to take care of us, we know you've got to do a lot for yourself. We'll be happy to provide great verdicts against someone who failed to do all they needed to do with the plaintiff, as long as you first show us the plaintiff did everything he could to take care of himself, first."

Eric Oliver concludes that this "diminished expectations" is a factor that needs to be considered as Generation X becomes a larger and larger segment of our jury pool.

6. Consider the Impact of Current Events

a. Events of September 11

There is no question that the events of September 11, 2001 have changed America. A natural consequence is that juror attitudes have changed as well. Dr. Doug Keene suggests that the impact of September 11, 2001 is most

significant on Generation Xers because it is the first time that members of its generation have been recognized as heroes. It also adds significant vulnerability to Generation X, a vulnerability they previously have not had.

Furthermore, different people on juror panels will have connections to those who have lost loved ones. There will be a broader understanding of the term, "mental anguish." Alternatively, some juror consultants contend that any effect of 9/11 was transient and that most people compartmentalized their feelings about the event.

b. Corporate Scandals

Jurors may not presume that all corporations are dishonest but once provided the evidence, jurors are more disapproving and quick to punish.

Jonathan Bernstein, president of Bernstein Communications, says, "the average citizen on the street" has been much quicker to believe even completely unfounded allegations against my corporate clients than in the past."

c. Desensitization to Negative News

A recent study by juror consultants points to the trend for jurors to be desensitized to the on-going news of corporate and bureaucratic wrong doing. The impact of this trend is that juries are not surprised by wrong doing and are critical of plaintiffs who fail to anticipate such conduct. For example, the early breast implant verdicts reflected juror anger at the corporate conduct. Almost a decade later, juries were more critical of patients who received implants because it was publicly known that the product was associated with complications. Likewise, in corporate business litigations, juries are taking a harder look at plaintiffs to see what they did to protect themselves from the known risk of corporate dishonesty. The bottom line is that current attitudes may be against corporations but they are anti-plaintiffs as well. See "Post-Enron Jury Perceptions and What to do About Them" by Marsha Montgomery, Karen Lisko and Ann Gendaszek, News from the Mental Edge, Summer 2003

7. Develop Some Insight Into Your Personal Questioning Skills

While psychological strategies are not the whole answer to voir dire, lawyers must learn how to show respect for people who have been summoned to serve on juries. If you view these people, as:

a. obstacles to be overcome;

b. people who can be persuaded if they would just listen to you; or

c. human beings of lesser intelligence

you will never establish constructive rapport. Instead, if you start from the assumption that members on the panel are:

a. interesting individuals with varied life experiences;

b. people capable of understanding the facts;

c. citizens who care about their community and want to be fair; and

d. opinion holders with beliefs that are not going to be changed by you

you will see that your task is to do the treasure hunt to find those people on the panel who happen to agree with your view of the world. While doing your treasure hunt, you have to be polite, respectful and somehow encourage those jurors to be helpful in disclosing the information that you need.

E. Proposed Changes to Voir Dire

In 1996, the Texas Supreme Court appointed a Jury Task Force to consider options for improving Texas' jury selection process. As a result of this task force, the following changes have been proposed:

1. Time limits
2. Bar on asking leading questions

3. Bar on asking questions about which way the veniremen are "leaning"
4. Increased ability to rehabilitate a veniremen
5. Reduction or elimination of peremptory challenges
6. Limits on written juror questionnaires.

The Texas Supreme Court has not yet acted on any of these recommendations. See *Don't Mess with Texas Voir Dire*, 39 Hous. L. Rev. 201 (2002).

The argument for no change is also made by a recent Dallas Morning News study that surveyed judges and found that they were nearly unanimous in believing that jurors did very well or moderately well in reaching a just and fair verdict. Ninety percent of federal and Texas trial judges said that they agreed with jury verdicts in their cases "most of the time." See *Foreword: Juries Rule*, 54 SMU L. Rev. 1681 (2001).

The implication is that jurors are reaching the right result because they base their conclusions on the evidence. If the jurors are following the evidence then, presumably, their decisions were based on facts and not any prejudices.

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