

VOIR DIRE

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CHAPTER 3**

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Mr. Beck served as President of the State Bar of Texas in 1995-96. He is and has been a very active trial lawyer throughout his professional career. He was named by the National Law Journal as one of the top 10 trial lawyers in the United States for 1998, and was named by the National Law Journal in 1999 as one of the top trial lawyers in the Southwest. He has been selected as a Regent and Fellow in the American College of Trial Lawyers, a Fellow in the International Academy of Trial Lawyers, and an Advocate in the American Board of Trial Advocates. He has been named an "Honorary Overseas Member" of The Commercial Bar Association ("COMBAR"), a preeminent association of English barristers. He also is a Fellow in the American Bar Foundation, a Past Chairman (1986) of the Texas Bar Foundation Board of Trustees, and a Sustaining Life Fellow in the Texas Bar Foundation. He was recently named President of the University of Texas Law School Foundation Board of Trustees.

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Mr. Beck is a past member of the Advisory Committee of the Supreme Court of Texas, a past member of the Advisory Council of the Texas Center for Legal Ethics and Professionalism, a Research Fellow of the Southwestern Legal Foundation, and a member of the State Bar of Texas College. Mr. Beck is also a Past President of the International Association of Defense Counsel ("IADC"). The IADC, which was founded in 1920, is a professional organization of attorneys in the private practice of law, who specialize in representing defendants in civil litigation.

Mr. Beck has published numerous law journal articles and has appeared as a lecturer on many bar association and law school continuing legal education programs. He authored the Annual Survey of Evidence Law in the Southwestern Law Journal for many years. Mr. Beck is the author of a book entitled Legal Malpractice in Texas, which was originally published by the Baylor Law Review in 1991 and whose second edition was published in 1998. Most recently, he co-authored the 1999, 2000, 2001, and 2002 versions of O'Connor's Annotated Civil Practice and Remedies Code. He has won various awards for his legal writing.

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Mr. Nichols obtained a J.D. Degree with honors from the University of Texas School of Law, where he served as Editor-in-Chief of the *Texas Law Review*. He holds a B.A. degree, with distinction, from the University of Virginia. Mr. Nichols has authored several publications on trial practice and procedure for legal journals and law reviews, and actively writes and lectures for various continuing legal education programs throughout the United States. One such publication, a co-authored chapter with Judge Hittner, appears in the multi-volume treatise *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* (West Publishing 1998).

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VOIR DIRE

“Voir dire is the most important, yet least understood portion of a jury trial.”¹

James M. Mehaffey

I. INTRODUCTION

Practicing trial attorneys realize selecting a jury during voir dire is an intricate and delicate process crucial to the eventual outcome of the litigation. Commentators have described jury selection alternatively as an art, a science, and a guessing game.² Experienced trial lawyers view jury selection as a highly tactical, yet always mysterious, exercise in which cases are often won or lost. The various statutes and rules governing jury administration in state and federal cases are designed to take out at least some of the guesswork in the voir dire process. Those statutes and rules leave a substantial degree of discretion in the hands of the trial court, however. In fact, the trial court has so many options in administering jury selection and voir dire that a practitioner often encounters a new process, or at least a process with new “wrinkles,” almost every time he or she steps into trial in an unfamiliar court.

Voir dire is more than a method of picking a jury. There are numerous other factors to be considered while questioning the venire. Recognizing these factors is essential to the maximization of the proceeding. This article will address the various things an attorney should consider when approaching a jury voir dire. Beginning with defining who qualifies for jury service, this article will discuss the panel selection process and the criteria for jury service. Second, this article discusses the conduct of voir dire by the trial court and lawyers, including recent developments in the law applicable to the process. Finally, it briefly discusses the methods and mechanisms to disqualify potential jurors.

¹James M. Mehaffey, *A Few Tips on Jury Selection: A View From the Bench*, 63 Tex. L. Rev. 787, 878 (2000).

²Eugene I. Pavalon, *Jury Selection Theories: Art? Science? Guessing Game?*, Trial, June 1987, at 26.

The literal translation of voir dire is “to say the truth.” However, the practical definition given to the term is “a preliminary examination under oath made of one presented as a juror or witness where his competency, interest, etc. is inquired into.”³ Although courts and lawyers use the voir dire process for many different reasons, two commonly recognized purposes of voir dire are (1) to eliminate, by exercising challenges for cause, panel members lacking the legal qualifications required, and (2) to engage in a conversation with the panel members to determine wise use of peremptory challenges.⁴ Insights into the venire’s thoughts and predispositions can be discovered by observing the panel members reactions, listening to their responses, reviewing personal backgrounds and experiences, and gleaned other clues that accompany personal interactions of this sort. By capitalizing on the information and observations made during voir dire, challenges to objectionable jurors can be made effectively and judiciously.

Additionally, voir dire presents the attorney with the opportunity, if not necessity, to introduce potential jurors to his or her case in the best possible light. The party’s position should be introduced in voir dire so the prospective jurors can relate to the client and situation. Furthermore, the attorney should use voir dire to build a rapport with the jury to solidify the *ethos* component of advocacy. “Voir dire is a ‘critical opportunity to develop rapport with the jury, and is the beginning point of [the lawyer’s] credibility.’”⁵

Studies have shown that, fortunately or unfortunately, many jurors make up their mind about the ultimate issues of the case at the initial stages of the trial.⁶ In fact, a recent study

³BLACK’S LAW DICTIONARY 1412 (5th ed. 1979).

⁴See *Implement Dealers Mut. Ins. Co. v. Castleberry*, 368 S.W.2d 249, 254 (Tex. Civ. App.—Beaumont 1963, writ ref’d n.r.e.); 4 MCDONALD, TEXAS CIVIL PRACTICE § 21.15, at 60 (1992).

⁵William C. Smith, *ABA Connection Voir Dire: Veteran Litigators Ignore Stereotypes, Knowing That Venire Members Will Weigh the Facts Against a Lifetime of Experiences*, ABA Journal (April 2002).

⁶See generally Dr. Hans Zeisel and Harry Kalven, Jr., THE AMERICAN JURY.

concluded that some jurors make up their minds early *and* steadfastly hold onto those opinions throughout the trial. More importantly, even if they are in the panel's minority, these jurors have a far greater influence on the ultimate outcome of a trial than their more-reasoned, more open-minded colleagues.⁷

The importance of voir dire is clear and generally undisputed among trial practitioners. Despite this consensus, many judges limit the amount and scope of voir dire to be conducted. In fact, the federal rules leave it to the discretion of the judge to allow attorneys to ask *any* questions during voir dire.⁸ Therefore, if presented with the opportunity to conduct voir dire the attorney should be fully prepared to maximize the benefits of connecting with the venire, building a rapport with the panel members and to present the client's case in the most plausible and persuasive way possible.

II. PANEL SELECTION

The genesis of our right to trial by jury began in early Anglo-Saxon law.⁹ Early English colonists carried our right to trial by jury with them from England. The colonists found the right to trial by jury to be one of the most effective safeguards against British oppression over the colonies.¹⁰ Consequently, after the Revolutionary War, Americans were persistent in retaining their right to jury trial in our new government. The passage of the Seventh Amendment cemented our right to trial by jury.

Arising from modest beginnings, the right to jury trial has become the cornerstone of our criminal and civil trial process. Likewise, the right to serve as a juror has been recognized to be both a

constitutional right and a civic duty.¹¹ While the right to serve as a juror is fundamental, there are restrictions and qualifications limiting who can serve. The Jury Selection and Service Act (the 1968 Act) governs the procedures for determining who can and will serve on a jury in federal court.¹² In Texas state court the general parameters of the jury selection process are set out in the Government Code.¹³

A. The Jury Selection and Service Act

The 1968 Act ensures all litigants to a jury that is randomly selected from a "fair cross section of the community in the district or division wherein the court convenes."¹⁴ The federal system embraces the public policy that all citizens should have an opportunity to be considered for service on a jury. However, there are statutory disqualifications that define those eligible for service. The 1968 Act requires that a person must have the following characteristics to qualify for consideration for a petit or grand jury seat:

- 1) He or she must be a U.S. citizen;¹⁵
- 2) He or she must be at least eighteen (18) years of age;¹⁶
- 3) He or she must have been a resident of the district in which service is requested for at least one year;¹⁷
- 4) He or she must be able to read, write and understand the English language;¹⁸

⁷Diana Digges, *Study Finds 'Low-Reasoning' Jurors Hold Sway in Jury Room*, LAW WEEKLY USA, February 4, 2002, at 20.

⁸FED. R. CIV. P. 47(a); *Hicks v. Mickelson*, 835 F.2d 721, 725 (8th Cir. 1987).

⁹Alan Harding, A SOCIAL HISTORY OF ENGLISH LAW 27 (1973).

¹⁰Stephan Landsman, *The Civil Jury Trial in America: Scenes From an Unappreciated History*, 44 HASTINGS L.J. 579, 585 (1993).

¹¹*See Powers v. Ohio*, 499 U.S. 400, 406-7 (1991); TEX. GOV'T CODE ANN. § 62.101 (Vernon 1988).

¹²28 U.S.C. §§ 1861-1878.

¹³TEX. GOV'T CODE § 62.102.

¹⁴*U.S. v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998).

¹⁵28 U.S.C. § 1865(b)(1).

¹⁶28 U.S.C. §§ 1865(b)(1).

¹⁷28 U.S.C. §§ 1865(b)(1).

¹⁸28 U.S.C. §§ 1865(b)(3).

- 5) He or she must not be incapable, by reason of mental or physical infirmity, or rendering satisfactory jury service;¹⁹
- 6) He or she must not have a criminal charge pending, or a conviction in federal or state court of record of, a crime punishable by imprisonment for more than a year, and the person's civil rights have not be restored.²⁰

Apart from the basic requirements of the 1968 Act, the method for selecting the panel members is left to the individual discretion of the district courts.²¹ Nevertheless, a district's plan must receive the approval of the judicial council for the circuit in which the district is located.

The Act provides for management of the venire selection process by the clerk of the district court or a jury commission appointed by the district court.²² The Act calls upon each district court to create a venire selection plan that meets the following requisites:

- 1) The venire selection plan should ordinarily draw prospective jurors from voter registration lists or from the lists of actual voters.²³ A plan may permissibly draw from *either* voter registration lists *or* lists of actual voters.²⁴ The plan may draw from a wider group of individuals "where necessary to foster the policy and protect the rights" established by the Act.²⁵ Although the vast majority of district courts base their jury pools on voter

registration lists, many districts have at least discussed the possibility of drawing jury panels from a more expansive pool, such as from a list of licensed drivers residing in the district, and some district courts have in fact implemented such a plan.²⁶

- 2) The venire selection plan should provide for a "master jury wheel" into which the venire administrator places the names of randomly selected prospective jurors.²⁷ In the ordinary case, the venire selection plan provides for some method of randomly selecting jurors (proportionately from each political subdivision within the district) for placement in the master jury wheel.²⁸ That master jury wheel is then emptied and refilled; through the same random selection process, after a specified period that is not to exceed four years.²⁹

¹⁹28 U.S.C. §§ 1865(b)(4).

²⁰28 U.S.C. §§ 1865(b)(5).

²¹28 U.S.C. § 1863(a).

²²28 U.S.C.A. § 1863(b)(1) (West 1994 & Supp. 1997).

²³28 U.S.C.A. § 1863(b)(3) (West 1994 & Supp. 1997).

²⁴*United States v. Lewis*, 10 F.3d 1086, 1090 (4th Cir. 1993); *United States v. Douglas*, 964 F.2d 738, 742 (8th Cir. 1992); *United States v. Grisham*, 841 F. Supp. 1138, 1141 (N.D. Ala. 1994), *aff'd*, 63 F.3d 1074 (11th Cir. 1995), and *cert. denied*, 116 S. Ct. 798 (1996).

²⁵*See Douglas*, 964 F.2d at 742.

²⁶*See, e.g., United States v. McKinney*, 53 F.3d 664, 669-70 (5th Cir.), *cert. denied*, 116 S. Ct. 261 (1995).

²⁷28 U.S.C.A. § 1863(b)(3), (4) (West 1994 & Supp. 1997). The jury "wheel" was historically a metal drum, rotating on an axis, from which slips of paper with prospective jurors' names would be drawn. With the advent of computer technology, the metal "wheel" was replaced by software.

²⁸*See, e.g., Grisham*, 63 F.3d at 1077-78.

²⁹28 U.S.C.A. § 1863(b)(4) (West 1994 & Supp. 1997).

- 3) The plan should provide for some procedure by which the venire administrator then selects the actual jury panelists.³⁰ In some cases, panelists will be drawn directly from the master jury wheel.³¹ In many cases, the court clerk sends questionnaires to the persons listed in the master jury wheel. Those persons determined to be eligible, based on the responses to the questionnaires, are placed in a qualified jury wheel.³²

The Act provides that members of the federal armed forces, members of police and fire departments, and state or federal “public officers . . . actively engaged in the performance of official duties” are barred from jury service.³³ The language sets out a mandatory bar to jury service; according to the statute, those members of the statutorily exempt classes who wish to serve on juries may not do so. Those persons designated as exempt should identify themselves as such in response to a qualification questionnaire from the court. As discussed below, the Act also allows a venire selection plan to designate additional categories of persons or occupational classes whose members may be excused upon individual request because of “undue hardship or extreme inconvenience.”³⁴

In accordance with the Act, a particular federal district court may provide some additional grounds for excusal from jury service upon individual request and consideration. Each district may establish its own specific categories within the Act’s guidelines. The Southern District of Texas plan, for example, provides an opportunity for the following persons to notify the court that they fall within one of the statutory exemptions (bars) from jury service:

- 1) A member in active service of the armed services of the United States;
- 2) A member of a fire or police department;
- 3) Any elected official actively engaged in the performance of official duties.

A person may be excused by the court upon written request for the following:

- 1) Persons not employed outside the home having active care and custody of a child under the age of 10 whose health or safety would be jeopardized by their absence for jury service; or a person who is essential to the care of an aged or infirmed person and who is not employed outside of the home.
- 2) Persons who have served as a grand or petit juror in federal court within the previous two years;
- 3) Persons over 70 years old;
- 4) Members of federal law enforcement agencies;
- 5) Members of volunteer safety organizations who work in an official capacity without compensation (fire fighters, rescue squads or ambulance crews); and
- 6) Others for whom the jury service would cause undue hardship or extreme inconvenience.

Each federal court has some additional procedure that allows prospective jury panelists to present claims of hardship that do not fall within any of above categories, such as an inability to get to the courthouse (e.g., “I don’t drive in big-city traffic”); medical excuses (e.g., incontinence, loss of hearing); time conflicts (e.g., need to care for elderly parent, or disabled spouse or child); or business reasons (e.g., sole proprietorships, farmers, etc). How such “equitable” reasons for avoiding jury service are administered is fully within the court’s discretion. It involves a judge’s balancing act between the rights and obligations of citizenship and the content and presentation of the request to avoid jury service. A court’s decision is

³⁰28 U.S.C.A. §§ 1863(b)(8), 1864(a) (West 1994 & Supp. 1997).

³¹28 U.S.C.A. §§ 1864, 1866(a) (West 1994 & Supp. 1997).

³²See, e.g., *Grisham*, 63 F.3d at 1078.

³³28 U.S.C.A. § 1863(b)(6) (West 1994).

³⁴28 U.S.C.A. § 1863(5)(A) (West 1994).

likely to hinge on the seriousness of the situation presented (in other words, making the easy distinction between a prospective juror's caring for a sick dependent and missing a business trip) and the manner in which it is presented (in other words, whether the prospective juror's application shows the applicant has the proper regard for his or her civic duties). Judges are extremely sensitive to the need to avoid excusing too many of those who claim business hardship. After all, if you exclude professionals such as doctors or lawyers, or sole business owners, from the pool, it may impact the district's ultimate ability to get a fair cross-section of the community from its jury selection plan.³⁵ Instead of dismissing a person who claims business hardship, a court may reset the prospective juror for a later jury call.

The petition of a prospective juror who claims hardship but who does not meet any criteria for exemption under the Act or the guidelines of the Southern District of Texas plan is considered by the "miscellaneous" judge (the judge who is "on call" during a particular month to handle emergency matters). Such a procedure falls within the Act's provision that the clerk or court may excuse a person summoned for jury duty "upon a showing of undue hardship or extreme inconvenience."³⁶

Some venire selection plans, such as the one in place in the Northern District of California, incorporate pre-empanelment questionnaires that seek to identify those potential panelists for whom an extended trial would be an extreme hardship.³⁷

An understanding of the basic qualifications and exemptions from service is important, as the mechanisms put in place by the courts do not always ensure that unqualified jurors and exempt jurors do not appear on panels. An understanding of the jury selection mechanisms used by the court is likewise essential to a basic understanding of the mix of persons on a panel. For example, the geographical

reach of a federal court is broader than its state counterpart for purposes of jury empanelment. For example, in the Southern District of Texas veniremen living in the Bryan/College Station area are frequently called to serve in Houston – an hour and a half drive away. The odds of having one or more panelists from rural or semi-rural areas increases exponentially between picking a jury in a Houston or Dallas state court and federal court.

B. Texas State Court Requirements for Jury Service

To be eligible for jury service in state courts, a person must meet eight criteria:

- 1) must be a citizen of the state and county;³⁸
- 2) must be at least eighteen (18) years of age;³⁹
- 3) must be qualified to vote (though failure to register does not disqualify a person for jury service);⁴⁰
- 4) must be of sound mind and good moral character;⁴¹
- 5) must be able to read and write;⁴²
- 6) must not have served as a juror six days within the preceding six months in the district court or three months in the county court;⁴³
- 7) and must not have been convicted of a felony or be under indictment or other legal accusation of misdemeanor theft or felony.⁴⁴

³⁸ TEX. GOV'T. CODE ANN. § 62.102(2).

³⁹ TEX. GOV'T. CODE ANN. § 62.102(1).

⁴⁰ TEX. GOV'T. CODE ANN. §§ 62.102(3), 62.1031.

⁴¹ TEX. GOV'T. CODE ANN. § 62.102(4).

⁴² TEX. GOV'T. CODE ANN. §§ 62.102(5), 62.103(a).

⁴³ TEX. GOV'T. CODE ANN. §§ 62.102(6), 62.103(b).

⁴⁴ TEX. GOV'T. CODE ANN. §§ 62.102(7) and (8).

³⁵ See *Marks v. Shell Oil Co.*, 895 F.2d 1128, 1130 (6th Cir. 1990).

³⁶ 28 U.S.C.A. § 1866(c) (West 1994 & Supp. 1997).

³⁷ See generally Dennis Bilecki, *A More Efficient Method of Jury Selection for Lengthy Trials*, 73 JUDICATURE 43 (1989).

