

VOIR DIRE FOR THE DEFENDANT

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"A man who practices law in the criminal courts should be able to tell something about a man by looking at his face. A large part of his work is sizing up judges, jurors, and witnesses at the first glance."

- Clarence Darrow

I. INTRODUCTION

Sizing up the venire who may become part of the jury that decides a case is critical for both criminal and civil practitioners. Many trial lawyers consider voir dire to be the most essential part of the trial because that is when the attorney makes a first impression and is given the first opportunity to explain the client's case to the prospective jury.

Voir dire literally means "to say the truth;" however, the more modern 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."¹ Voir dire may be used for a number of diverse purposes. Two commonly recognized purposes are 1) to test the legal qualifications of the panel members to serve as jurors through challenges for cause, and 2) to enable counsel to elicit facts so that peremptory challenges can be exercised wisely.² These

¹ BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

² See *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).

purposes may be accomplished by observing the jurors, reviewing their backgrounds, and by eliciting from them other pertinent information.

Voir dire is also where potential jurors form their first (and often lasting) impressions of you and your client. Of course, it is a truism that voir dire is as much about potential jurors sizing up the parties as it is about lawyers evaluating jurors. If your client is a large corporation, then the voir dire process presents a unique set of dangers and opportunities.

Defending a large corporation or institution sometimes can be extremely challenging. Many potential jurors have been conditioned to think of business as big, bad and greedy. This is especially true in the wake of high-profile corporate scandals where the corporation involved appeared callous, brazen, and indifferent to the well being of the ordinary person.³ Indeed, there have been a few studies that suggest that plaintiffs have been awarded significantly bigger verdicts against corporate defendants, doctors, or other “deep pockets” than against individual defendants in cases involving personal injuries.⁴ Mock jury studies have held big corporate

³ See Margaret Cronin Fisk, *Firestone's Effect: Jaded Juries, Defense Counsel Fear the Tire Scandal will Poison Jury Pools*, 23 NAT'L L. J., Sept. 25, 2000, at A12.

⁴ Cass R. Sunstein, et al, *Assessing Punitive Damages*, 107 YALE L.J. 2017 (May 1998) at footnote 46 (citing Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep Pockets” Hypothesis*, 30 L. & SOC'Y REV. 121, 133 (1996)). See also Patricia Danzon, *Report on Awards for Noneconomic Loss*, FLORIDA MEDICAL MALPRACTICE POLICY GUIDEBOOK 132 (Henry G. Manne, ed., 1985); Audrey Chin and Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials*, The Rand Corporation (1985); Mark A. Peterson, *Compensation of Injuries: Civil Jury Verdicts in Cook County*, The Rand Corporation (1985); and James K. Hammitt, et al, *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751 (1985).

defendants liable more often than small ones on the same facts.⁵ However, the methodology employed in studies of this type has been strongly criticized.⁶

Nevertheless, consider the usual situation you face when defending a large corporation or institution: (1) no sympathy; (2) no presumption of credibility; and (3) little or no margin for error. One step in overcoming these problems is to humanize the corporate or institutional defendant in the jury's eyes. Whether you are representing a corporation as a plaintiff or a defendant, it is important to convey to the jury the simple but often overlooked fact that, just like a person, a corporation can be wronged. How can you level the playing field when your client's adversary is either a much smaller company or an individual?

Voir dire is usually your first opportunity to do so. However, because many judges will not permit the lawyers to conduct an extensive *voir dire*, in those courts your first opportunity is opening statement. But regardless of whether it is in *voir dire* or opening, it is imperative to take the opportunity to humanize the corporation. The statistics teach, and it is certainly my experience, that many jurors make up their minds very early in the case.⁷ In fact, a recent study 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-

⁵ Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997); Cass R. Sunstein, et al, *Assessing Punitive Damages*, 107 YALE L.J. 2017 (May 1998).

⁶ Deborah Jones Merritt and Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999). See also Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327 (1998); Professor Neil Vidmar, *Imperial Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217 (1993).

⁷ See generally, Dr. Hans Zeisel and Harry Kalven, Jr., *The American Jury*.

reasoned, more open-minded colleagues.⁸ Therefore, learning to select a proper jury is critical to the success of any case, and every trial lawyer should seek to learn the procedures involved in voir dire.

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 to our United States Constitution 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 right and a civic duty.¹¹

To be eligible for jury service in state courts, a person: 1) must be a citizen of the state and county¹²; 2) must be at least eighteen (18) years of age¹³; 3) must be qualified to vote (though

⁸ Diana Digges, *Study Finds 'Low-Reasoning' Jurors Hold Sway in Jury Room*, LAW WEEKLY USA, February 4, 2002, at 20.

⁹ ALAN HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 27 (1973).

¹⁰ Stephan 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).

¹² TEX. GOV'T. CODE ANN. § 62.102(2).

¹³ TEX. GOV'T. CODE ANN. § 62.102(1).

failure to register does not disqualify a person for jury service)¹⁴; 4) must be of sound mind and good moral character¹⁵; must be able to read and write¹⁶; must not have served as a juror six days within the preceding six months in the district court or three months in the county court¹⁷; and must not have been convicted of a felony or be under indictment or other legal accusation of misdemeanor theft or felony.¹⁸

Persons who are legally blind or deaf are not disqualified to serve as jurors in state court unless the court determines that the disability renders the prospective juror unfit to act in a particular case.¹⁹ Furthermore, a deaf person on a jury panel is entitled to have the proceeding interpreted by a court-appointed interpreter.²⁰

A juror in a federal district court must satisfy the following minimum qualifications:

1. Be a U.S. citizen, at least eighteen years of age, and resident of the judicial district for one year or more;
2. Have the ability to speak English, and to "read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;"

¹⁴ TEX. GOV'T. CODE ANN. §§ 62.102(3), 62.1031.

¹⁵ TEX. GOV'T. CODE ANN. § 62.102(4).

¹⁶ TEX. GOV'T. CODE ANN. §§ 62.102(5), 62.103(a).

¹⁷ TEX. GOV'T. CODE ANN. §§ 62.102(6), 62.103(b).

¹⁸ TEX. GOV'T. CODE ANN. §§ 62.102(7) and (8).

¹⁹ TEX. GOV'T. CODE ANN. § 62.104.

²⁰ TEX. CIV. PRAC. & REM. CODE § 21.002 (Vernon 1997); TEX. GOV'T. CODE ANN. §62.1041.

3. Lack any mental or physical infirmity that would prevent them from rendering satisfactory jury service; and
4. Lack a charge pending against him for the commission of, or have not been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and not have had his civil rights restored.²¹

Persons who cannot satisfy these minimum standards may not serve as jurors.

Certain classes of persons may be excused from jury duty in state court. For example, the courts exempt persons with custody of a child younger than 10; full time student; primary caretaker for person unable to care for himself; persons who have served on a grand or petit jury within the last three years; persons over 70 years of age; and officers and employees of the state legislature.²²

III. DISQUALIFYING POTENTIAL JURORS

A. Challenges for Cause

After a panel of jurors has been brought to the courtroom, the voir dire process actually begins. The judge usually begins by explaining the judicial process in general and the voir dire process in particular. Although the process may vary from court to court, typically the judge introduces the parties and the attorneys to determine if any prospective juror knows any of them and, if so, whether that knowledge prevents them from being a fair and impartial juror. The

²¹ 28 U.S.C § 1865(b)(1)-(5).

²² TEX. GOV'T. CODE ANN. § 62.106; *see also* 28 U.S.C. § 1866(c) for exemptions from federal jury service.

court then permits the attorney for the plaintiff and the defendant to conduct the examination of the venire.

Attorneys have two methods to "strike" prospective jurors: 1) for cause, and 2) by peremptory challenge. A party has an unlimited number of challenges for cause, but is limited to six peremptory strikes in state district court, three in county court, and three in federal district court.²³ TEX. R. CIV. P. 228 defines a challenge for cause as "an objection made to a juror, alleging some fact which by law disqualifies him to serve in the case or in any case, or which in the opinion of the court, renders him an unfit person to sit on the jury. . . ." TEX. GOV'T. CODE ANN. § 62.105 sets forth a number of statutory reasons for juror disqualifications such as:

1. one who has a direct or indirect pecuniary interest in the subject matter of the controversy;
2. one who is related to a party, including any person who, though not named as a formal party, is directly interested in the action (the relation being by consanguinity within the third degree);
3. one who has served as a juror at a former trial of the same case or of an action involving the same factual issues;
4. one who is actually expected to testify as a witness; and
5. one who has a bias or prejudice in favor of or against a party, or the type of case involved.

²³ TEX. R. CIV. P. 233; 28 U.S.C. § 1870.

TEX. R. CIV. P. 227 requires that the statutory reasons for disqualifying prospective jurors in state court be asserted orally through a challenge for cause.

In addition to the disqualifications set forth in TEX. GOV'T. CODE ANN. § 62.105, an attorney may elicit testimony from a prospective juror during voir dire examination which indicates a bias or prejudice on the part of the prospective juror that makes him or her unfit to sit on the jury in the case. Bias is more than an inclination toward one side, and prejudice means the prejudgment of a case before any evidence is presented and embraces bias.²⁴ To disqualify a juror on a challenge for cause, it must appear that the juror's state of mind leads to the natural inference that the juror can not or will not act with impartiality.²⁵ If a prospective juror responds to an inquiry indicating that he or she is biased or prejudiced toward an issue or a party in the lawsuit and cannot act impartially in rendering a verdict, the attorney can orally request that the court strike that person "for cause." If a prospective juror admits bias or prejudice, he or she is disqualified from serving on the jury as a matter of law.²⁶

When a juror is disqualified as a matter of law, all discretion is removed from the trial judge and the judge must remove the juror²⁷, even if the juror testifies later that he can put aside

²⁴ *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963).

²⁵ *Gant v. Dumas Glass and Mirror, Inc.*, 935 S.W.2d 202, 207 (Tex. App.–Amarillo 1996, no writ); 5 Dorsaneo, TEXAS LITIGATION GUIDE CIVIL TRIAL PROCEDURES § 120.02[3][d] (1992).

²⁶ *Dorsaneo, supra* at 120-15; *Sullemon v. U.S. Fidelity & Guar. Co.*, 734 S.W.2d 10, 14-15 (Tex. App.–Dallas 1987, no writ); *see also* H. Lee Godfrey, Comment, *Civil Voir Dire in Texas: Winning the Appeal Based on Bias or Prejudice*, 31 S. TEX. L. REV. 409 (1990).

²⁷ *Compton*, 364 S.W.2d at 181-82; *Sullemon v. U.S. Fidelity & Guar. Co.*, 734 S.W.2d 10, 14 (Tex. App.–Dallas 1987, no writ). *See also* *Molina v. Pigott*, 929 S.W.2d 538, 541 (Tex. App.–Corpus Christi 1996, writ denied) (“Once basis or prejudice is established, a potential juror is disqualified as a matter of law.”); *see also* TEX. GOV'T. CODE ANN. § 62.105(4).

the bias or prejudice. However, when the evidence does not clearly establish bias or prejudice, it is a question of fact for the trial court.²⁸ The court has wide discretion in determining which jurors will be struck for cause²⁹, and such discretion is exercised by the court after the oral examination of the prospective juror by the opposing attorneys.³⁰

In federal district court, the judge usually conducts most of the voir dire examination. Indeed, the parties do not have the right to conduct *any* examination of prospective jurors.³¹ Nevertheless, Rule 47(a) does permit the court to allow questioning "as it deems proper," and there appears to be a trend in federal courts to accord each party a small amount of time to examine the jury panel. In courts where the judge is the sole interrogator of the jury panel, attorneys are usually allowed to submit proposed voir dire questions. Obviously, where the judge does not permit direct questioning by counsel, these proposed questions should be drafted with considerable forethought.

Challenges for cause in federal district court, as in state court, are made orally and the court has discretion regarding such challenges.³² Examples of persons who would be disqualified from serving and, therefore, should be struck for cause include:

²⁸ *Swap Shop v. Fortune*, 365 S.W.2d 151, 154 (Tex. 1963); *Molina*, 929 S.W.2d at 541; *Glenn v. Abrams/Williams Bros.*, 836 S.W.2d 779, 782 (Tex. App.–Houston [14th Dist.] 1992, writ denied); Perdue, *A Practical Approach to Jury Bias*, 54 TEX. B. J. at 936 (Oct. 1991).

²⁹ TEX. R. CIV. P. 228.

³⁰ *Id.*

³¹ FED. R. CIV. P. 47(a).

³² 28 U.S.C. § 1870.

- (a) Any panelist who fails to meet the minimum requirements for jury service under the Jury Selection and Service Act;
- (b) Any panelist with a financial interest in the trial's outcome³³; and
- (c) A panelist in a personal injury case who suffered an injury very similar to the kind of which the plaintiff complains.³⁴

In the event that a party believes that a challenge for cause was improperly denied, that party may eventually raise that as a point on appeal. Therefore, for purposes of a complete record, it is imperative that a court reporter always record the voir dire examination, including the questioning of prospective jurors by the attorneys at the bench.

IV. PEREMPTORY CHALLENGES

In addition to the challenges for cause permitted by the Texas Rules of Civil Procedure and the Federal Rules of Civil Procedure, parties are also permitted a number of peremptory challenges – "strikes" for which a party need not show a reason. Peremptory challenges have historically been recognized as means for allowing parties to strike jurors whose partiality, whether real or imagined, is not sufficient or amenable to articulation to remove such jurors for cause. In theory, peremptory challenges may be used to strike jurors based on nothing more than "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another."³⁵ However, in the reality of modern trial practice and the age of jury

³³ See *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1050-51 (4th Cir. 1984). *But see, Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1468 (10th Cir. 1994).

³⁴ See *Consolidated Gas & Equip. Co. v. Carver*, 257 F.2d 111, 115-16 (10th Cir. 1958).

³⁵ *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (citation omitted), *overruled in part by Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

consultants, parties carefully and methodically use peremptory challenges to select the best possible jury for their client.³⁶ "The exercise of peremptory challenges is, however, subject to abuse when parties attempt to use the challenges not as a method of selecting an impartial juror, but as a means of eliminating certain jurors and impaneling those who are potentially more partial toward their cause."³⁷ In light of the potential for abuse, courts have placed restrictions on the use of peremptory challenges. The foremost restriction is that peremptory strike may not be made solely on the basis of a juror's race or gender.

Peremptory strikes are made at the conclusion of voir dire and after challenges for cause have been made and ruled upon by the court. TEX. R. CIV. P. 232 states that peremptory strikes are only made in the event that twenty-four (24) names remain on the list in district court or twelve (12) names remain on the list in county court. TEX. R. CIV. P. 233 allows each party to a civil action six peremptory strikes in district court and three strikes in county court. In multiple party cases, the judge determines whether any of the litigants aligned on the same side of the docket are antagonistic.³⁸ If so, the court may "equalize" the number of peremptory challenges, so that the plaintiff and defendants have a comparable number of peremptory strikes.

A. Equalizing Peremptory Strikes in Multi-Party Litigation

³⁶ See generally Paul M. Lisnek (moderator), *Illinois Legal Times Roundtable: Tipping the Scales in Favor of One Side? The Jury is Still Out on the Motivations for Using Trial Consultants*, ILL. LEGAL TIMES, February 1996, at 18.

³⁷ John S. Lapham, *Gender-Based Peremptory Challenges Under United States v. DeGross*, 43 WASH. U. J. URB. & CONTEMP. L. 465 (1993).

³⁸ See TEX. R. CIV. P. 233.

Prior to the exercise of peremptory strikes, any party to a multiple party suit may make a motion to equalize the number of peremptory strikes allowed.³⁹ The court must then ascertain whether litigants on the same side are, in fact, "antagonistic" to each other. Antagonism may be established by the pleadings, but the principal question is whether there is antagonism based upon a fact issue which the jury will decide. If liability is based on the same ultimate facts, there is no factual antagonism between the parties.⁴⁰ However, if each defendant in a multiple defendant case is charged with different acts of negligence,⁴¹ or if each defendant alleges that the fault of another defendant is the sole cause of the plaintiff's damage,⁴² or if there is a settlement agreement between ostensibly opposing parties,⁴³ the court may find "antagonism" exists and realign the parties and apportion the number of peremptory strikes between them.

After a determination of antagonism, the court is required to equalize the peremptory strikes between sides if a litigant makes such a motion.⁴⁴ If no antagonism exists between parties

³⁹ TEX. R. CIV. P. 233.

⁴⁰ *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 737 (Tex. 1986); *Texas Commerce Bank, Reagan Through Texas Commerce Bank Nat'l. Ass'n. v. Lebcu Constructors*, 865 S.W.2d 68, 77 (Tex. App.–Corpus Christi 1993, no writ).

⁴¹ *Tamburello v. Welch*, 392 S.W.2d 114, 116 (Tex. 1965); *Baker Marine Corp. v. Herrera*, 704 S.W.2d 58, 59-60 (Tex. App.–Corpus Christi 1985, writ ref'd n.r.e.).

⁴² *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 918 (Tex. 1979); *Lopez v. City Towing Assocs., Inc.*, 754 S.W.2d 254, 258 (Tex. App.–San Antonio 1988, writ denied).

⁴³ *Webster v. Lipsey*, 787 S.W.2d 631, 638-39 (Tex. App.–Houston [14th Dist.] 1990, writ denied); *Council v. Bankers Comm. Life Ins. Co.*, 558 S.W.2d 487, 488-89 (Tex. Civ. App.–Beaumont 1977, writ ref'd n.r.e.).

⁴⁴ TEX. R. CIV. P. 233; *Diamond Shamrock Corp. v. Wendt*, 718 S.W.2d 766, 768 (Tex. App.–Corpus Christi 1986, writ ref'd n.r.e.); *American Cyanamid Co. v. Frankson*, 732 S.W.2d 648, 653 (Tex. App.–Corpus Christi, 1987, writ ref'd n.r.e.).

on the same side, each side must receive the same number of strikes.⁴⁵ The equalization of peremptory strikes is to be made in accordance with the ends of justice and in the sound discretion of the trial court.⁴⁶ The court has considerable discretion in this area and, for example, may equalize peremptory challenges by increasing the number allotted to a sole party or decreasing the number allotted to the multiple parties on the other side.⁴⁷ Basically, the equalization of peremptory strikes must be fair.⁴⁸

Parties entitled to separate peremptory challenges may confer before exercising their strikes.⁴⁹ However, an unqualified agreement for dismissal in exchange for challenges between the parties is prohibited and an agreement to dismiss a party for its peremptory strikes constitutes reversible error.⁵⁰

In federal district courts, the number of peremptory strikes is governed by 28 U.S.C. § 1870. Each party is entitled to three peremptory strikes. In the event that there are multiple litigants, a motion to equalize may be made.⁵¹ Federal courts have discretion in aligning the parties, but their decision-making power is not unlimited.⁵²

⁴⁵ *Garcia*, 704 S.W.2d at 736; *Lopez*, 754 S.W.2d at 258.

⁴⁶ TEX. R. CIV. P. 233; see 4 MCDONALD, TEXAS CIVIL PRACTICE § 21.24, at 77-82 (1992).

⁴⁷ *Patterson*, 592 S.W.2d at 920; see, e.g., *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex. 1986).

⁴⁸ See *Williams v. Texas City Refining, Inc.*, 617 S.W.2d 823, 826-27 (Tex. Civ. App.–Houston [14th Dist.] 1981, writ ref'd. n.r.e.).

⁴⁹ *Sisco v. Hereford*, 694 S.W.2d 3, 8 (Tex. App.–San Antonio 1984, writ ref'd n.r.e.); *Brown & Root, Inc. v. Gragg*, 444 S.W.2d 656, 660 (Tex. Civ. App.–Houston [1st Dist.] 1969, writ ref'd n.r.e.).

⁵⁰ *General Motors Corp. v. Hebert*, 501 S.W.2d 950, 957 (Tex. Civ. App.–Houston [1st Dist.] 1973, writ ref'd n.r.e.).

⁵¹ *United States v. Vaccaro*, 816 F.2d 443, 456 (9th Cir.), *cert denied*, 484 U.S. 928 (1987).

