"Voir Dire: How To Master An Essential Trial Skill"

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Voir Dire - How to Master An Essential Trial Skill

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The overwhelming majority of cases are won or lost well before they ever see the inside of a courtroom. We all know that in close cases however, an attorney can profoundly influence the outcome in the first few hours of trial. How the jurors frame the issues will control how they interpret and remember the evidence. Voir dire is the first and most critical step in the process of getting jurors to frame issues. More important, however, is how the court frames the case in its charge. An attorney who frames the case differently than the court's charge risks losing the jury.

This leads us to Lesson One:

THE TWO MOST IMPORTANT ASPECTS OF A VERDICT ARE WHO IS MAKING THE DECISION AND WHAT QUESTIONS ARE THEY ANSWERING!

This simple fact makes voir dire and the jury charge essential trial skills deserving of our focus well before a trial begins. Unfortunately, these two aspects of the trial are often lost in the fog of discovery, motions, witness preparation and organizing exhibits. Yet, we can greatly increase our proficiency and focus without a huge increase in the amount of time spent.

This leads us to Lesson Two:

START IMPROVING YOUR VOIR DIRE SKILLS NOW.

I. THE JURY CHARGE:

I start with the jury charge because knowing what the court will be asking the jury influences both our evaluation of the case and who we want on the jury. Some of these steps can be done without a specific case in mind, but for the most part I find it helpful to pick a case – presumably, your next case up or your most important case – and use that as a prototype.

1. Know the substantive law pertaining to your case. Sorry, there's no short cut for this step.

2. Carefully read Rules 271-279 of the T.R.C.P. and Rule 51 of the F.R.C.P.

3. Read 4 cases:

A. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000);

B. *Harris County v. Smith, 96 S.W.3d 230* (Tex. 2002);

C. *Romero et al. v. KPH Consolidated, Inc.*, 166 S.W. 3d 212 (Tex. 2005).

D. *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992).

(If you would like an extended version of this paper, email me at wtaylor@taylaw.com and I will send you a more detailed paper concerning the charge.)

4. Purchase the state and federal Pattern Jury Charges.

The Texas Pattern Jury Charges are available for CD-ROM & book purchase: at www.texasbarcle.com, There are 5 volumes: 1) General Negligence and Intentional Personal Torts, 2) Malpractice, Premises, and Products, 3) Criminal Volume, 4) Business, Consumer, Insurance, and Employment, and 5) Family Volume.

In addition, the 5th Circuit Pattern Jury Instructions are available CD-ROM and book at: www.west.thompson.com. There are 2 Volumes, Civil, and Criminal.

5. Draft the charge as the first order of business on a new case.

Unless you have actually tried similar cases to verdict and you already know what the charge will look like, the most important step you can take on any case is to draft the charge first. Knowing the questions the court will ask the jury will inform every step you take on the case: evaluation, discovery, pretrial motions, settlement, and jury selection. It is important that you cover the complete charge, including your opponent's issues.

If there are pattern charge questions applicable to your case, consider whether they accurately reflect the law, and whether they skew the question against you. Although there is a case that holds trial courts depart from the PJC "at its peril", the reality is the question must fairly state the law. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007).

If you want to go against the PJC, draft an alternative question. Be prepared to explain to the court not simply why your question is "better," but why the PJC is wrong.

6. Read one more case:

Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).

II. VOIR DIRE

Counsel is permitted broad latitude on voir dire. *Haryanto* v. *Saeed,* 860 S.W.2d 913, 918 (Tex. App. - Houston [14th Dist.] 1993, writ denied) *(citing Texas Employers Ins. Assoc.* v. *Loesch,* 538 S. W.2d 435,440 (Tex. Civ. App. - Waco 1976, writ ref'd.n.r.e.). The scope of a voir dire

examination is a matter within the sound discretion of the trial judge and its judgment will not be reversed absent a clear abuse of the discretion. *Id; see also, Blount v. Bordens, Inc.,* 802 S.W.2d 932,953 (Tex. App. Houston lst Dist., 1994, rev'd on other grounds at 910 S.W.2d 932). The court abuses its discretion only when its denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for a cause or denies an intelligent use of peremptory challenges. *Haryanto,* 860 S.W.2d at 918, *citing Loesch,* 538 S.W.2d at 440 *(citing Dickson* v. *Burlington, N.R.R.,* 730 S.W.2d 82, 85 (Tex. App. - Fort Worth 1987, writ ref'd n.r.e..)

In order to preserve complaint on appeal regarding improper voir dire examination, timely objections should be made to improper statements and questions or error may be waived. *Haryanto,* 860 S. W.2d at 918 *(citing Babcock v. Northwest Memorial Hosp., 767* S.W.2d 705,707-08 (Tex. 1989). If complaining on appeal regarding improper portions of a voir dire examination, the record on appeal should contain the entire voir dire examination so the court can determine if the questions objected to were proper or duplicitous, or whether the answers sought were not otherwise obtained. *Dickson v. Burlington.* 730 S.W.2d at 85.

LAYING THE PREDICATE FOR VOIR DIRE

1. **Know the court's charge.** How many lawyers complete their discovery and begin trial without a clear understanding of the questions that will be asked of the jury at the end of the case? The jury's findings control destiny. It makes no sense to defend a case without a clear understanding of the court's charge. Knowledge of the charge will affect the questions you ask, the information you gather and the objections you raise.

How can you effectively voir dire the jury without knowing the questions it will be asked?

2. **Evaluate your case early, well, and often.** I am amazed at lawyers who do not examine their cases closely when they first come in. How many times do lawyers charge enthusiastically into the defense of a case only to make that hated phone call the weekend before trial attempting to settle a case once they realize it shouldn't be tried?

Don't waste the court's time or your client's money attempting to defend the indefensible. Make the phone call early.

How can you effectively voir dire the jury when you yourself are not sure how the jury questions should be answered?

3. **Write your closing argument before you take the first deposition (and rewrite it all the way through discovery; rewrite it again before voir dire).** Keep yourself focused on the ultimate issues and how you want them presented to the jury.

Discovery should not only be for development of information, it should be a sounding board for themes and ideas to be used with a jury. It also should have a case - specific purpose. Before walking into the courtroom, know what you need to prove.

How can you effectively voir dire the jury if you don't know what you want to argue in summation?

4. **Establish credibility with the court.** Trial judges make important discretionary rulings on admissibility of evidence and consequently the scope of a trial. If you arrive at trial having exhausted the court's patience on petty discovery objections and frivolous motions, you may not have the court's full attention (and confidence) when you need it the most — with a jury in the box. Most discovery issues are well settled and should be resolved by agreement. File motions only when necessary and when you genuinely believe you are entitled to prevail. Establish a reputation you can count on at trial when there is a close call. You would be amazed how quickly a jury recognizes which attorneys have the court's respect.

How can you effectively voir dire the jury if you don't command the court and the jury's respect?

5. **Be flexible.** Even the most prepared lawyer gets surprised. Even the most polished witnesses will say something foolish. Even the most respected judge will make an error (or at least disagree with you) on the admission or exclusion of evidence. DEAL WITH IT!

Do not let the unexpected throw you off your game. The great courtroom advocates are not necessarily those who can give a great speech. Instead, they are quick on their feet, quick with a skillful riposte and devastating on cross- examination. The more prepared you are, the easier it is to respond to the unexpected.

How can you effectively voir dire the jury if your case is not secure enough to handle a little adversity?

INCREASING YOUR PROFICIENCY

1. Read Rules 221-236 of T.R.C.P. and Rule s 38, 39, 47, and 51 if the F.R.C.P.

2. Read 3 cases:
A. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006).
B. *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005).
C. *Batson* v. *Kentucky,* 476 U.S.79, 106, S.Ct. 1712,90 L. Ed.2d 69 (1986)

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

The Vasquez plaintiffs brought a products liability suit against Hyundai for injuries causing the death of their child in an auto accident while the child was sitting in the passenger seat of the family's Hyundai without the seatbelt buckled. Vasquez asserted that a faulty air bag design caused the injuries.

Counsel for the Vasquezes asked two panels of venire members whether the plaintiff's failure to wear a seat belt would determine their verdict. With the third panel, the trial court, concerned that this question inquired into the weight jurors would give to evidence, disallowed the question and limited counsel to general questions of jurors' personal opinions and habits regarding wearing seat belts. The jury rendered a take nothing judgment.

Vasquez appealed, arguing that the Court's refusal to allow specific questions prevented discovering jurors' predisposition against a Plaintiff not wearing a seat belt. The court of appeals first affirmed the trial court, then on a rehearing en banc reversed, holding that the specific question focused on jurors' ability to be fair. Hyundai appealed to the Supreme Court, asserting that the trial court properly excluded the question from voir dire because it sought an improper commitment on the weight the jurors would give to evidence at trial.

The Court held that, just as excluding jurors who weigh summarized facts in a certain way infringes on the right to an impartial jury, so too does excluding jurors who reveal the weight they would give to specific evidence. Just as summaries omit key details, isolated facts fail to give a juror a fully informed view of the case. Both tactics are simultaneously a skewed assessment of bias and an improper attempt to preview jurors' votes. The court stated:

> "An inquiry about the weight jurors will give relevant evidence should not become a proxy for inquiries into jurors' attitudes, because the former is a determination that falls within their province as jurors. Just as excluding jurors who weigh summarized facts in a particular way infringes upon the right to trial by a fair and impartial jury, so too does excluding jurors who reveal whether they would give specific evidence great or little weight. In both cases, questions that attempt to elicit such information can represent an effort to skew the jury by pre-testing their opinions about relevant evidence. And, when all of the parties to the case engage in such questioning, the effort is aimed at guessing the verdict, not at seating a fair jury." *Id.* at 752.

> "Inquiring whether jurors can be fair after isolating a relevant fact confuses jurors as much as an inquiry that previews all the facts. Lawyers properly instruct jurors that voir dire is *not* evidence, yet jurors must answer whether they can fairly listen to all of the evidence based only upon the facts that counsel have revealed. In responding, jurors are unable to consider other relevant facts that might alter their responses, rendering their responses unreliable. This confusion may explain in part why jurors' voir dire reactions to the evidence have not been proven to be predictors of jury verdicts: experience tells that, whatever jurors' stated opinions about

particular evidence may be at the outset, they can shift upon hearing other evidence." *Id.*

> "Statements during voir dire are not evidence, but given its broad scope in Texas civil cases, it is not unusual for jurors to hear the salient facts of the case during the voir dire. 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 to be given) a particular fact or set of relevant facts. If the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not disqualifying, because while such responses reveal a fact-specific opinion, one cannot conclude they reveal an improper subject-matter bias." *Id* at 753.

B. *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005).

The heir of a deceased nursing home resident sued the nursing home. Although the jury returned a verdict for the heir, the heir was unsatisfied with the apportionment of fault and appealed, arguing he was improperly denied a challenge of a venire member for cause. The venire member in question, an auto insurance adjuster, initially stated he "may feel bias" toward the plaintiff's case because he has seen "lawsuit abuse so many times" that, in a way, "the defendant was starting out ahead". When questioned further he said that auto claims he evaluated often had merit and he was willing to try to listen to the case and decide it according to the law and based on the evidence presented. The plaintiff struck the adjuster with his last peremptory strike. The plaintiff objected to impaneled juror 7 before the jury was seated although giving no reason on record for doing so. The appeals court held that the asserted error in jury selection was properly preserved for review, but affirmed the trial court's denial of challenge for cause. The heir appealed to the Supreme Court.

Defendants argued that plaintiff-heir failed to preserve error by failing to state why venire member 7 was objectionable. The existing law stated that a party must (1) strike the venire member for which cause was sought peremptorily, (2) exhaust all peremptory strikes, (3) request additional strikes and, if refused, (4) identify the objectionable juror remaining. Thus the issue was whether element (4), identification of an objectionable juror, entailed identifying the reason the juror was objectionable. The Supreme Court held that because peremptory strikes do not require a reason, the appellant does not need to give a reason on the record so long as he informs the trial court of the objection before knowing who the opposing party will strike or who the actual jurors will be.

Plaintiff argued that once the adjuster confessed bias, no further questioning was permissible and plaintiff should have been allowed to strike for bias. The defendant countered that further questioning revealed the juror had no extrinsic bias toward the parties or the subject matter of the claim specifically; thus, he held no bias that mandated a bias strike.

The Supreme Court agreed with the defendant. The subsequent questioning revealed that the juror's bias was against lawsuit abuse. Upon stating he was willing to listen to all evidence and

suspend judgment until the entire case was presented, he had been effectively "rehabilitated." Questioning further into the nature of the adjuster's proclaimed bias revealed that his bias was neither toward a party or subject matter this case implicated, but about frivolous claims in general.

Plaintiff also argued that the juror stating that the defendant was "starting out ahead" revealed bias. The court also rejected this argument, holding that the relevant inquiry is not where jurors start but where they are likely to end. Again, a willingness to hear all evidence and be impartial will obviate any initial leanings that are inevitably inherent in the minds of people. The Court stated:

> Nor do challenges for cause turn on the use of "magic words." Cortez argues, and we do not disagree, that veniremembers may be disqualified even if they say they can be "fair and impartial," so long as the rest of the record shows they cannot. By the same token, veniremembers are not necessarily disqualified when they confess "bias," so long as the rest of the record shows that is not the case. *Id.* at 93
>
> As a preliminary matter, we must define what we mean by "rehabilitation." We agree that if the record, taken as a whole, clearly shows that a veniremember was materially biased, his or her ultimate recantation of that bias at the prodding of counsel will normally be insufficient to prevent the venire member's disqualification. But what courts most often mean by "rehabilitation" is further questioning of a venire member who expressed an apparent bias. And there is no special rule that applies to this type of "rehabilitation' but not to other forms of voir dire examination. *Id.*
>
> "Many potential jurors have some sort of life experience that might impact their view of a case; we do not ask them to leave their knowledge and experience behind, but only to approach the evidence with an impartial and open mind. The veniremember here expressed willingness to do that. Any bias he did express was equivocal at most, which is not grounds for disqualification." *Id.* at 94

C. *Batson* v. *Kentucky,* 476 U.S.79, 106, S.Ct. 1712,90 L. Ed.2d 69 (1986)

The United State Supreme Court and courts of this State have held that a strike of a juror because of race is unconstitutional. *Batson* v. *Kentucky,* 476 U.S.79, 106, S.Ct. 1712,90 L. Ed.2d 69 (1986); *Edmonson* v. *Leesville Concrete Co., 500* U.S. 614, 618-28, 111 S.Ct 2077, 2081-87, 114 L.Ed.2d 660 (1991); *Goode* v. *Shoukfeh,* 943 S.W.2d 441 (Tex. 1997). Race discrimination in jury selection is the only constitutionally prohibited discrimination which has been adopted and applied to civil cases in Texas by the Texas Supreme Court. However, there is authority that strikes based on ethnicity or gender are also impermissible. *Hernandez v. New York,* 500 U.S.352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (ethnicity); *J.E.B.* v. *Alabama Ex. Rei T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (gender).

The analysis used to challenge a party's peremptory strike as being unconstitutional consists of three steps. First, the opposing party must establish a prima facie showing of discrimination

against an eligible venire member. *Mandujano* v. *State,* 966 S.W.2d 816 (Tex. App. - Austin 1998); *Goode,* 943 S.W.2d at 445. Only minimal evidence is needed to support a rational inference or to support a prima facie case. *Id.* If a prima facie case of discrimination is made, the party that made the strike has the burden to come forward with a race neutral reason for the strike. *Id* The explanation must be clear and reasonably specific and must contain legitimate reasons for the strike related to the case being tried. *Id.* Once the party making the strike offers a race-neutral explanation, the opponent of the strike must prove by a preponderance of the evidence that the reasons given by the party making the strike in support of its strike are a sham or a pretext for discrimination. *Johnson* v. *State,* 959 S. W.2d 284, 290 (Tex. App. - Dallas 1997, pet ref'd). The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Purkett* v. *Elem,* 514 U.S. 765, 767-69, 115 S.Ct 1769, 1771, 131 L.Ed.2d 834 (1995) (per curium). If, after the opposing party attempts to make a prima facie case of racial discrimination, the striking party offers race-neutral explanations for its strikes without objecting to the opponent's failure to establish a prima facie, showing the striking party waives that objection. *Graff v. Whittle,* 947 S.W.2d 629,632 (Tex. App. - Texarkana 1997, writ denied).

The Court of Appeals gives the trial court's decision on the ultimate question of discriminatory intent great deference. *Id; citing Hernandez* v. *New York,* 500 U.S. at 364; *Vargas* v. *State,* 838 S.W.2d 552, 553 (Tex. Crim. App. 1992) (en banc); *Dominguez* v. *State Farm Ins. Co.,* 905 S.W.2d 713, 716 (Tex. App. - El Paso 1995, writ dism'd by agr.); *In Re A.D.E.,* 880 S.W.2d 241,243-45 (Tex. App. - Corpus Christi 1994, no writ); *Mayr* v. *Lott,* 943 S.W.2d 553 (Tex. App. - Waco 1997, no writ). In reviewing a *Batson/Edmonson* challenge, an Appellate Court will apply an abuse of discretion standard of review. *Goode,* 943 S.W.2d at 446. The issue of whether the race-neutral explanation should be believed is purely a question of fact for the trial court. *Goode,* 943 S.W.2d at 446 *(citing Hernandez,* 500 U.S. at 367). Consideration of this type of challenge is by its very nature adversarial. *Goode,* 943 S.W.2d at 451. The proceeding should be held in open court. *Id.* Unsworn statements of counsel may be offered as an explanation of why the peremptory challenges were exercised. *Id.* Juror information cards may be made a part of the record. *Id.* To the extent any party wishes to include any other information in the record, the rules of evidence and procedure apply. *Id.* The party challenging the strike has the right to examine the voir dire notes of the opponent's attorney when that attorney relies upon the voir dire notes while giving sworn or unsworn testimony in an *Edmonson* hearing. *Id.* at 449. Absent such reliance, even if the lawyer witness uses the writing to refresh his or her recollection before testifying, the voir dire notes are privileged work product and the movant may not examine them. *Id.*

The following is a list of explanations for use of peremptory strikes which have been heId to be "racially neutral":

- Striking a juror because of his long, unkempt hair, a mustache, and beard, *Purkett,* 514 U.S. at 789;
- Striking a juror for wearing sunglasses during voir dire, *Alexander v. State,* 866 S.W.2d 1, 8-9 (Tex. Crim. App. — 1993);
- Striking a juror wearing "only a t-shirt," *Hernandez v. State,* 808 S.W.2d 536; 544 (Tex. App. — Waco 1991, no pet.);

- Peremptory strikes based on a panel member's employment status are allowed *Earhart v. State,* 823 S.W.2d 607, 625 (Tex. Crim. App. 1991); *Tompkins v. State,* 774 S.W.2d 195, 205 (Tex. Crim. App. 1987) (en banc), aff'd 490 U.S. 754, 109 S. Ct. 2180, 104 L.Ed. 2d 834 (1989) (per curiam);
- A panel member may be struck based on a hunch, for failure to make eye contact, inattentiveness, or other non- quantifiable characteristics, *Molina v. Pigott,* 929 S. W.2d 538, 545 (Tex. App. — Corpus Christi 1996, writ denied) (*citing Vargas,* 838 S.W.2d at 554-55); *Doby v. State,* 910 S.W.2d 79, 82 (Tex. App. — Corpus Christi 1995, pet. ref'd); and
- Youth is a proper consideration in making peremptory challenges, *Jack v. State,* 867 S.W.2d 942, 947 (Tex. App. — Beaumont 1993, no pet.); *Barnes v. State,* 855 S.W.2d 173, 174 (Tex. App. — Houston [14th Dist.] 1993, pet. ref'd).

In determining whether a striking party's racial- neutral explanation is a pretext, the court may consider the following:

a. The reason given are not related to the facts of the case.
b. There is a lack of questioning to the challenged juror or a lack of meaningful questions.
c. Disparate treatment — persons with the same or similar characteristics as the challenged juror were not struck.
d. Disparate examination of members of the venire; for example, a questions designed to provoke a certain response that is likely to disqualify the juror and was asked only to minority jurors.
e. Any explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically. *Lott,* 943 S.W.2d at 557.

3. Purchase the Resource: Choosing and Courting a Jury, Texas Bar CLE.

You will find information at texasbarcle.com.

4. Develop a template voir dire.

5. Write 3 scaled questions.

Scaled questions are designed to have prospective jurors "weigh" the importance of certain attitudes or concepts on a scale. For example, "on a scale of 1-5, with one being the lowest and five being the highest, how important is it to you that an insurance company pay claims that it owes?"

There are several advantages to scaled questions. First, they are easy to "score" and may identify hostile jurors for further questioning. Second, they give you an opportunity to talk to everyone on the panel; something that often gets overlooked. Third, they begin the process of jurors thinking about concepts that are important to the case.

Sometimes, you will get a "run" on answers where one juror gives an answer and everyone else simply adopts that answer. If that happens, stop and question a specific juror about whether she is "following the crowd" or whether that is what her answer would have been.

Also, ask a different variation of the question designed to get jurors to think a little bit. In the question above, most of the time I get 4s and 5s. So, later on, I ask the question this way:

"How important is it that an insurance company not pay claims that it does not owe?"

I get much more varied responses to this question and the responses are much more useful to me.

6. On each case, after you have drafted your charge copy your "template" voir dire over to a file unique to that cases. As part of your template add a column at the beginning for "goals of voir dire", "issues of concern" and "possible themes". Whenever you think of one of these items on your case, enter the thought in the appropriate column.

7. Write a short 20 second explanation of why your client is trying this case.

8. Write an explanation of key concepts: burden of proof, preponderance of the evidence, direct vs. circumstantial evidence, etc.

9. Consider a power point an key concepts. (Can be used from case to case). Make sure your presentation is accurate.

10. Check your court's local rules on voir dire. Some courts will not allow power points; some will not allow explanations of key concepts beyond what is in the court's charge.

III. CONDUCTING VOIR DIRE ITSELF.

Once you reach the courtroom, it is still not time to unload your vast knowledge on the jury. Conduct a little more discovery — this time about your potential jurors. But, that doesn't mean you can't educate members of the jury panel while you get to know them. Successful voir dire is a blend of learning and teaching at the same time, of persuading and listening. You might try to follow these guidelines:

1. **Be the first to frame the issue persuasively.** Psychologists tell us that primacy rules — jurors begin forming opinions almost immediately, and remember and weigh evidence as funneled through those opinions. If you don't persuade a jury quickly you've lost. My rule of thumb is to undo the plaintiff's voir dire and "hook" the jury with my theory in the first four sentences — before I even introduce myself.

Plaintiff's counsel's best asset (besides bias/ sympathy) is that of primacy. Plaintiff's counsel has the ability to frame the issues for the jury, not only by the order and presentation of facts but also by telling the jury: "Ladies and Gentlemen, this case is about _____' (for example, an elderly widow who has paid premiums for decades and now can't get her claim paid).

Defendant's counsel, on the other hand, has "clean up" duty. If plaintiff's counsel does not effectively frame the case the job is easy. Defendant's counsel can and should provide a frame from the defense perspective. "This claim is about _____" (usually attorneys or other experts misleading plaintiff about whether her claim is owed or, plaintiff herself trying to inflate the value of her claim).

If, however, plaintiff's counsel has framed the case well, defendant's counsel must break that frame quickly and replace it with another one. It is not enough to offer an alternative; the plaintiff's frame must be broken! For example:

> "Ladies and Gentlemen, an insurance policy is not a savings account, where you put money in and can withdraw it at anytime. An insurance policy is a contract, like any other contract, and plaintiff is only entitled to recover when certain events occur. Does everyone understand that? Those events did not occur, and here's why. . .'

You cannot conduct your voir dire while the jury is listening to you in a framework provided by your adversary.

2. **Use Word Pictures to illustrate your message.** "Word Pictures" are colorful, everyday examples that illustrate a point. The New Testament parables are word pictures. The "savings account" analogy used above is a form of word picture.

Word pictures are a powerful tool of persuasion. Imagine an arson/bad faith case where plaintiff's counsel attacks your case on voir dire for all the evidence you don't have (no confession, no eyewitness, no removal of contents, etc.) Consider opening voir dire as follows:

> "Ladies and Gentlemen, an arson investigation is like a jig saw puzzle. If you have enough time, and if you have all of the pieces, you can put in every piece. But you don't need every single piece of the puzzle to know what the picture is. Mr. Plaintiff has hidden many of the puzzle pieces. But enough remain that can tell you what happened...."

Then proceed to the introduction of your client and its case.

From there, it is not a tough sell that the jury should base its decision on the evidence that exists, as opposed to the evidence that will never exist. And the jury is ready, and open, to hear your side of the story.

Do not describe your case in legal or technical terms. Use everyday language and situations a jury can understand. A jury cannot side with you until it can understand your argument.

3. **Keep your argument short.** Voir dire is not the time to argue your case or put on your evidence. Once you have framed the issue (and broken the plaintiff's frame), don't waste time persuading an audience you don't yet know. Proceed as soon as possible to number 4.

4. **Listen to the jury.** Some lawyers spend so much of their voir dire time talking they never listen to what the jury says. A reminder: the jury decides the facts of the case. Juries cannot get reversed; only judges get reversed. Don't spend all of your voir dire time trying to prejudice the jury in your favor. Advise the jury of your major points, give an effective rebuttal to any points raised by the plaintiff's attorney, and then spend the vast majority of your time getting to know the prospective jurors. You can only do this if you listen to what the potential jurors are trying to tell you. Not only will you make more intelligent strikes, your listening to them motivates their listening to you. If you don't listen at the beginning of the case, you may not like what the jury tells you at the end.

5. **Blend leading and open ended questions.** Leading questions can make points and persuade, but they don't tell you much about your audience. Open ended questions tell you a lot about the audience, but risk losing control of the process, and also risk having jurors "blurt out" prejudicial information. "Does everyone understand you are to decide this case based on the evidence, not based on sympathy?" is a leading question; "how many of you know someone who works for an insurance company?" is non- leading.

The trick is to gather as much information as possible without losing control, all the while subtly continuing to persuade. My solution is to blend the two types of questions. This has the side benefit of varying the pace of your voir dire.

6. **When in doubt, learn more about the juror.** Don't bury your head in the sand about potentially hostile jurors. Ask more questions. More lawyers are burned by the unknown than by the known. If you fear contamination of the panel, question the juror privately at the bench. Make knowledgeable strikes.

7. **Never use a peremptory strike when a strike for cause will do.** How many times do we settle for a peremptory strike when a little more questioning will disqualify the juror for cause? For example, a juror (with a profile similar to the plaintiff) has had a bad claim experience of his own. You are tempted to write him off and just use a peremptory. Take a shot at having him removed for cause. The questions might go like this:

Q. You must be pretty angry about how you were treated?

Q. Have you ever wanted to get back at the insurance company?

Q. Are you suspicious that other insurers treat people the way you were treated?

Q. Are you cynical about insurers?

Q. Do you see the plaintiff as someone similar to you?

Q. Would it be easier to vote for the plaintiff than against him?

Q. Would I have to overcome your experience in order to objectively discuss the facts of this case with you?

Q. Can you weigh the evidence in this case without calling up your own experience?

Q. Are both sides really starting out even in your mind?

The honest answer to any of these questions could disqualify the juror, allowing you to use a peremptory on a more dangerous, but less obviously disqualified, juror.

8. **Do not discriminate based on stereotypes.** No defendant wants a jury of twelve people just like the plaintiff — same age, sex, race, profession and residential neighborhood. On the other hand, not all people of any single category (such as age) think alike. That is, not all 60 year olds tend toward plaintiff or defendant jurors. The same applies to each class described above.

Discrimination in jury selection is illegal and could cost you a strike. It is also short- sighted. There are too few strikes to waste them on surface issues or outdated views of how people think.

Invest the time necessary to know each individual you are striking.

9. **Take your time but don't waste time.** Voir dire is your one opportunity to speak conversationally with the jury. It is your one chance to get to know prospective jurors before they are selected. Take your time and be thorough. Your case is important. Jury selection is important. A jury knows and respects this.

On the other hand, don't waste time. Be prepared, don't get off track, and keep it moving. The jury's time is as important as your case. By respecting the jurors' time, you earn their attention.

10. **Maintain your personal credibility.** Don't get carried away with grandiose predictions of how good your case is, or how much evidence you have. If anything, understate your evidence, particularly early in the trial. Make sure your evidence is weighed against the court's charge, not against your voir dire promises to the jury. In a close case, I want to be the lawyer the jury trusts the most, having proven myself reliable throughout the trial.

IV. CONCLUSION

Voir Dire and the Court's charge control the two most significant factors in a verdict: who is making the decision, and what questions are they answering. Accordingly, they deserve our focus. Fortunately, we can significantly improve our abilities in these areas by following the steps set forth above.

Voir Dire - How to Master An Essential Trial Skill

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CASE LAW SUPPLEMENT

In Re Polk, 2011 Tex. App. Lexis 1323 (Tex. Civ. App. Beaumont February 24, 2011): Polk argued that the trial court improperly limited the areas of questioning by defense counsel during voir dire, preventing counsel from discovering possible bias. The Court held that defense counsel did not properly preserve error when the potential questions were neither before the trial court nor apparent from the context of Polk's pretrial request.

Davis v. Fisk, 268 S.W.3d 508 (Tex. 2008): Davis argued that the trial court improperly overruled his Batson objections when at the conclusion of voir dire defense counsel peremptorily struck six venire members, five of whom were African Americans. The explanations included unspecified nonverbal conduct, past experience with employment discrimination issues, etc. The Supreme Court concluded that the reasons given for the peremptory strikes were pretextual because of the statistical disparity and because a comparative juror analysis indicated the strikes were more likely due to race than any other reason.

Murff v. Pass, 249 S.W.3d 407 (Tex. 2008): a venireperson stated that he would hold the Plaintiff to a clear and convincing standard of proof when the proper standard was preponderance of the evidence. The trial court clarified the standard to the panel. Plaintiff/appellant objected to the prior arguing he should be disqualified for cause; the trial court overruled the challenges. The Supreme Court held that nothing in the examination indicated that the venireperson harbored bias or prejudice in favor or against a party or claim, or that he would be unable or unwilling to follow the court's instructions once the definitions were properly stated.