

**VOIR DIRE**

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**VOIR DIRE**

**TABLE OF CONTENTS**

**I. INTRODUCTION-SCOPE OF ARTICLE** ..... 1

**II. THE LIMITED GUIDANCE ON THE JURY SELECTION PROCESS** ..... 1

    A. The Rules of Civil Procedure and the number of strikes ..... 1

    B. Recent case law giving the trial judge more discretion ..... 2

        1. *Cortez v. HCCI-San Antonio, Inc.* ..... 2

        2. *El Hafi v. Baker* ..... 3

        3. *Hyundai Motor Co. v. Vasquez* ..... 3

    C. *Batson* Challenges ..... 3

    D. Preserving Error ..... 4

        1. When not permitted a line of inquiry ..... 4

        2. When a juror is not struck for cause and overruled *Batson* Challenges ..... 4

**III. PRACTICAL TIPS FOR CONSTRUCTING YOUR VOIR DIRE AND ORGANIZING YOUR NOTES** ..... 5

    A. Focus on whom really matters ..... 5

    B. Focus on the issues that will really matter ..... 5

    C. There are not “magic words,” but ..... 6

    D. Organizational tricks ..... 6

**IV. IT’S DECISION TIME, NOW WHAT?** ..... 7

    A. The experts and “scientific” evidence ..... 7

        1. Litigation support services ..... 8

        2. Professional psychological evaluations ..... 8

        3. Old-fashioned stereotypes ..... 8

    B. The anecdotal evidence ..... 10

**IV. CONCLUSION** ..... 11

## Voir Dire

### I. INTRODUCTION-SCOPE OF ARTICLE

Voir dire is often the most-overlooked piece of trial preparation. With everything else that needs to be done, we have all said we will prepare the voir dire when we have the time. Despite its step-child treatment, voir dire can be one of the most important parts of the trial. It is the lawyer's first attempt to build rapport and, more importantly, credibility with the jury. The lawyer will not have the opportunity to speak directly with and hear from the jurors at any other time in the case. Some lawyers suggest you should start arguing your case during the voir dire stage. While an artful voir dire will include some advocacy, with the limited time to question the panel, it is more important to listen to the panel and find out as much as possible. At the conclusion of the voir dire, the lawyer then must move to strike any potential jurors for cause, use her peremptory challenges and focus on preserving error. At the end, the lawyer and the clients are left with the remaining jurors to decide the case's fate. That's why it is often referred to as "jury deselection" as opposed to jury selection. Because of the importance and all that goes into it, voir dire preparation should move to the top of the list in trial preparation.

This article will touch on every aspect of voir dire. Because of the broad scope of the article, we recommend other resources for more in-depth treatment. This article will begin with the basics of the rules of procedure. We will then focus on the recent case law and the limits to striking potential jurors. Highly related to the strikes is the preservation of error when the judge refuses to grant you a strike or a challenge to the opposing side's strikes. Then, the article takes a turn from the science to more of the art involved in the voir dire process. For better or worse, voir dire strategies and tactics are like opinions, everyone has one and thinks theirs is the best. We will take a survey of general strategies and the literature discussing generalities applicable when you do not have enough information to make an educated guess on whether to strike a potential juror.

### II. THE LIMITED GUIDANCE ON THE JURY SELECTION PROCESS

#### A. The Rules of Civil Procedure and the number of strikes.

Studying the rules and case law will not make a lawyer a more savvy juror selector. In fact, there is very little by way of rules or cases that speak on the issue of how best to use strikes. The rules provide the basics, and the rest makes this process more of an art than science.

A peremptory challenge, or strike, is a challenge to a perspective juror without assigning a reason. *See* TEX. R. CIV. P. 232; *Patterson Dental Co. v. Dunn*, 592 S.W.2d 974, 917 (Tex. 1979). Peremptory strikes permit the parties to reject certain panelists who may be unsympathetic to their position; the strikes do not permit the parties to select members for the panel. *See id.* at 919.

In a typical two-party case with 12 jurors, each side gets six peremptory strikes in district court. *See* TEX. R. CIV. P. 233. In county court (or other six juror trials), the strikes are limited to three per side. *See id.* The purpose of allocating the strikes is to ensure no party has an unfair advantage because of its peremptory challenges. *See* TEX. R. CIV. P. 233; *Patterson Dental*, 592 S.W.2d at 919.

Multiparty cases are a little more complex. In those cases, a party may file a motion to equalize the peremptory strikes if parties on one side of the case are antagonistic to each other on an issue going to the jury. *See Van Allen v. Blackledge*, 35 S.W.3d 61, 64 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2000, pet. denied). The motion must be filed before peremptory strikes are made by the parties. *See* TEX. R. CIV. P. 233.

The trial court must determine if the litigants on the same side of the litigation are antagonistic with respect to any issue to be submitted to the jury. *See id.* A cross-claim will not, on its own, support a finding of antagonism. *See Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 737 (Tex. 1986). Rule 233 requires the court to consider any matter brought to its attention to eliminate any unfair advantage. The term "side" is not synonymous with "party," "litigant," or "person." *Id.* The parties must actually be antagonistic on an issue of fact that will be submitted to the jury, not on a matter that constitutes a pure question of law. *See Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 918 (Tex.

1979). The antagonism must be between litigants on the same side as to each other, not because they have differing disputes with the other side. *See id.* For instance, defendants are antagonistic with each other when they contend the other is solely responsible for the injuries of the plaintiff. *See id.* The determination is a question of law. *See Central Power*, 704 S.W.2d at 736.

If there is no finding of antagonism, then six strikes per side are allowed. *See TEX. R. CIV. P.* 233. If there is true antagonism between parties on the same side, the court has the discretion to determine the number of strikes to give each side so neither side has an unfair advantage. *See Patterson Dental*, 592 S.W.2d at 919. The court may proportion the strikes by increasing the strikes on one side, decreasing the strikes on the other, or both. *See id.* at 920. The antagonistic parties on one side each get their own number of strikes. *See Frank B. Hall & Co. v. Beach*, 733 S.W.2d 251, 256-57 (Tex.App.–Corpus Christi 1987, writ ref’d n.r.e.). For example, in *Frank B. Hall*, the court gave the intervenor three strikes and equalized the strikes of other parties. If antagonistic parties are given additional strikes, they should not be permitted to coordinate their strikes. *See Van Allen v. Blackledge*, 35 S.W.3d 61, 65 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2000, pet. denied).

When the trial court impanels alternate jurors pursuant to TEX. GOV’T CODE § 62.020, the sides must be given additional peremptory strikes. *See Temple EasTex, Inc. v. Old Orchard Partners*, 848 S.W.2d 724, 738 (Tex.App.–Dallas 1992, writ denied). If the trial court impanels one or two alternate jurors, the sides are each entitled to one additional strike. *See TEX. GOV’T CODE* § 62.020(e). If the trial court impanels three or four alternate jurors, the sides are each entitled to two additional peremptory strikes. *See id.*

After the challenges for cause are made, at least 24 persons must remain on the panel in district court. *See TEX. R. CIV. P.* 231. There must be at least 12 persons remaining in county court. *See id.* If the jury panel has fewer than those numbers, the trial court must direct the clerk to call other panelists to complete the jury. *See id.* and TEX. R. CIV. P. 235; *Thomas v. City of O’Donnell*, 811 S.W.2d 757, 759 (Tex.App.–Amarillo 1991, no writ).

After the peremptory challenges, the first 12 persons not stricken comprise the jury panel in district court. *See TEX. R. CIV. P.* 234; *Dunlap v. Excel Corp.*, 30 S.W.3d 427, 433 (Tex.App.–Amarillo 2000, no pet.). In county court, the first six persons not stricken make up the jury panel. *See TEX. R. CIV. P.* 234. Once the jury is called, the court cannot add or subtract jurors. *See Dunlap*, 30 S.W.3d at 433.

## **B. Recent case law giving the trial judge more discretion.**

In recent case law, the Supreme Court of Texas has attempted to provide guidance on exactly what is allowed in voir dire and the trial court’s role in the process. The clearest result from the *Cortez-Baker-Hyundai* series of cases is that the trial judge has broad discretionary power over voir dire examination.

### **1. Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87 (Tex. 2005).**

During the voir dire of this nursing home case, the plaintiff’s lawyer obtained an opinion from one of the panelists, an auto insurance adjuster, that he had some “preconceived notions” about the case. The venireman said he would “feel bias” based on his previous experience with “lawsuit abuse.” While stating, “in a way . . . the defendant was starting out ahead,” he also stated “I can’t answer anything for certain” and that he was “willing to try” and listen to all of the evidence. Plaintiff’s counsel attempt to strike the juror for cause was denied and the plaintiff appealed.

The Supreme Court began its decision by ending the notion that a venireman cannot be rehabilitated once they have shown bias per se. The court claimed it was up to the trial judge who has the discretion to determine when rehabilitation efforts should cease. The court also rejected the idea that any certain “magic words” resulted in automatic cause or rehabilitation. The court concluded the venireman’s statements were nothing more than indications of an initial leaning. In an interesting note, the court cited Jim Perdue’s article, *A Practical Approach to Jury Bias*, 54 Tex. B. J. 936, 940 which indicated the appropriate follow-up question is whether or not the prospective juror formed the opinion before they entered the courtroom as opposed to whether

there was a leaning based on some of the facts presented during the voir dire.

**2. *El Hafi v. Baker*, 164 S.W.3d 383 (Tex. 2005).**

A medical malpractice lawyer sitting as a venireman in a medical malpractice case opined that he would relate to the defense layers, but would not agree the defendant would be starting out “a little bit behind” and that he would “do his best to be objective.” The Supreme Court of Texas said the statements did not rise to the level of disqualification basis in light of the totality of his comments.

**3. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006).**

In this case, a four-year-old girl died in a car accident when she was not wearing her seatbelt in the front seat and the air bag deployed. Not surprisingly, plaintiff’s counsel asked the venire panel if the fact the little girl was in the front seat without a seatbelt would determine the verdict. Enough prospective jurors raised their hand that the first panel was dismissed and a second one was brought in. The trial judge asked a very similar question to the second panel and got the same result. For the third panel, the trial judge instructed the plaintiff’s lawyer that he was not to disclose that the little girl was not wearing her seatbelt, but could inquire as to the veniremen’s seatbelt habits and other “general questions about belting.”

The Supreme Court ruled the trial court correctly exercised discretion by prohibiting question that sought to preview a verdict on the facts. The court maintained the focus of voir dire should be to determine bias and prejudice as to parties and types of cases, not specific pieces of evidence:

If the voir dire includes a preview of the evidence, we hold that a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not be given) a particular fact or set of relevant facts.

*Id.* at 753. When questions regarding specific evidence are allowed, the juror’s response is not disqualifying without more. The trial court’s job is to balance whether the question seeks to

uncover an external bias or to test what the verdict is likely to be based on the evidence. The court clarified that an external bias is one held by the juror before walking into the courtroom.

**C. *Batson* Challenges**

Trial lawyers are given relatively broad discretion to strike jurors for any reason they see fit. One of the few limitations is the exclusion of a venire person because of a prohibited discriminatory classification. The objection that a panelist was excluded because of a prohibited classification is called a *Batson* challenge based on the first criminal case that held racially based challenges were unconstitutional. *See Batson v. Kentucky*, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723 (1986). The Supreme Court extended the reach of *Batson* to other situations, notably civil trials, in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-28, 111 S.Ct. 2077, 2081-87, 114 L.Ed. 2d 660 (1991). The Court held in *Edmonson* that race-based exclusion of civil jurors violates the equal protection rights of the excluded juror. *Id.* A thorough discussion of *Batson* challenges and the applicable law is beyond the scope of this paper, but the practitioner should note that a party in a civil case has standing to assert the equal protection rights of a panelist who was excluded from jury because of a protected classification.

Texas courts have prohibited the striking of jurors based solely on the issue of race (*Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991)), ethnicity (*Benavides v. American Chrome & Chemicals*, 893 S.W.2d 624, 626-27 (Tex.App.–Corpus Christi 1994, writ denied)) and gender (*Fritz v. State*, 946 S.W.2d 844, 850 (Tex.Crim.App. 1997)). For a quick discussion on the *Batson* procedure, see O’CONNORS TEXAS RULES CIVIL TRIALS 2008, Chapter 8.A. § 6.3.4.

While the issue has not been raised in Texas, other jurisdictions have determined strikes because the panelist was Native American, Italian-American, Asian-American, disabled or because of religious affiliation are improper. *See* O’CONNORS TEXAS RULES CIVIL TRIALS 2008, Chapter 8.A. § 6.3.2. Litigants may, however, strike panelists based on appearance (*Mayr v. Lott*, 943 S.W.2d 553, 556-57 (Tex.App.–Waco 1997, no writ)(large, flamboyant hat)), age or employment status (*Brumfield v. Exxon Corp.*, 63

S.W.3d 912, 916 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2002, pet. denied); *Dominguez v. State Farm Ins. Co.*, 905 S.W.2d 713, 716-17 (Tex.App.–El Paso 1995, writ dismissed), or medical treatment received by the panelist (*Mayr*, 943 S.W.2d at 556). See *id.*

*Batson* introduced a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. *Batson*, 476 U.S. at 96-98. First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. *Batson*, 476 U.S. at 96-97.

Second, if the requisite showing has been made, the burden shifts to the party who made the strike to provide a race-neutral explanation for striking the venire member in question. *Batson*, 476 U.S. at 97-98. A neutral explanation means the challenge was based on something other than the juror's race. *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 2148 (2003).

Third, the trial court must determine whether the party challenging the strike has carried the burden of proving purposeful discrimination. *Batson*, 476 U.S. at 98. Under *Batson*, the ultimate burden of persuading the court that the peremptory challenges were attributable to a discriminatory purpose lies with, and never shifts, from the party challenging the strikes. *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769 (1995).

## **D. Preserving Error**

### **1. When not permitted a line of inquiry**

As mentioned before, trial judges are given broad discretion to allow or prohibit certain lines of questioning. If the adversary presents an improper matter to the panel, it will not be cause for reversal unless an objection is made when the improper statements are made or when improper questions are asked. See *Consolidated Underwriters v. Pittman*, 388 S.W.2d 315, 319 (Tex.Civ.App.–Beaumont 1954, no writ).

When you are prohibited from asking certain questions, on the other hand, you must inform the trial court, on the record, of the specific manner in which you intended to pursue the inquiry. See *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743,

758 (Tex. 2006). The safest method is to generally describe the topic and then list a handful of the actual questions you would have asked had you been given the opportunity. See, e.g., *Odom v. Clark*, 215 S.W.3d 571, 574-75 (Tex.App.–Tyler 2007, pet. denied). Improperly excluding questions infers probable harm on appeal. See *Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705, 709 (Tex. 1989).

### **2. When a juror is not struck for cause and overruled *Batson* challenges.**

If the trial court allows a potential juror to remain that should have been stricken for cause, you must show the error was harmful. To do so, before exercising peremptory challenges, you must advise the trial court: (1) the court's denial of the challenge for cause would force the party to exhaust its peremptory challenges; and (2) that after exercising all of your peremptory strikes, one or more specific objectionable jurors would still remain on the panel. See *Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998). The proper language is: "We contend that juror numbers four and seven should have been stricken for cause. Because they were not, we were forced to exhaust all of our peremptory challenges and we would have stricken jurors number nine and seventeen."

Failure to notify the court of both of these facts waives the right to complain on appeal. See *Hallett v. Houston Northwest Med. Ctr.*, 689 S.W.2d 888, 889-90 (Tex. 1985). If properly preserved, error is presumed because it is impossible to determine whether the inclusion of an objectionable juror was the cause of the verdict. See *Cortez ex rel Puentes v. HCCI-San Antonio*, 159 S.W.3d 87, 91 (Tex. 2005).

The unsuccessful *Batson* challenger must lodge an objection regarding the use of peremptory strikes before the jury is sworn and the remainder of the veniremen are dismissed as well. See *Jones v. Martin K. Eby Const. Co., Inc.*, 841 S.W.2d 426, 428-29 (Tex.App.–Dallas 1992, writ denied). Because the voir dire questioning is obviously relevant, the appellate record needs to include the voir dire, along with the juror information sheets and whatever notes and testimony is elicited from opposing counsel regarding the strikes. See *Soto v. Texas Industries, Inc.*, 820 S.W.2d 217, 218-19 (Tex.App.–Fort Worth 1991, no writ). For the

same reason, to preserve error, you should request that the trial judge make the necessary findings. *See id.* at 219.

### III. PRACTICAL TIPS FOR CONSTRUCTING YOUR VOIR DIRE AND ORGANIZING YOUR NOTES

While the actual decision to strike a juror may rely mostly on a gut feeling, there are some things that can be done to make *voir dire* more efficient and productive before you are left with five minutes and barely decipherable notes. Any system is beneficial because judges do not like to leave a panel out in the hall while lawyers pontificate the strengths and weaknesses of each potential juror. Thus, efficiency and organization is the key.

#### A. Focus on whom really matters

The obvious and probably the only universally applied rule is to focus on the jurors who are really in play. For example, if the court has empaneled 36 possible jurors, focus should be paid on the first 24-27 jurors.

With the recent Texas Supreme Court rulings on the ability to rehabilitate jurors and narrowing the meaning of bias, striking jurors for cause is becoming more and more difficult. Nevertheless, it is safe to say at least one or two jurors might be stricken for cause. With each side striking six jurors each, it is possible (if there are no double-strikes) 12 jurors will be stricken via peremptory challenges. After all of the strikes are determined, the first 12 remaining will make up the jury. That means the first 24-27 jurors are realistically at play. It is never a good idea to cut off the talkative 36th juror in fear of coming off as rude, but it might be prudent to explain to the higher-numbered jurors that they will not likely get reached. It can be explained courteously that if the judge or the attorney feels like they might get reached, further input will be sought from them.

Of course, the idea on focusing on the first 24 jurors assumes the case is not wrought with sensitive issues that will likely “bust” the jury. Several high profile cases, or cases with divisive issues have been known to have so many jurors stricken for cause, the court was forced to bring in a whole new panel. Courts usually prepare for

these contentious cases in advance by empaneling larger potential jurors.

#### B. Focus on the issues that will really matter

Texas courts give lawyers broad discretion on the questioning in *voir dire*. *See Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989). Thus, lawyers have latitude to discover any biases or prejudice by the panelists so that peremptory challenges may be intelligently exercised or determined whether grounds exist to challenge for cause. *See id.* Unfortunately, in the rush of trial preparation, *voir dire* is one of the oft-overlooked steps despite its importance. The scope of this article does delve into detailed *voir dire* strategies, but there are some techniques during *voir dire* that can make it easier after *voir dire* when the decisions are being made.

There are primarily two goals in *voir dire*, educating the potential jurors and discovering any biases. Lawyers will consistently argue which is more important and the focus of the *voir dire* may be dictated by the judge and the complexity of the case. Ideally, the *voir dire* will do both; meaning biases will be revealed while the panel is educated on the strengths and weaknesses of the case on favorable terms.

Hopefully, there will be more than one set of eyes assisting at *voir dire*. With everything going on, it is recommended that someone help the lawyer conducting the *voir dire* take notes of juror’s reaction because many of the biggest signals are nonverbal. The person conducting the *voir dire* should focus on making eye contact and building rapport with the jurors. Meanwhile, the rest of the team should be informed of the important issues and the questions that matter. The team should see the outline and should discuss before hand the types of jurors that are beneficial or detrimental to the cause. Then, when the important questions are asked during *voir dire*, the entire team is prepared and can focus on the jury.

The keys the trial team is looking for should be discussed in advance because of the time crunch after *voir dire*. Houston trial lawyer Jim Perdue, Sr. wrote that he looks for reactions to nine key questions: (1) are you honest? (2) are you a leader? (3) how will you relate to other members of the jury? (4) How will you relate to me? (5)

How will you relate to the plaintiff? (6) How will you relate to the defendant? (7) How will you relate to the story? (8) How will you view scientific evidence? and (9) How will you view a verdict for the plaintiff? See Jim M. Perdue, Sr., *Tips for weeding out juror bias*, TRIAL MAGAZINE at 54 (July 2005). While eliciting responses to those questions is the focus of his article, having the entire team focused on the issues crucial to the lead counsel before *voir dire* will make the decision making more efficient and productive.

### C. There are not “magic words,” but . . .

In light of the recent case law already discussed, the notion that certain magic words automatically lead to disqualification for cause is out the window. However, certain phrases are still generally accepted as the first step to arguing disqualification for cause.

First, you should be careful not to ask for commitments on the verdict based on evidence in the case such as the lack of a seatbelt in the *Hyundai* case. Instead, the focus should be on the opinions the jurors held before they stepped into the courtroom. A judge may not let you ask, “if the evidence shows the four-old-child was in the front seat without a seatbelt, would you be unable to side with the plaintiffs in this case?” Instead, after eliciting the predictable opinions that children should always be in proper restraints in vehicles, be prepared to ask, “in light of the opinions you have just shared with me that you formed before we started bugging you with all these questions, would you be able to consider there were other things or people that caused the death of this child?” “Could you consider other evidence?” “Could you consider that other people have some responsibility for this tragedy or would you automatically assume her parents are to blame?” If any veniremen answered negatively to these questions, they could be stricken for cause. While it is much more difficult to get a commitment to these questions, you could follow it up with: “Thank you for your opinion, and I just want to know if your opinion that you came here with would be the same whether I am asking you the questions, or the judge or even opposing counsel?”

The most important thing to remember is that because of the broad discretion granted to trial

judges, the court’s decision to strike a juror for cause is not likely to be reversed. Therefore, if the judge gives you the latitude, then ask the commitment-type question based on the evidence. For a thorough discussion of effective questioning with specific examples on various topics in light of the recent case law, see Harrison, Cliff, *The Art and Science of Selecting the Right Jury*, THE JURY TRIAL 2007 CLE.

### D. Organizational tricks

Because court procedures differ in every circumstance and location, it is difficult to find hard and fast rules that will help everyone. However, many skilled trial lawyers have shared strategies that work for them. The most universal tip is to know in advance the seating arrangement of the panel. The prepared lawyer will have the seating chart already ready to be filled-in as soon as the juror names are given to them. The chart should include at least the jurors’ name and number. Each member of the team should have the identical chart. Judges and court personnel are usually happy to assist with this procedure in advance of trial.

By way of another example, Dallas-based jury consultant Robert B. Hirschhorn, uses old-fashion color coded note cards. See John Sirman, *A Day in the Life: Robert B. Hirschhorn*, TEXAS BAR JOURNAL at 624 (July 2006). Before *voir dire*, he writes the juror number, last name, and codes for race, gender, age and education. In the top upper-right hand corner he rates each person based on his or her responses to the jury questionnaire. After *voir dire*, he lines them up to mirror the seating arrangement during the questioning. He then turns over any juror he plans on peremptorily striking. He turns sideways any jurors he believes the other side will strike. According to him, any cards not turned over or on their side usually end up on the panel with few, if any, double-strikes.

Houston trial lawyer George Fleming tries toxic tort and catastrophic injury cases that usually involve highly divisive issues. Thus, his panels are rather large. To help with the note taking, he hands out paddles with the juror number for each panelist. Instead of asking the potential juror to raise her hand, he asks her to raise the paddle so his team can easily track the number of the responding party and cipher the myriad of

responses after *voir dire*.

#### IV. IT'S DECISION TIME, NOW WHAT?

So, you survived the *voir dire* process without making a complete fool of yourself. You have even managed to ask most of the questions you planned to ask in advance without having the judge begrudgingly tell you to wrap things up. The trial team has made notes regarding the comments from the prospective jurors. You were even fortunate enough to elicit substantive information from many of the first 26 jurors. A few of the panelists have even been struck for cause. The judge looks down from his bench and says: "I've got the panel out there waiting counselors. You have five minutes to make your strikes and bring me your lists."

Now, what happens? There was no class in law school on how to pick the jury. There is no hard-to-find case that tells the trial lawyer what to do. There are plenty of articles and tips on conducting the *voir dire* to elicit more information. Most lawyers do not have psychology backgrounds. There are not many resources on what to do with the information solicited and how to determine which jurors to strike. The clock is ticking and now there are four minutes left to make possibly one of the most important decisions of the case. Which prospective jurors should be struck?

The best news is there are no hard and fast rules to apply at that moment. Assuming there is not a highly paid jury consultant involved, the best a practitioner can do is organize the *voir dire* in a way to make the juror selection process efficient. There are some general theories as to whom might make the best jurors for a particular case. However, like other aspects of the art of trying a case, much can be learned through experience and watching other successful advocates. There is likely to be plenty of advice floating around if the topic comes up amongst trial lawyers. In fact, if twenty different lawyers were asked to watch the same *voir dire* and then choose six peremptory strikes, odds are there would be twenty different juries.

There is no magic bullet. Instead, there are various tips and different theories that can be used when sitting in the cramped conference room while the clock is ticking. In addition,

professional consultants can be used and various studies list general stereotypes and psychological issues a practitioner should consider. While most admit it comes down to a gut feeling, there are methods, tips, services and studies that can help when there is thirty seconds on the clock and the decision comes down to keeping juror number 14 or juror 23.

Experience and preparation can help the lawyer with every other aspect of the trial. The use of peremptory strikes presents another issue. The Honorable Judge James W. Mehaffy put it this way:

Most reasonably intelligent lawyers, and probably a reasonably sophisticated computer program, can make [strategic legal decisions] with substantial accuracy.

Not so the decisions made in jury selection. In usually less than half a day, sometimes in less than an hour, the effective trial lawyer must learn an incredible amount about the life experiences and corresponding attitudes of a large number of individuals. The attorney must try to make a fairly accurate prediction about whom opposing counsel will strike, and then calculate the dynamics among the remaining venire panel. Further, the attorney must consider the positive and negative factors in his or her case, how those factors will impact the individuals on the jury panel, and how the individuals' reactions will figure in the resulting dynamics among the jurors.

Mehaffy, James W., Judge, *A View From the Bench: A Few Tips on Jury Selection*, TEXAS BAR JOURNAL at 878-79 (October 2000). Judge Mehaffy opined it is not humanly possible to scientifically do this correctly every time. Given the track record of successful lawyers, however, he insists "it must be done at a visceral and intuitive level." *Id.*

#### A. The experts and "scientific" evidence

While every lawyer will provide different words of wisdom, there are professionals who expend all of their energy on trying to perfect the art. Should a litigation support service be engaged? The amount at issue and the client's ability to pay often dictates that strategy decision. However,

there are many services available to the practitioner fortunate to have the resources at her disposal.

### **1. Litigation support services**

For example, for the lawyer in an unfamiliar jurisdiction, a team can be employed to conduct simple telephone surveys to view general opinions on topics relevant to the case. Focus groups or jury research groups are another option, in which people at random in the area where the trial will be conducted are chosen. They are polled to help draw a profile of potential juror's attitudes and habits. This research can help develop a broad theme for the case that is likely to resonate in the relevant community. A truly scientific poll with statistical analysis usually runs in excess of \$20,000 and up.

On the more costly side, there can be mock trials or behind the scenes "shadow" jury trials conducted simultaneously with the "real" trial. In advance of trial, attorneys can watch "mock" jurors struggle with the evidence through a two-way mirror and then ask the "mock" jurors specific questions to help focus the strategy when the time for the real trial comes along. The strength of actual witnesses, exhibits and trial strategies can be tested. Errors can be corrected and it helps the lawyer and the client better understand the value of the case. As a corollary benefit, presenting the other side of the case also puts a fresh perspective on trial preparation. Sometimes live mini trials are conducted with the actual lawyers. Other times, the "mock" jury is shown video presentations. These methods generally work best when the "mock" jurors are not told which side is paying for their services. Shadow juries sit in the gallery during the actual trial and provide feedback as the trial progresses.

### **2. Professional psychological evaluations**

Often times, a professional can assist at the actual jury *voir dire*. Lisa Blue is a lawyer and psychotherapist. She believes it is important to do a psychological analysis of the group dynamics at play. She claims individuals fall into specific categories: leaders; followers, fillers; negotiators; and hold-outs. Lisa A. Blue, *Do's and Don't of Selecting a Jury*, THE ADVOCATE at 139 (Winter 2000). In addition to determining bias, the lawyer

should determine what type of person each potential juror is. For example, if the panelist may lean to the adversary, it might be acceptable to leave him on the jury if he is a follower or filler. She says the biggest clue to figuring out what category the person fits is their occupation. *See id.* Leaders can be revealed by their occupation, hobbies, participation in organizations outside of work. Followers either want to get done with the process as soon as possible or demonstrate no assertiveness in their occupation or personal lives. *See id.* at 140.

The fillers are even more passive than followers. These are usually the ones who do not speak. She opines that fillers may be good on a jury where the attorney knows there are several strong jurors who will be sympathetic to his case. *See id.*

Negotiators take care not to upset anyone and will reveal their mind set during *voir dire* by taking both sides of a question or quickly agreeing to any counter-point presented. *See id.*

Meanwhile, hold-outs are those who will never change their mind regardless of the pressure or the consensus reached by the others. She suggests hold-outs will disclose background of a rebellious nature, an unusual religion or occupation. They may show a barrier between themselves and other jurors. If a hung jury is the goal, the hold out juror is the ideal candidate.

### **3. Old fashioned stereotypes**

While stereotypes have fallen out of fashion, there are some generally accepted typecasts that can be employed as a supplement to a lawyer's other tools. While they should not be relied upon in lieu of common sense and observation, and are subject to being grossly inaccurate, some studies have categorized the types of people that are likely to favor the defense and those that are likely to favor the plaintiff.

It has been suggested that traditionally good defense jurors are:

1. Jurors who exhibit stability in their work record and family history;
2. Engineers, architects, or other professional individuals;

3. Lean individuals;

4. Strong, aggressive, athletic types are like to follow the evidence and be less swayed by emotion.

5. Jurors who have been sued as defendants

It has been suggested that traditionally good plaintiff jurors are:

1. Civil service workers, especially postal employees;

2. Union members of the trades (pipefitters, ironworkers, longshoremen, carpenters, etc.);

3. Electricians;

4. Barbers;

5. Southwestern Bell employees;

6. Painters;

7. Professors;

8. Unemployed;

9. People with unusual grooming and attire (often hung-jury material)

10. Senior citizens;

11. Overweight persons;

12. Schoolteachers (although this occupation has been highly debated).

Varney, Lana, K., *Voir Dire and Civil Batson*, TEXAS STATE BAR CLE: 19TH ANNUAL ADVANCED CIVIL TRIAL at T-24 (1996). While obviously not a socially acceptable way to categorize people in general, the studies suggest certain superficial characteristics can reveal some information about potential juror characteristics.

1. Socio-economic status and wealth: Those with smaller incomes are more prone to sympathize with the poorer party, but wealthy jurors, if they side with the plaintiff are more

likely to give larger damage awards. The higher the income, the more involved they are likely to be in deliberations.

2. Education: Higher educated persons tend to be more conservative and focus on the jury charge, while less educated people tend to put more emphasis on witness testimony, personal experience and emotion.

3. Nationality/Ethnic background: the stronger the association with the traditional ethnic culture, the more likely a stereotypical conclusion will provide some insight.

4. Age: Generally, jurors get more conservative with age. Younger jurors are found to be more questioning of authority figures and traditional values. They may be less sympathetic to an injured person's plight unless they have personally experienced a similar injury. Older people are less likely to empathize with a younger party in a lawsuit.

5. Gender: Attractive witnesses seem to draw quick initial empathy from jurors of the opposite sex.

6. Religion: Generally the more traditional and moralistic a person's belief, the more conservative and defense-minded they are. Agnostic, nontraditional practitioners, Protestants and Jews are more likely to be relatively liberal.

7. Marital status: Happily married jurors with children are thought to be more plaintiff oriented. It is thought that experiences of marriage and family expose the individual to situations that require sensitivity to other's shortcomings.

8. Managers of money in the household: The bookkeeper at home is thought to be less prone to require a party seeking damages to account for every detail of the damages requested.

9. Reading materials: People who read technical and work journals are thought to be very serious and competitive. They will be more likely to be persuaded by logic and documentary evidence. Fiction readers are thought to focus on emotional issues.

*Id.* at T-22 through T-23. Appropriately, the author implores lawyers not to be tied to stereotypes and that common sense and experience are always better guides. “The value of stereotyping in jury selection is that it provides a working hypothesis about an individual to which further information may be compared.” *Id.* at T-22. It should not be used as the primary tool.

To take advantage of a bad pun, the jury is still out on whether sociological studies and legal services are beneficial or worth the cost in hard dollars and time. They can not and will not be a guarantee or accurate prediction of what will take place at trial. They can help the trial lawyer and the client better prepare and fine tune their trial strategies. These methods help show how certain evidence or witnesses play to certain types of potential jurors. The information gathered through these methods can help determine the type of jurors that would be best, or more importantly, worse for the case.

## **B. The anecdotal evidence**

As with many aspects of trial strategy, much can be learned from experienced successful trial lawyers. Despite efforts to apply a scientific method to jury selection, many believe it is a matter of instinct and experience. Jury consultant Robert Hirschhorn admits “It’s gut instinct,” he told the TEXAS BAR JOURNAL. “It’s a sense I have based on their body language and the way they react to lawyers.” Sirman, TEXAS BAR JOURNAL at 625.

Former Chair of the ABA Section of Litigation Robert Clifford writes “a lawyer in a civil case must try to pick 12 people who know how to listen and follow—people who are not predisposed to showboat or who feel compelled to sway others their way.” Clifford, Robert A., “Deselecting” the Jury in a Civil Case, LITIGATION at 8 (Winter 2004). Clifford believes any “good” jurors are going to be struck by the other side so the key is to eliminate or “deselect” the jurors who are bad for your case. *Id.* at 9.

While Clifford admits some stereotyping is required, he recommends lawyers pick sheep rather than leaders. He advises:

Don’t try to pick a leader because,

invariably, it never turns out that way. And if it does, that leader might end up steering everyone for the other side because of something you didn’t detect in voir dire. Try to figure out which jurors have had prior contact with the court system. Identify jurors who relate a background or personal experience that may cause them to believe they know more about the issues involved in the case, which may lead them to try to out-think the witnesses or experts. Instead, identify jurors who are sufficiently smart and willing to be educated about the issues in the case and will make a commitment to pay attention.

*Id.* at 13. Lisa A. Blue, a psychotherapist and lawyer, agrees. She believes the goal is to strike the six worst, not to pontificate who would be the twelve best. Lisa A. Blue, *Do’s and Don’t of Selecting a Jury*, THE ADVOCATE at 139 (Winter 2000).

Much of the advice focuses on the reluctant or overeager juror. A reluctant juror is usually a bad juror. Unhappy jurors can taint the case and will likely be more interested in going home than administering justice. Especially, with today’s broad form questions where one negative answer can end the whole process, the plaintiff wants to make sure the unhappy juror does not crater the case. Likewise, the overeager juror probably comes to the table with an agenda. Given recent efforts by tort reform advocates, the agenda usually relates to wanting to “fix the system” at the expense of the plaintiff’s case.

Judge Mehaffy believes no single factor is more important in juror attitude than employment. *See* Mehaffy, TEXAS BAR JOURNAL at 879. He believes the inquiry needs to be much deeper than place of employment, but duties, pay, supervisory capacity, working with tools or working with people. It also includes the same questions about the panelist’s spouse. *See id.* He concludes these lines of questions are important because you may reveal someone in the insurance industry or a law and order type that may impact your case.

Many of the anecdotal stories run counter-intuitive the stereotypes discussed above. For example, in a car wreck wrongful death case, the decedent was a young man in his late teens. The defendant argued contributory negligence and was hoping to avoid any payment to the decedent’s

estate. Two females in their late teens were on the panel and had talked about having long-term relationships with boyfriends with similar traits as the decedent. The defense lawyer initially thought to strike the two young females for fear that they would empathize and think of the impact of the loss of their boyfriends. The jury consultant, however, advised they should remain on the jury because people of that age have a feeling of being invincible. Rather than empathize, the two young females thought that accidents like that do not and would not happen to them or their boyfriends. Therefore, for it to have actually happened, the plaintiff must have been negligent in a way they or their boyfriends never would be. The jury consultant's "hunch" was confirmed after the jury returned a verdict in favor of the defendants and defense counsel had the chance to speak with the girls.

To prove that there are as many opinions as lawyers, Lisa A. Blue claims there is a very basic golden rule: "people relate and identify to others who have similar backgrounds, characteristics, or life experiences." Blue, *THE ADVOCATE* at 135. She uses the example that if the plaintiff is a former alcoholic, it is imperative to know who on the jury has had similar experience and reminds lawyers of the old saying: "we fear those things which are unknown to us." *Id.* Presumably, she may have a gut reaction or hunch at *voir dire* to contradict the golden rule.

The best rule is to review the panel and make the best observation as to whether or not the prospective juror is going to be receptive to the evidence, witnesses, lawyers and theme of the case. While the juror may fit neatly into place on paper, let instinct determine if the juror is receptive to the case.

#### IV. CONCLUSION

Inevitably, any trial lawyer with graying hair will face the unenviable task of questioning a jury after a verdict for the other side. They are going to come away wishing they knew something about one or two more jurors before they put them on the panel. No matter how many tricks they use, consultants they hire, trials they have conducted, it is bound to and will happen. When flipping through juror information sheets, nothing should replace instinct and common sense. Despite

efforts to apply science to the selection of a jury, it truly remains an art.

While the losing trial lawyer may come away disappointed and dismayed about how one of the jurors presumed favorable ended up voting, there should be faith in the jury trial system. While the jurors may confound lawyers, almost every juror comes away from service feeling better about the civil justice system. They take their responsibility serious and appreciate the efforts of good lawyering—win or lose. Assuming there has been minimal time-wasting, they enjoy their service. They enjoy learning about the facts of the case and the law.

Because there are many strategies and theories, the only true mistake a lawyer can make is selecting a juror who does not feel good about the civil justice system at the conclusion of the case regardless of the outcome of the trial.