# VOIR DIRE (IN A POST COVID WORLD)

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## TABLE OF CONTENTS

## I. INTRODUCTION AND SCOPE OF ARTICLE

Juries are the smallest unit of democracy. Picking a jury can make or break a case. It's a flash point in litigation.

Voir dire is an opportunity. An opportunity to get the theme of your case out. The opportunity to eliminate potential jurors who will tune your case out. And an opportunity to build in error in case the jury goes haywire on your client.

Basic error preservation rules and procedures are often forgotten or overlooked. There may be dire consequences for an attorney who does not review basic error preservation rules before trial and who does not implement them during trial. Particularly, voir dire is an area where it is difficult to retain the particular and specific error preservation rules that courts have promulgated. This paper is intended to give a busy trial lawyer a general overview of what he needs to know about error preservation rules and procedure for impaneling a jury and conducting voir dire.

## II. PRESERVING ERROR IN GENERAL

Texas courts have set out general guidelines for preserving error in both rules and in caselaw. Most appellate courts first cite to the Texas Rule of Appellate Procedure 33.1, which provides:

> (a) In general. As a prerequisite to presenting a complaint for appellate review, the record must show that:
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> > (1) the complaint was made to the trial court by a timely request, objection, or motion that:
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> > > (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
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> > > (B) complied with the requirements of the Texas Rules of Civil Evidence or the Texas Rules of Civil or Appellate Procedure; and
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> (2) the trial court:
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> > (A) ruled on the request, objection, or motion, either expressly or implicitly; or
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> > (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.[1]

[1] TEX. R. APP. P. 33.1.

Though less cited, Texas Rule of Evidence 103 also provides a general rule for preserving error:

> (a) Effect on Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> > (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.
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> > (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.
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> (b) Record of Offer and Ruling. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.
>
> (c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.[2]

Following these rules, to preserve error a party must make a valid, timely, and specific request, motion, or objection and obtain a ruling.[3] The objection must be timely, i.e., it must be brought within the time permitted by the rules and decisions.[4] Further, in order to be timely, a complaint must be raised at a time when the trial court has the power and opportunity to correct the error alleged.[5] An objection is timely if made "as soon as the ground of objection becomes apparent."[6] A party cannot make the objection for the first time on appeal — the objection at trial must be consistent with the complaint on appeal.[7] The basic reason for the requirement that a party

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[2] TEX. R. EVID. 103.

[3] *See* TEX. R. APP. P. 33.1(a); TEX. R.EVID. 103(a)(1); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

[4] *See* TEX. R. APP. P. 33.1(a)(1); *Vaughan v. Walther*, 875 S.W.2d 690, 690-91 (Tex. 1994); *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991).

[5] *Wal-Mart Stores, Inc. v. McKenzie,* 997 S.W.2d 278, 280 (Tex.1999); *Richards v. Texas A&M Univ. Sys.*, 131 S.W.3d 550 (Tex. App.–Waco 2004, pet. denied).

[6] *See Kerr-McGee Corp. v. Helton,* 133 S.W.3d 245 (Tex. 2004).

[7] *See In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999).

object at trial is that the trial court must be afforded an opportunity to correct the error or rule on the issue.[8]

Generally, a court of appeals will deem error in the admission of evidence harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection.[9] In order to preserve error, a party must object to each offer of the inadmissible evidence. However, a party may preserve error by asserting a "running objection" without having to object to each individual offer. A running objection preserves error if it clearly identifies the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury, and if properly done, courts will recognize a running objection for more than one witness.[10]

A party complaining on appeal must show that the trial court ruled on his objection or motion. The Texas Rules of Appellate Procedure now provide that the trial court must either expressly or implicitly overrule the objection, or if the court refuses to rule, the complaining party must object to the court's failure to rule.[11] When a ruling is implied by the court's actions, no express ruling is necessary.[12] The determination of whether a court "impliedly" overrules an objection or motion is an unnecessary inquiry, a party can guarantee that his complaint is preserved for appellate review by obtaining a ruling or by objecting to the court's refusal to rule. That is the safest course.

To complain about the exclusion of evidence, the offering party must make an offer of proof.[13] A party must make its offer of proof after it officially offers the evidence into record and secures an adverse ruling.[14] As one court stated:

> To adequately and effectively preserve error, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility . . . . The offer of proof may be made by counsel, who should reasonably and specifically summarize the evidence offered and state its relevance unless already apparent. If counsel does make such an offer, he must

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[8] *See In re Shaw*, 966 S.W.2d 174, 182 (Tex. App.--El Paso 1998, no pet.).

[9] *Volkswagen of America Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004); *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984).

[10] *See Volkswagen of America Inc. v. Ramirez*, 159 S.W.3d at 907.

[11] TEX. R. APP. P. 33.1; *Guyot v. Guyot*, 3 S.W.3d 243, 247 (Tex. App.--Fort Worth 1999, no pet.).

[12] *See* TEX. R. APP. P. 33.1.; *Clement v. City of Plano*, 26 S.W.3d 544, 550 n.5 (Tex. App.—Dallas 2000, no pet.) (non-movant's special exceptions were implicitly overruled by trial court granting summary judgment), *overruled in part, Telthorester v. Tennell*, 92 S.W.3d 457 (Tex. 2002); *Dagley v. Haag Eng'g Co.*, 18 S.W.3d 787 n.9 (Tex. App.–Houston [14th Dist.] 2000, no pet.) (trial court implicitly overruled non-movant's objection to adequate time for discovery by granting summary judgment); *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 395-96 (Tex. App.–Corpus Christi 2000, no pet.) (trial court implicitly overruled non-movant's objections to movant's summary judgment evidence by granting summary judgment); *Hardman v. Dault*, 2 S.W.3d 378, 381 (Tex. App.--San Antonio 1999, no pet.).

[13] *See Perez v. Lopez*, 74 S.W.3d 60, 66 (Tex. App.–El Paso 2002, no pet.).

[14] *Id*.

> describe the actual content of the testimony and not merely comment on the reasons for it.[15]

The party complaining on appeal must also make a sufficient record such that the court of appeals can determine that error occurred and that a complaint to the error was preserved.[16] Without a motion, response, order, or a statement of facts containing an oral objection and ruling, an appellate court must presume that the trial court's ruling was correct and was supported by the omitted portions of the record.[17] This will require that a party repeat on the record statements made off the record in a bench conference.

Moreover, the complaining party must be able to show harmful error to the court of appeals. Texas Rule of Appellate Procedure 44.1 provides that an error does not require a reversal unless it "(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals."[18] Preserving error is not the object – the object is to preserve reversible error. In order to preserve reversible error, the party must make a record of every instance that supports the fact that the trial court's error "probably caused the rendition of an improper judgment." Making this showing may include instances where opposing counsel hammered the error home to the jury via statements made in voir dire, opening statements, evidence admission, and closing statements. Moreover, harmful error may be shown by making an offer of proof and showing the court of appeals that the trial court left out crucial evidence or argument. Accordingly, making a record of the error and its impact on the trial is of utmost importance to preserve reversible error.

## III. PRESERVING RIGHT TO JURY TRIAL

A party has the constitutional right to a jury trial — the right to a jury "shall remain inviolate."[19] However, that right must be exercised in order for a party to be entitled to a jury trial.[20] Texas Rule of Civil Procedure 216 states:

> a. Request. No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non jury docket, but not less than thirty days in advance.

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[15] *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.–Houston [14th Dist.] 2002, pet. denied).

[16] *See* TEX. R. APP. P. 33.1, 44.1; *Petitt v. Laware*, 715 S.W.2d 688 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Lauderdale v. Ins. Co. of North America*, 527 S.W.2d 841, 844 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.) (absent a record from voir dire, a court cannot tell if the trial court abused its discretion); *Dickson v. Burlington Northern R.R.*, 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

[17] *See e.g., Christian v. Prezelski*, 782 S.W.2d 842 (Tex. 1990).

[18] TEX. R. APP. P. 44.1; *see also, McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992).

[19] *See* TEX. CONST. ART. 1 §15; *see also* U.S. CONST. AMEND. 7; *Mercedes-Benz Credit Corp. v. Rhyme*, 925 S.W.2d 664, 666 (Tex. 1996).

[20] *See* TEX. R. CIV. P. 216; *Huddle v. Huddle*, 696 S.W.2d 895, 895 (Tex. 1985).

> b. Jury Fee. Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.[21]

In order to preserve a right to a jury trial, a party must make a written request for a jury trial and pay a fee a reasonable time before trial.[22] Generally, filing a request thirty days before a trial setting is presumed "reasonable," however a request made inside of thirty days has no such presumption.[23] The adverse party may rebut this presumption "by showing that the granting of a jury trial would operate to injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the court's business."[24] "Such evidence must appear in the record."[25] In the absence of such rebuttal however, the right is absolute.[26] If the case is reset, then the new trial setting controls in the Rule 216 reasonableness inquiry.[27]

The request and fee must be filed with the clerk.[28] The request simply states that the party requests a jury trial, and is often included in other pleadings, e.g., petition or answer. If the jury request is included in a party's pleadings, the party must take care when amending those pleadings. If an amended pleading omits a jury request, then the party may waive his prior request.[29] The jury fee is currently $30 in district court and $22 in county court.[30] However, an indigent is not required to pay the jury fee where he files an affidavit of inability to pay within the deadline for paying the fee.[31] "Even where a party does not timely pay the jury fee, courts have held that a trial court should accord the right to jury trial if it can be done without interfering with the court's docket, delaying the trial, or injuring the opposing party."[32]

When a party files a request for a jury trial within thirty days of a trial setting, the party should file a request for a jury trial and a motion to strike the non jury trial setting stating the following:

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[21] TEX. R. CIV. P. 216.

[22] *See id.; Huddle v. Huddle*, 696 S.W.2d at 895.

[23] *See Southern Bureau Cas. Inc. Co. v. Penland*, 923 S.W.2d 758, 760 (Tex. App.--Corpus Christi 1996, no writ).

[24] *Taylor v. Taylor*, 63 S.W.3d 93, 100 (Tex. App.--Waco 2001, no pet.).

[25] *Southern Farm Bureau Cas. Ins. Co. v. Penland*, 923 S.W.2d 758, 760 (Tex. App.--Corpus Christi 1996, no writ).

[26] *See Citizens State Bank v. Caney Invs*., 746 S.W.2d 477, 478-79 (Tex. 1988) (per curiam); *Cardenas v. Montfort, Inc*., 894 S.W.2d 406, 408 (Tex. App.--San Antonio 1994), *writ denied per curiam*, 924 S.W.2d 156 (Tex. 1996).

[27] *See Whiteford v. Baugher*, 818 S.W.2d 423, 425 (Tex. App.--Houston [1st Dist.] 1991, writ denied).

[28] *See* TEX. R. CIV. P. 216.; *Grossnickle v. Grossnickle*, 865 S.W.2d 211, 212 (Tex. App.--Texarkana 1993, no writ).

[29] *See Texas Valley Ins. Agency v. Sweezy Const. Inc.,* 105 S.W.3d 217, 220 (Tex. App.--Corpus Christi 2003, no pet.).

[30] *See* TEX. GOV'T C. §51.604(a).

[31] *See* TEX. R. CIV. P. 217.; *Taylor v. Taylor*, 63 S.W.3d 93, 100 (Tex. App.--Waco 2001, no pet.).

[32] *See General Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997).

- that a jury is available on the setting date (if it is not, then the party should file a motion for continuance);
- a jury trial will not inconvenience the court or the opposing party;
- there are disputed facts that should be submitted to a jury;
- the reason that a jury trial was not previously requested; and
- that the Texas Constitution guarantees a jury trial in this type of case.[33]

One court of appeals has held that generally a trial court does not err in denying a jury trial where a party first requests such and pays the fee on the day the trial is set.[34]

Normally, unless the court's clerk receives a jury demand and fee, the case is placed on the non jury docket. Thereafter, a party must comply with Rule 216 in order to perfect his right to a jury trial. If a trial court sua sponte sets a case on the jury docket, it cannot thereafter deny a party a jury without allowing the party a reasonable amount of time to comply with Rule 216.[35]

To preserve error in a trial court not granting a jury trial, the party should object on the record to the lack of a jury at the beginning of the non jury trial.[36] A trial court's error in denying a properly-requested jury trial requires reversal unless "the record shows that no material issues of fact exist and an instructed verdict would have been justified."[37]

## IV. SELECTION OF ARRAY

Venire panel members are selected by using a "jury wheel" system. The wheel is literally a mechanism that mixes cards with names on them. The names are pulled from current voter registration lists from all precincts in the county and lists showing the citizens of the county who hold a valid driver's license, personal identification card or certificate.[38] The cards are mixed and then pulled, and the names are placed on one or more jury lists.[39] Alternatively, the county commissioners may adopt a plan for the selection of prospective jurors with the aid of mechanical or electronic means other than a "jury wheel," however, any method must provide for

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[33] *See* MICHOL O'CONNORS, O'CONNOR'S TEXAS RULES - CIVIL TRIALS 2004, pg. 230 (2004).

[34] *See Continental Fire & Cas. Ins. Corp. v. Surber*, 231 S.W.2d 750 (Tex. Civ. App.--Fort Worth 1950, no writ).

[35] *See Mercedes-Benz Credit Corp. v. Rhyme*, 925 S.W.2d 664, 666 (Tex. 1996).

[36] *See Rodriguez v. Texas Dept. of MHMR*, 942 S.W.2d 53, 55-56 (Tex. App.--Corpus Christi 1997, no writ).

[37] *Taylor v. Taylor*, 63 S.W.3d 93, 101 (Tex. App.--Waco 2001, no pet.); *see also, Brosseau v. Ranzou*, 58 S.W.3d 315 (Tex. App.--Beaumont 2001, no pet).

[38] *See* TEX. GOV'T C. §§ 62.001(a), 62.1031.

[39] *Id*. at §§ 62.003-005, TEX. R. CIV. P. 223.

a fair, impartial, and objective method for selecting potential panel members.[40] A party to a suit may observe the drawing of names provided that it made a written application.[41]

A party may object to the selection of prospective jurors before voir dire examination, i.e., challenge the array, which is an objection that challenges the procedure for selecting and summoning prospective jurors or asserts a violation of the jury wheel statute.[42] The challenge must be by written motion, supported by an affidavit, and filed with the particular judge in charge of the local jury system.[43] Failure to comply with Rule 221 waives any error, other than fundamental error.[44] However, an objection to the array may be made to the trial judge when the party had no opportunity to object at the time the impaneling judge assembled the array.[45]

In *Mendoza v. Ranger Insurance Co.*, a party moved for a mistrial and requested a new panel after initial voir dire by the court and before empaneling of the jury because a disproportionate number of the jurors were teachers.[46] The Fort Worth Court of Appeals found that the party's objection was timely in spite of being contrary to cases holding that the objection must first be presented to the judge in charge of the jury for the week. The court said that this rule "puts an unreasonable and impractical burden on a party who is faced with a jury panel which is impermissibly selected."[47] The court concluded that the party had actively asserted her rights and adequately moved for a mistrial when the jury irregularity became apparent. The court then reversed the judgment and remanded the case for a new trial stating:

> Every citizen is entitled to a fair and impartial trial before an impartial jury, fairly representative of the community. Appellant was denied this right because the panel from which she was forced to choose her jury was impermissibly assembled. The jury was not a randomly selected cross section of the community. The necessity to prevent the subtle erosion of the standards of the jury system does not require a showing by appellant of injury.[48]

Even if preserved, however, slight deviations from the statutory scheme are harmless error as long as the procedure used protects the principle of the random selection of jurors.[49]

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[40] *Id*. at 62.011.

[41] *Id*. at 62.005.

[42] *See Martinez v. City of Austin*, 852 S.W.2d 71, 73 (Tex. App.--Austin 1993, writ denied); *see also*, TEX. GOVT. CODE ANN. § 62.001-021.

[43] TEX. R. CIV. P. 221; *State ex rel. Hightower v. Smith*, 671 S.W.2d 32, 36 (Tex. 1984); *TEIA v. Burge*, 610 S.W.2d 524, 525 (Tex. App.--Beaumont 1980, writ ref'd n.r.e.).

[44] *See Mann v. Ramirez*, 905 S.W.2d 275, 276-77 (Tex. App.--San Antonio 1995, writ denied).

[45] *See Mann v. Ramirez,* 905 S.W.2d 275, 279 (Tex. App—San Antonio 1995, writ denied); *Mendoza v. Ranger Ins. Co.*, 753 S.W.2d 779, 780-81 (Tex. App.--Fort Worth 1988, writ denied).

[46] 753 S.W.2d 779 (Tex.App.--Fort Worth 1988, writ denied).

[47] *Id*. at 780.

[48] *Id.*

[49] *See e.g., Rivas v. Liberty Mutual Ins. Co*., 480 S.W.2d 610, 611-12 (Tex. 1972); *Whiteside v. Watson*, 12 S.W.3d 614, 617-620 (Tex. App.–Eastland 2000, pet. denied).

## V. SIZE OF THE JURY

The Texas Constitution and Texas Rules of Civil Procedure require that a district court jury consist of twelve members unless not more than three jurors die or "be disabled from sitting".[50] In county court, the jury must consist of six members unless not more than one dies or becomes disabled.[51]

In *Houston & Texas Central Ry Co. v. Waller*, the Texas Supreme Court set out guiding principles for defining "disabled from sitting" under the Texas Constitution.[52] While trial courts have broad discretion in determining whether a juror is "disabled from sitting" when there is evidence of constitutional disqualification, a trial court may not ignore the constraints established in *Waller*.[53] The *Waller* opinion equates "disabled from sitting" with an actual physical or mental incapacity:

> Without deeming it proper to attempt to define fully the meaning of the expression used in the constitution, we are satisfied that the causes which disable the juror from sitting, and justify the extreme course of allowing, over a party's objection, a verdict to be rendered by the remainder of the jury, must be of a nature more directly showing his physical or mental incapacity than mere mental distress occasioned by the sickness of others, and the feeling that duty to the sick demanded his presence elsewhere. Extreme cases of the kind, however strongly they may appear to the court to release the juror, do not belong to the class provided for by the constitution or statute.[54]

If a trial court dismisses a juror who is not "disabled", and there is no agreement to proceed with 11 jurors, the trial court abuses its discretion if it denies a motion for mistrial.[55] In *McDaniel v. Yarbrough*, the Texas Supreme Court addressed a situation where a trial court improperly dismissed a juror in the middle of trial.[56] The trial court had dismissed the juror because she could not return after a recess due to local flooding.[57] A divided Supreme Court found such temporary inability to return to the courthouse was not the type of disability contemplated by Article V, Section 13 or Rule 292 and reversed the judgment.[58]

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[50] *See* TEX. CONST. art. V, § 13; TEX. R. CIV. P. 292; *Yanes v. Sowards*, 996 S.W.2d 849, 850 (Tex. 1999).

[51] *Id*.

[52] 56 Tex. 331 (1882).

[53] *See McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995).

[54] 56 Tex. at 337-38.

[55] *See Fiore v. Fiore*, 946 S.W.2d 436, 438 (Tex. App. –Fort Worth 1997, writ denied).

[56] 898 S.W.2d 251, 253 (Tex. 1995).

[57] *Id*. at 252.

[58] *Id*. at 253.

## VI. JURY SHUFFLE

A party has the right to shuffle the jury before voir dire begins. The theoretical purpose of a jury shuffle is to ensure the randomness of the venire selection process.[59] The real purpose of a shuffle is to reorganize the venire so that potentially favorable jurors that are at the end of the venire may appear at the beginning of the venire after shuffling. The relevant portion of Texas Rule of Civil Procedure 223 provides that:

> [T]he trial judge of such court, upon the demand prior to voir dire examination by any party or attorney in the case reached for trial in such court, shall cause the name of all members of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by a trial judge in each case.[60]

The trial court errs in shuffling the jury using any other procedure, e.g., shuffling like a deck of cards.[61] Moreover, there can only be one shuffle in each case, and the trial court errs in shuffling a jury twice.[62] However, these errors will likely be harmless.[63]

As stated before, a party is only entitled to a jury shuffle before voir dire begins. With the onset of the use of jury questionnaires, one issue that has developed is whether voir dire begins when a jury questionnaire is handed out or when actual oral questioning begins. The Fort Worth Court of Appeals has held that once the case specific jury questionnaire has been handed out, voir dire has begun and a trial court errs in shuffling the jury thereafter:

> To grant a shuffle after parties and counsel have had the opportunity to review substantive responses based upon written questions, as opposed to oral questions in the courtroom, makes no sense. The distinction between oral and written questioning is virtually meaningless, especially where each party has already had the opportunity to view the panel. The distinction between the type of information solicited in a standard jury form card and that of a detailed, case specific questionnaire should be the focus of the inquiry, not whether the questions are asked verbally or in writing. After the venire panel has been sworn and once substantive inquiry begins and responses have been observed or made available to the parties or their counsel, whether verbally or in writing, voir dire has begun.[64]

Thereafter, under a relaxed harmless error standard, the court held that the trial court's error was harmful and reversed and remanded the case for a new trial.[65] Importantly, a party must preserve

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[59] *See Whiteside v. Watson*, 12 S.W.3d 614, 619 (Tex. App.--Eastland 2000, pet. denied).

[60] TEX. R. CIV. P. 223

[61] *See id; Whiteside v. Watson*, 12 S.W.3d 614, 619 (Tex. App.--Eastland 2000, pet. denied).

[62] *See id.*

[63] *See id.; Rivas v. Liberty Mut. Ins. Co.,* 480 S.W.2d 610, 611-12 (Tex. 1972).

[64] *Carr v. Smith*, 22 S.W.3d 128, 134 (Tex. App.--Fort Worth, 2000, pet. denied).

[65] *See id*. at 235-37.

error as to the shuffle by making a specific objection on the record at the time that the shuffle is requested and by obtaining a ruling.

It must be noted that under similar circumstances, the Court of Criminal Appeals reached the opposite conclusion in its interpretation of Article 35.11 of the Code of Criminal Procedure, which also provides that a jury shuffle must be requested before voir dire begins.[66]

As the shuffle is requested before any substantive questioning is done, the main reason that a party would want to shuffle the jury is likely based upon the physical appearance of the venire members, e.g., race, ethnicity, gender, etc. However, as set forth below, those are protected classes, and a party is not entitled to strike a venire member for such a classification. Therefore, many commentators have argued that the use of a jury shuffle should be abolished or that there be a challenge to a jury shuffle similar to a *Batson* objection.[67] However, the courts that have addressed this issue find that there is no *Batson* objection to a jury shuffle.[68]

## VII. VOIR DIRE

The purpose of voir dire is to seat a fair and impartial jury.[69] However, that is not necessarily the objective of each party in voir dire. Each party attempts to discover which venire members are the most inclined not to support their positions in the case and to then get those individuals off of the jury. Also, each party attempts to leave a good first impression and have the jury predisposed to their side of the dispute. Obviously, while pursuing these two main goals, there are a multitude of errors and corresponding objections that can occur during voir dire.

At the outset, it is important to note that a party has no right to have a particular person serve on the jury. A party's right to a trial by jury is established by Article I, Section 15 of the Texas Constitution and the Seventh Amendment to the U.S. Constitution. The right to a jury trial encompasses a right to have the jury selected in substantial compliance with the applicable procedural statutes and rules.[70] Under those statutes and rules, the parties have a role in

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[66] *See Garza v. State*, 7 S.W.3d 164, 165-66 (Tex. Crim. App. 1999).

[67] *See* Michael M. Gallagher*, Abolishing the Texas Jury Shuffle*, 35 ST. MARY'S L. JRL. 303 (2004); See John D. White, Comment, *Constitutional Law - Equal Protection - A New Hand From the Same Deck of Cards - Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509, 528 (1999); Dion Cason Ramos and Michael Richard Jackson, *Voir Dire/Jury Selection/Batson/Tort Reform: Defense Perspective, 14th Annual Advanced Personal Injury Law Course*, pg. 3 (1998).

[68] *See Ladd v. State*, 3 S.W.3d 547, 563 n. 9 (Tex. Crim. App. 1999) (refusing to endorse a scholar's argument that Batson should be extended to jury shuffles); *Warren v. State*, 877 S.W.2d 545, 546 (Tex. App.--Beaumont 1994, no pet.) (finding no authority for the broad extension of Batson to random jury shuffles); *Urbano v. State*, 808 S.W.2d 519, 520 (Tex. App.--Houston [14th Dist.] 1991, no pet.) (refusing to extend Batson to jury shuffle process); *Sims v. State*, No. 05-96-01395-CR, 1998 Tex. App. LEXIS 6688 (Tex. App.--Dallas Oct. 27, 1998, no pet.) (not designated for publication) (refusing to extend Batson to jury shuffles); *Robinson v. State*, No. 05-97-00689-CR, 1998 Tex. App. LEXIS 6658 (Tex. App.--Dallas Oct. 26, 1998, pet. ref'd) (not designated for publication) (declining to extend Batson to requests for jury shuffles).

[69] *See Hallett v. Houston Northwest Med. Ctr.*, 689 S.W.2d 888, 889 (Tex. 1985).

[70] *See Heflin v. Wilson*, 297 S.W.2d 864, 866 (Tex. Civ. App.–Beaumont 1956, writ ref'd ) (jury panel erroneously chosen by jury commission method rather than required jury wheel method).

excluding prospective jurors who are disqualified or unfit for service as jurors by virtue of bias, prejudice, or otherwise.[71] The statutes and rules also allow parties a limited opportunity to strike prospective jurors even when bias or prejudice cannot be shown,[72] and provide for the involvement of the parties in some decisions to excuse prospective jurors.[73] Our state constitution, statutes and rules cannot be said, though, to grant litigants the right to "select" jury members.[74] The right to a jury trial is a right to have fact questions resolved by an impartial jury.[75] That right is distinguishable from a right to have particular persons serve on the jury. Therefore, voir dire is the process of deselecting members from the panel in order to create the jury.

Due to a lenient standard of review, a trial court's ruling during voir dire will be difficult to reverse. A voir dire ruling will not be disturbed absent a clear abuse of discretion.[76] To establish an abuse of discretion, it must be shown that, under the facts and circumstances of the case, the law permits only one decision.[77] In other words, a court of appeals may not find an abuse of discretion merely because it would have decided the issue differently than the trial court.[78]

## A. TIME TO CONDUCT VOIR DIRE

A party may examine the members of the panel to determine if any of them are disqualified or should otherwise not serve on the case.[79] A trial court has the right and broad discretion to limit the time for voir dire.[80] A court abuses its discretion, however, when its denial of the right to ask proper questions on voir dire examination prevents determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges.[81] To obtain a reversal, a party must show that the trial court abused its discretion and that the error was calculated to cause and probably did cause the rendition of an improper judgment.[82]

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[71] *See* TEX. GOV'T CODE § 62.105 (Vernon 1998); TEX. R. CIV. P. 229.

[72] *See* TEX. R. CIV. P. 232-33.

[73] *See* TEX. GOV'T CODE § 62.110(c) (Vernon 1998) (requiring approval of parties for excuse of prospective juror for economic reason).

[74] *See Wells v. Barrow*, 153 S.W.3d 514 (Tex. App.–Amarillo 2004, no pet.).

[75] *See Babcock v. Northwest Memorial Hosp.,* 767 S.W.2d 705, 709 (Tex. 1989).

[76] *Babcock v. Northwest Mem. Hosp.*, 767 S.W.2d 705 (Tex. 1989).

[77] *See Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 917 (Tex. 1985).

[78] *See Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 242 (Tex. 1985).

[79] *See Implement Dealers Mut. Ins. Co., v. Castleberry*, 368 S.W.2d 249, 254 (Tex. App.--Beaumont 1963, writ ref'd n.r.e.).

[80] *See McCarter v. State*, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992) (criminal case).

[81] *Babcock v. Northwest Mem'l Hosp*., 767 S.W.2d 705, 709 (Tex. 1989); *McCoy v. Wal-Mart Stores, Inc.,* 59 S.W.3d 793 (Tex. App.--Texarkana 2001, no pet.).

[82] *See* TEX. R. APP. P. 44.1; *Babcock v. Northwest Mem'l Hosp.*, 767 S.W.2d at 709; *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d at 797.

To preserve error if a trial court overly limits a party's right to voir dire, the party making the objection should show:

- The party did not attempt to prolong voir dire;
- The party was prevented from asking proper and relevant voir dire questions because the court imposed unreasonable time limitations;
- The specific questions that were not permitted; and
- The party was not permitted to examine prospective jurors who actually served on the jury.[83]

A party will waive an objection where he fails to object when the voir dire is cut off by the trial court stating that he has not had enough time, that he requests additional time, and makes a record as set forth above.[84] For example, in *In the Matter of V.M.S.*, the court of appeal held that the appellant did not preserve error where his trial attorney only mentioned the areas that he was not able to go into instead of forming the actual questions.[85] Most of the cases discussing a complaint about a trial court's time limits on voir dire are criminal cases and indicate that the burden to show error is a difficult one to meet.[86]

## B. EXCLUDING VOIR DIRE QUESTIONS

A party can complain that the trial court did not allow it to pose a permissible question during voir dire examination. Texas courts permit a broad range of inquiries on voir dire.[87] If a trial court does not allow a question, the issue is whether the trial court abused its discretion by refusing to allow questions to the jury panel about their reaction on a particular issue.[88] A court abuses its discretion when its denial of the right to ask a proper question prevents the determination of when grounds exist to challenge for cause or denies intelligent use of peremptory challenges.[89] If such an abuse of discretion exists, the result is to deny the party the right to trial by a fair and impartial jury, a right guaranteed by the Texas Constitution and by

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[83] *See Id.* at 119-20; *In the Matter of V.M.S.*, No. 01-03-00072-CV, 2004 Tex. App. LEXIS 9833 (Tex. App. – Houston [1st Dist.] November 4, 2004, pet. denied); *McCoy v. Wal-Mart Stores, Inc.,* 59 S.W.3d 793 (Tex. App.--Texarkana 2001, no pet.); *S.D.G. v. State*, 936 S.W.2d 371, 380 (Tex. App.--Houston [14th Dist.] 1996, writ denied) (general topics of questions were not sufficient to preserve error).

[84] *See Diaz v. State*, 2002 Tex. App. LEXIS 7647 (Tex. App.--Houston [14th Dist.] 2002, no pet.).

[85] *In the Matter of V.M.S.*, 2004 Tex. App. LEXIS 9833.

[86] *See, e.g., Barajas v. State*, 93 S.W.3d 36 (Tex. Crim. App. 2002); *Diaz v. State*, 2002 Tex. App. LEXIS 7647 (Tex. App.--Houston [14th Dist.] 2002, no pet.); *Glanton v. State*, 2002 Tex. App. LEXIS 4296 (Tex. App.--Dallas June 17, 2002, pet. denied).

[87] *See Southwestern Elec. Power Co. v. Martin,* 844 S.W.2d 229, 237 (Tex. App.--Texarkana 1992, writ denied).

[88] *See Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 709 (Tex.1989); *Southwestern Elec. Power Co. v. Martin*, 844 S.W.2d at 237.

[89] *See Babcock v. Northwest Memorial Hosp*., 767 S.W.2d at 705; *Dickson v. Burlington Northern Railroad*, 730 S.W.2d 82, 85 (Tex.App.-Fort Worth 1987, writ ref'd n.r.e.).

statute.[90] To preserve error a party must make a complete record of the voir dire via a court reporter[91] and should:

- Make a timely objection, request or motion to the trial court;
- State the specific grounds for the objection including the specific questions that the attorney wants to ask; and
- Obtain a ruling or object to the court's failure to rule.[92]

The Texas Supreme Court previously held that a party preserved error if the nature of the question was apparent from the record.[93] Most recently, the Court has held that although a party does not have to pose the exact questions that he wanted to ask the panel to preserve error, the record must show the specific manner in which it intends to pursue the line of questioning:

> [T]o preserve a complaint that a trial court improperly restricted voir dire, a party must timely alert the trial court as to the specific manner in which it intends to pursue the inquiry. Such a requirement provides the trial court with an opportunity to cure any error, obviating the need for later appellate review, and further allows an appellate court to examine the trial court's decision in context to determine whether error exists, and if so, whether harm resulted. In *Babcock*, we held that litigants need not present a list of each intended voir dire question, but parties must nonetheless "adequately apprise[] the trial court of the nature of their inquiry." A timely, specific presentation to the trial court of the manner of an inquiry is important because it is difficult to evaluate after a trial whether the trial court's denial of an inquiry caused a biased juror to be seated on the jury or to evaluate what additional information a party could have adduced for the exercise of peremptory strikes. Thus, the Court traditionally has adhered strictly to the principle that voir dire objections must be timely and plainly presented.[94]

The Court held that the complaining party did not preserve error when it only posed one question that was objectionable:

> The Vasquezes carried their objection to the trial court's ruling throughout the remainder of individual voir dire, but they did not frame additional inquiries or convey to the trial court that the thrust of any remaining questions would be different from the single one presented for a ruling. We do not know whether the trial court would have allowed other sorts of inquiries had counsel presented their

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[90] *See* TEX. CONST. art. I, §§ 15; TEX. GOV'T CODE ANN. §§ 62.105.

[91] *See* TEX. R. APP. P. 13.1; *Soto v. Texas Indus. Inc*., 820 S.W.2d 217, 219 (Tex. App.--Fort Worth, 1991, no writ).

[92] *See* TEX. R. APP. P. 33.1; *Babcock v. Northwest Mem. Hosp*., 767 S.W.2d 705, 707 (Tex. 1989).

[93] *See Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705, 708 (Tex. 1989).

[94] *Hyundai Motor Co*. v. *Vasquez*, 189 S.W.3d 743, 758-59 (Tex. 2006).

substance. We therefore hold that the record does not present a sufficient basis for review of the trial court's ruling foreclosing further inquiry into seat belts.[95]

As pointed out in the dissent, the safest practice is for a party to make a record of the actual questions that the party wants to ask the panel.[96]

## C. IMPROPER COMMENTS BY VENIRE MEMBERS

During the voir dire process, a venire member may make a statement that is prejudicial and harmful — "why isn't insurance taking care of this?" If a jury member makes a spontaneous, prejudicial statement, the party must make a timely and specific objection thereto.[97] If the court sustains the objection, the party must request a limiting instruction, and if that is granted move to strike the entire panel.[98] To prove harm, the party moving to strike the panel should question the panel to establish that the misconduct was material and probably caused an injury.[99]

## D. IMPROPER COMMENTS/QUESTIONS BY COUNSEL

Attorneys should be permitted wide latitude in conducting voir dire.[100] This wide latitude should be granted so that a party can "discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised."[101] For example, a party can inquire whether a venire member has a bias or prejudice with regard to a party's nationality, wealth, status, or absence from trial.[102] In fact, a trial court's admonitory instructions to the jury panel expressly instruct the jurors that: "The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences, and attitudes."[103] "The scope of voir dire examination is a matter which rests largely in the sound discretion of the trial court."[104] However, if a party's voir dire question is aimed at uncovering information to be used for peremptory strikes or challenges for cause, the trial court's discretion is limited by a party's right to fair trial.[105] Moreover, a trial court abuses its discretion and reversibly errs if it does not allow a line of questioning that inquires into a juror's background,

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[95] *Id.*

[96] *See id*. at 763 (Wainwright, J., dissenting).

[97] *See Brentwood Fin. Corp. v. Lamprecht*, 736 S.W.2d 836, 840 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.).

[98] *See Reviea v. Marine Drilling Co.*, 800 S.W.2d 252, 256 (Tex. App.--Corpus Christi 1990, writ denied).

[99] *See Brentwood Fin. Corp. v. Lamprecht*, 736 S.W.2d at 840; *see also Golden Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000).

[100] *Hayanto v. Saeed,* 860 S.W.2d 913, 918 (Tex. App.--Houston [14th Dist.] 1993, writ denied).

[101] *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989).

[102] *See Hayanto v. Saeed*, 860 S.W.2d at 918.

[103] TEX. R CIV. P. 226a.

[104] *McCoy v. Wal-Mart Stores, Inc*., 59 S.W.3d 793, 797-800 (Tex. App.–Texarkana 2001, no pet.).

[105] TEX. CONST. ART. 1, § 15; *Babcock,* 767 S.W.2d at 708-709; *Haryauto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App.–Houston [14th Dist.] 1993, writ denied).

experiences, and attitudes concerning a matter that is reasonably related to the issues presented in the case.[106]

As one of the purposes of voir dire is to predispose the venire to a party's position, attorneys often interject improper questions or comments during voir dire. The following are examples of some improper comments:

- Mentioning that any party has or does not have insurance;[107]
- Discussing inadmissible evidence;[108]
- Advising the jury of the effect of their answers;[109]
- Committing the venire to certain conclusions;[110]
- Advising the jury as to the monetary caps on exemplary damages; and[111]
- Comparing the wealth of the parties.[112]

To preserve error, the voir dire must be recorded.[113] If a party challenges the other party's question, he must object to the question timely and sufficiently and obtain a ruling.[114] If the objection is sustained, he must seek an instruction from the court instructing the jury to disregard the question.[115] If the limiting instruction is granted, the party must make a motion for mistrial.[116] Regarding improper comments, one court of appeals has stated:

> In order to establish the judgment should be reversed due to improper comments during voir dire, [the party] must prove (1) an improper comment; (2) the comment was not invited or provoked; (3) error was preserved; (4) the error was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the trial court; and (5) the comment, by its nature, degree, and

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[106] *See Babcock*, 767 S.W.2d at 709.

[107] *See Ford v. Carpenter*, 216 S.W.2d 558 (Tex. 1949); *Atchison, Topeka and Santa Fe Railway Co. v. Acosta*, 435 S.W.2d 539, 549 (Tex. Civ. App.--Houston [1st Dist.] 1968, writ ref'd n.r.e.).

[108] *See Traveler's Ins. Co. v. Deleon*, 456 S.W.2d 544, 545 (Tex. Civ. App.-- Amarillo 1970, writ ref'd n.r.e.).

[109] *See TEIA v. Loesch*, 538 S.W.2d 435 (Tex. Civ. App.--Waco 1976, writ ref'd n.r.e.).

[110] *See Texas General Indem. Co. v. Mannhalter*, 290 S.W.2d 360, 365 (Tex. Civ. App.--Galveston 1956, no writ).

[111] *See* TEX. CIV. PRAC. & REM. CODE ANN. §41.008(e).

[112] *See Southern Pac. Co. v. Hayes*, 391 S.W.2d 463, 468 (Tex. App.--Corpus Christi 1965, no pet.).

[113] *See Soto v. Texas Industries, Inc*., 820 S.W.2d 217, 219 (Tex. App.--Fort Worth 1991, no writ).

[114] *See Hartford-Lubbock v. Cato Corp.,* No. 07-01-0345-CV, 2002 Tex. App. LEXIS 3834 (Tex. App.–Amarillo 2002, no pet) (not design. for pub.); *General Resources Org., Inc. v. Deadman,* 907 S.W.2d 22, 28-29 (Tex. App.--San Antonio 1995, no pet.); *TEIA v. Loesch*, 538 S.W.2d 435, 440 (Tex. App.--Waco 1976, writ ref'd n.r.e.).

[115] *See id.*

[116] *See id.*

extent, constituted reversibly harmful error. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979); *Russell v. City of Bryan*, 919 S.W.2d 698, 708 (Tex.App.-Houston [14th Dist.] 1996, writ denied). There are only rare instances of incurable harm from an improper comment by counsel. *Reese*, 584 S.W.2d at 839.[117]

Accordingly, harmful error can be difficult to prove in the context of improper questions during voir dire.

## E. COMMITMENT QUESTIONS AND QUESTIONS THAT ASK FOR THE WEIGHING OF EVIDENCE

### 1. Commitment Questions And Weight Of The Evidence Questions Are Improper

You can ask a potential juror how they feel about an issue, but you cannot ask them to commit to a certain point of view. Big difference.

An attorney may not try to commit a venire member to a particular result based upon certain facts – the impermissible "commitment" question. The purpose of voir dire, of course, is to ensure a fair and impartial jury; it is not a means to seek unfair advantage. For that reason, an attempt to commit a potential juror to a particular outcome or as to what weight the juror would give certain evidence is improper.[118] However, determining whether a particular question is designed to properly discover bias and prejudice or is designed to commit a juror to a result can be a very difficult task.[119]

The Texas Court of Criminal Appeals addressed the scope of impermissible and permissible commitment questions in *Standefer v. State*.[120] The trial court did not allow the defendant from asking venire members: "Would you presume someone guilty if he or she refused a breath test on their refusal alone?" The court of appeals reversed holding that the question was proper. The Texas Court of Criminal Appeals affirmed the trial court's exclusion of the question. The Court held that a question is an improper commitment question if one or more of the possible answers require the venire member to resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question:

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[117] *Truck Ins. Exchange v. Smetak*, 102 S.W.3d 851, 858 (Tex. App.--Dallas 2003, no pet.).

[118] *See Grey Wolf Drilling Co. L.P. v. Boutte,* 154 S.W.3d 725, 746 (Tex. App.–Houston [14th Dist.] 2004, jmt. vacated w/o ref. merits); *Vasquez v. Hyundai Motor Co*., 119 S.W.3d 848 (Tex. App.–San Antonio 2003, pet. granted) (en banc); *Lassiter v. Bouche*, 41 S.W.2d 8, 90 (Tex. Civ. App.–Dallas 1931, writ ref'd) (cannot ask questions that seek to commit jurors, in advance of evidence, as to weight they would give certain evidence).

[119] *See e.g., Sandefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001) ("the rule is easily stated but has not been so easily applied.").

[120] 59 S.W.3d 177 (Tex. Crim. App. 2001). The following are other criminal cases dealing with commitment questions: *Sells v. State*, 121 S.W.3d 748, 756-59 (Tex. Crim. App. 2003); *Lydia v. State*, 109 S.W.3d 495, 498-99 (Tex. Crim. App. 2003); *Barajas v. State*, 93 S.W.3d 36, 41 (Tex. Crim. App. 2002).

> [A]n attorney cannot attempt to bind or commit a prospective juror to a verdict based on a hypothetical set of facts. The rule is easily stated but has not been so easily applied. Nevertheless, while case law has not always been clear and consistent, a few common principles are apparent. Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact. Often, such questions ask for a "yes" or "no" answer, in which one or both of the possible answers commits the jury to resolving an issue a certain way. . . . [A]lthough commitment questions are generally phrased to elicit a "yes" or "no" answer, an open-ended question can be a commitment question if the question asks the prospective juror to set the hypothetical parameters for his decision-making.[121]

Importantly, the Court noted that not all commitment questions are improper. If the commitment question seeks a response to legal requirement, then it is permissible. If, however, the law does not require the commitment, then the question is improper. For example, a defendant may inquire whether a venire member could follow the law and not hold it against the defendant if he or she failed to testify. Importantly, the Court warned that otherwise proper commitment questions that include extra, unnecessary facts may become improper. A proper commitment question must contain only those facts that are necessary to test whether the juror is challengeable for cause.

There are not many opinions discussing commitment questions in the context of civil cases. In *Parker v. Schrimsher*, the plaintiff attempted to ask whether his execution of a deed of trust to a bank would influence the venire member in determining whether the property in question was the plaintiff's homestead at the time the mortgage was executed.[122] The court of appeals affirmed the trial court's exclusion of the question stating that "the jury should have been free to consider without a previous pledge that they would not 'let the fact that [the plaintiff] executed the mortgage or mortgages to the bank' influence them in determining whether the property was a homestead."[123]

In *Campbell v. Campbell*, the court of appeals affirmed the exclusion of a question inquiring whether the fact that the testator left out one or more members of his family would influence the venire member in finding a verdict.[124] The court of appeals held that to require a venire member "to say that he will or that he will not let a given material fact influence him in reaching a conclusion, if chosen, is simply to commit him to or against that material fact in evidence . . . would be improper."[125]

In *Lassiter v. Bouche*, the trial court excluded questions seeking to elicit from the venire whether there existed any prejudice against the use of an oral agreement to dispute the terms of

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[121] *Id*. at 179-180.

[122] 172 S.W. 165 (Tex. Civ. App.–Amarillo 1914, writ ref'd).

[123] *Id*. at 170.

[124] 215 S.W. 134, 136-37 (Tex. Civ. App.–Dallas 1919, writ ref'd).

[125] *Id*.

written documents.[126] The court of appeals affirmed the exclusion stating that a party "should not be permitted, by questions to a prospective juror, to commit such juror, in advance of the evidence, as to the weight he would give any certain evidence."[127]

In *Airline Motor Coaches, Inc. v. Bennett*, the court of appeals affirmed the trial court's decision to allow a question whether "the mere presence of a quart of rum and a piece of a bottle of rum or liquor in our car prejudice you at all in this case."[128] The court of appeals held that the question "does not require the juror to state what he would do with certain evidence which would be offered in the case nor to state what his verdict thereon would be."[129]

In *General Indemnity Company v. Manhalter*, the trial court allowed a plaintiff to question the venire as to whether they would be prejudiced if he did not call doctors, who had examined the plaintiff at the plaintiff's request, to testify as to the nature of his injury.[130] The court of appeals found that allowing the question was error because it sought a commitment from the venire against a material fact that could properly be considered by the jury.[131]

In *In re Commitment of Larkin*, the court of appeals affirmed a trial court's ruling denying a party's question whether a sex offender's prior sexual offenses would be persuasive in the outcome of the case (whether he should be committed under sexually violent predator statute).[132] The court of appeals held that the trial court correctly denied the question because it improperly sought to commit the venire members on the weight of particular evidence.[133]

In *Grey Wolf Drilling Co. v. Boutte*, the court of appeals affirmed a trial court's ruling allowing a plaintiff's question whether the venire members would not be able to listen to all of the evidence and focus only the fact that the plaintiff was experienced and knew the mud he slipped on was slippery.[134] The trial court then allowed the plaintiff to set out several uncontested facts and ask whether the venire could not consider the rest of the evidence that would be presented. The court of appeals held that the questions were not impermissible commitment questions because they did not ask the venire members to commit to a particular verdict or the weight they would give particular evidence.[135]

In *City Transportation Company v. Sisson*, the court of appeals affirmed the trial court's decision to allow a party to ask the venire if any of them would have any bias "or prejudice as to

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[126] 41 S.W.2d 88, 89-90 (Tex. Civ. App.–Dallas 1931, writ ref'd).

[127] *Id.*

[128] 184 S.W.2d 524 (Tex. Civ. App.–Beaumont 1944), *rev'd on other grounds*, 187 S.W.2d 982 (Tex. 1945).

[129] *Id.*

[130] 290 S.W.2d 360 (Tex. Civ. App.–Galveston 1956, no writ).

[131] *See id.*

[132] 161 S.W.3d 778 (Tex. App.–Beaumont 2005, no pet.).

[133] *Id*. at *4.

[134] 154 S.W.3d 725, 746 (Tex. App.–Houston [14th Dist.] 2004, pet granted, jmt vacated without ref. to merits).

[135] *Id*.

the plaintiff if during the trial evidence of her use of narcotics in prior years or of any narcotic convictions in the past should be introduced."[136] The court of appeals found no error in the question finding that it properly questioned about bias or prejudice.[137]

The only discernable difference in the outcomes of the above listed cases may be the phrasing of the question. As one commentator as stated:

> [T]hese holdings appear to be based on semantical distinctions without practical difference. Jurors are not technically sensitive nor critical of words during voir dire and will likely understand questions as to whether the juror would consider, be prejudiced by, or would be influenced by certain evidence to mean the same thing.
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> . . .
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> Case law indicates that asking a panelist whether certain evidence at trial will influence the juror would be an impermissible attempt to commit the juror to the weight he would give such evidence at trial. Asking a juror whether certain evidence will influence his determination of the case is not clearly distinguishable from the above mentioned cases, all holding that to ask a prospective juror whether he would consider or be prejudiced by certain evidence at trial is permissible.[138]

It is under this backdrop that the Texas Supreme Court and the San Antonio Court of Appeals wrestled with the bounds of a proper bias question versus an improper commitment question in *Hyundai Motor Co*. v. *Vasquez.* [139] In *Hyundai*, the plaintiffs sued the manufacturer of the automobile that their daughter was riding in when she was killed after her impact with an air bag following a low impact collision.[140] The girl was riding in the front seat of the automobile with her aunt driving, and the girl was not buckled into the seat belt. The plaintiffs wanted to ask the venire whether or not they would be predisposed to an opinion, regardless of the evidence, that if there is no seat belt in use that they could not be fair and impartial.[141] In the third attempt to seat a jury, the trial court refused to allow the question or any further seat belt questions. A jury was eventually picked, and it rendered a defense verdict. Vasquez appealed, and the San Antonio Court of Appeals reversed the trial court's decision, finding that it was a proper question that sought out information regarding the venire members' bias and prejudice.[142]

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[136] 365 S.W.2d 216, 219 (Tex. Civ. App.–Dallas 1963, no writ).

[137] *Id.*

[138] John Bibb, *Voir Dire: What Constitutes an Impermissible Attempt to Commit a Prospective Juror to a Particular Result*, 48 BAYLOR L. REV. 857, 876 (1996).

[139] *Vasquez v. Hyundai Motor Co*., 119 S.W.3d 848 (Tex. App.–San Antonio 2003) (en banc), *rev'd,* 189 S.W.3d 743 (Tex. 2006).

[140] *See id.*

[141] *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d at 743.

[142] The Court of Appeals' panel originally affirmed the trial court's decision, but that decision was reversed by the Court of Appeals on an en banc consideration. *Id*.

The court of appeals held that a commitment question is improper because it is designed to determine a potential juror's view of certain evidence and does not seek to expose the existence of bias. [143] The court stated: "a potential juror's view of the case as influenced by certain evidence does not necessarily mean the juror is biased and cannot be fair. Indeed, every trial lawyer hopes jurors are influenced by the evidence; otherwise, what is the point of a jury trial?"[144]

The court of appeals held that the question the plaintiffs wanted to pose the venire was proper because it focused on ability of the jury to be fair and did not attempt to have them weigh the evidence:

> This question clearly focuses on the ability of the jurors to be fair. . . . The Vasquezes were entitled to determine which of the potential jurors could not be fair to them based solely on the fact that Amber was not wearing a seat belt when she was killed and they were prevented from doing this. The trial court's decision to disallow questions directed at exposing this bias was an abuse of discretion that denied the Vasquezes the right to trial by a fair and impartial jury.[145]

In essence, the court of appeals held that the question was proper because it leaned on the side of exposing bias and prejudice and not committing a venire member to a particular result. The Texas Supreme Court disagreed and reversed the court of appeals.

The Supreme Court started its analysis with a general discussion regarding the purpose of voir dire.[146] "[T]he primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath." [147] As a part of this purpose, a party has a right to question the venire panel to allow it to discover information to intelligently use peremptory strikes. The Court acknowledged the "subjectivity inherent in jury selection – voir dire does not lend itself to formulaic management."[148] However, "[p]eremptory strikes are not intended . . . to permit a party to 'select' a favorable jury." In fact, because the "objective of jury selection is to determine representation on a governmental body," an attorney's ability to question is constrained.[149]

The Court then addressed voir dire questions that inquire about the facts of the case.[150] It affirmed its prior decision in *Cortez v. HCCI-San Antonio, Inc*.[151] The Court held that seeking opinions about weight venire members will give specific evidence is as equally improper as

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[143] *Vasquez v. Hyundai Motor Co*., 119 S.W.3d at 848.

[144] *Id*.

[145] *Id*.

[146] *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d at 743.

[147] *Id*.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] 159 S.W.3d 87, 94 (Tex. 2005).

summarizing the evidence and then asking whether one side was "starting our ahead" of the other:

> [A]n 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.[152]

The Court also stated that it was simply unfair to allow a venire member's comments about particular evidence to disqualify them from service because those opinions may change upon hearing all the evidence.[153] The Court stated that it also desired to be consistent with its sister court – the Texas Court of Criminal Appeals – and cited to *Standefer v. State*.[154] The Court concluded:

> 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.[155]

The Court then analyzed the proffered question in the case and determined that the trial court did not abuse its broad discretion in refusing to allow the attorney to ask it. The proffered question isolated the fact that the child had not been wearing a seatbelt and then sought to identify those jurors who agreed that this one fact overcame all other facts. The Court noted that "As reasonable jurors, however, it is within their province to so conclude. The question thus asks the jurors' opinion about the strength of this evidence, and does not cull out any external bias or prejudice."[156]

The trial judge is in a better position to judge the proffered question in the context of the courtroom, the phrasing of the question, and the physical appearance of the attorney and venire members.[157] Based on that assumption, the Court concluded:

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[152] *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d at 743.

[153] *Id*.

[154] *Id*. (quoting *Standefer v. State,* 59 S.W.3d 177 (Tex. Crim. App. 2001)).

[155] *Id*.

[156] *Id*.

[157] *Id*.

> The substance of a question, not its form, determines whether it probes for prejudices or previews a probable verdict. The trial court in this case reasonably could have concluded that the substance of the proposed question did not present a basis for disqualifying a juror for cause, and instead sought to test the weight jurors would place on the relevant fact that Amber was not wearing a seat belt at the time of the accident. Thus, the trial judge did not abuse her discretion in refusing to allow it.[158]

Rather than the individual holding as to the appropriateness of the proffered question, the *Hyundai* case is more important for the broad, sweeping language that trial courts should not allow voir dire questions that ask a venire member to weigh particular evidence – no matter how phrased: "incorporating phrases associated with an inquiry into whether the jurors hold a preconceived bias does not alter the basic substance of this question."[159] If the question incorporates a relevant fact, a venire member's response to it "encompass more than *pre*dispositions and *pre*conceived notions."[160]

Finally, the Court addressed when a commitment question is proper. Similar to the Court of Criminal Appeals in *Sandefer*, the Supreme Court held that some commitment questions are permissible when the attorney is attempting to commit the venire member to a legal requirement.[161] For example, when prejudicial evidence cannot be excluded, a party is entitled to question about it and inquire whether a venire member could follow a limiting instruction.[162] Vasquez argued that even if the proffered question was a commitment question, it was proper because it sought to have the members consider all of the evidence as the law requires.[163] The Court disagreed:

> The phrases "regardless of the evidence" and "no matter what else the evidence is" included in this question, however, do not transform its substance into a commitment to listen to the evidence, because the question itself isolates one relevant piece and its impact on juror decision-making. Asking whether jurors will ignore all the relevant facts, or all of the relevant facts but one are two very different questions – an affirmative answer to the former reflects bias or prejudice, but an affirmative answer to the latter, without more, reflects that jurors think a presented fact is most important, based upon what they have been told by counsel.[164]

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[158] *Id*.

[159] *See Id*.

[160] *Id*. (emph. in orig.).

[161] *See Id.*

[162] *See Id.*

[163] *See Id.*

[164] *Id*.

It goes without saying that Hyundai is a very important decision for voir dire practice. In fact, the tortured procedural history[165] of this case is evidence of the closeness of the decision.

There has been one case since *Hyundai* that discusses improper weighing of the evidence voir dire questions. In *In re Barbee*, a defendant appealed an order of civil commitment under the Texas Sexually Violent Predator Act.[166] During voir dire, the defendant's attorney attempted to ask certain panel members whether they could be fair and impartial jurors knowing that his client has multiple convictions for sexual offenses against children. For example, counsel asked: "Who could not be a fair and impartial juror if the evidence showed that the crimes for which Mr. Barbee was convicted involved children of tender ages?" The trial court refused to allow such questioning. Citing *Hyundai*, the court of appeals affirmed. The court first held that the questions previewed the fact that Barbee had prior convictions and sought the weight that jurors might place on this evidence.[167] The court then held that the trial court did not abuse its discretion in excluding these evidence weighing questions: "Under these circumstances, the trial court has the discretion to prohibit improper questions although it cannot foreclose all inquiry about a relevant topic."[168]

### 2. Striking Venire Members For Cause Due To Responses To Improper Commitment Or Weight Of The Evidence Questions May Be Reversible Error

In *Hyundai*, the Texas Supreme Court emphasized that the inquiry on whether the trial court erred in excluding a question was whether the trial court abused its discretion.[169] The focus of the opinion dealt with the fact that the trial court was in the best position to judge the venire panel and the questions. The Court left open the door that a trial court could under its discretion allow weight of the evidence questions under some circumstances: "a trial judge may choose to hear jurors' responses before deciding whether an inquiry pries into potential prejudices or potential verdicts."[170] The court stated:

> Permitting disclosures about the evidence the jury will hear during the case increases the potential for discovering external biases, but inquiries to jurors after

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[165] The trial court excluded the proffered question on the voir dire to the third panel, and the court of appeals' panel originally affirmed the trial decision before the en banc court reversed. Once in the Texas Supreme Court, two justices recused themselves, and the Court took the unusual step of requesting a second oral argument in the case due to several new justices sitting on the panel. The majority opinion was made up of Justices Hecht, O'Neill, Brister, Willet, and two Justices assigned from the Courts of Appeals -- Bland and Cayce. Justices Wainwright, Medina, and Johnson filed multiple dissents because they felt that the trial court had erred in not allowing Vasquez to ask further questions dealing with seatbelts notwithstanding the inappropriateness of the proffered question. The majority found that the issue of additional further questions had not been properly preserved.

[166] 192 S.W.3d 835 (Tex. App.–Beaumont 2006, no pet.). The Texas Sexually Violent Predator Act is located at TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.147 (Vernon 2003 & Supp. 2005).

[167] *See Id*.

[168] *Id*.

[169] *See Hyundai*, 189 S.W.3d at 743.

[170] *Id*.

> doing so should not spill over into attempts to preview the verdict based on the facts as represented to the jurors. Balancing these competing concerns depends on the facts in the case and on the inquiries posited to the jury. The trial judge is in a better position to achieve the proper balance.[171]

Therefore, there will be trial courts in Texas that continue allowing each side to ask questions of the venire panel that seek comments on the weight of evidence. Further, there will be some trial courts that strike jurors for cause because of the responses that they give. For example, in *Hyundai*, during the first two attempts to pick a jury, the trial court struck many venire members for cause because they could not be "fair and impartial" to the plaintiff after knowing that the child was not wearing a seat belt.

Accordingly, the next issue dealing with voir dire is whether a trial court reversibly errs in excusing venire members for cause due to their answers to questions that ask them to weigh the evidence. In *Hyundai*, the Court repeatedly said that it was error for a trial court to strike a venire person due to the weight that they place on evidence:

> If the trial judge permits questions about the weight jurors give relevant case facts, then 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.[172]

> If the trial court allows a question that seeks a juror's view about the weight to give relevant evidence, then the juror's response, without more, is not disqualifying.[173]

Therefore, it is clear that a trial court will err in striking a venire member because of the answer that he or she answers a question dealing with the weight of the evidence. What is less clear, however, is whether this error will be grounds for reversal.

The general reversible error rule is found in Texas Rule of Appellate Procedure 44.1: "No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals."[174] The appellate court must determine whether it is more likely than not that the trial court's error resulted in an improper judgment.[175]

This may be a difficult task in the context of the trial court erring in taking particular jurors off of the panel – those members are replaced by other presumably good jurors. For example, the United States Supreme Court recognized that an erroneous dismissal of a

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[171] *Id*.

[172] *Id.*

[173] *Id*.

[174] TEX. R. APP. P. 44.1.

[175] *See King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970).

prospective juror does not automatically require reversal if an impartial jury was impaneled. In *Northern Pacific R. Co. v. Herbert*, the Supreme Court stated:

> [The prospective juror] was . . . challenged, and the allowance of the challenge constitutes the first error assigned. . . . If we regard the challenge as for cause, its allowance did not prejudice the company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand.[176]

Several federal courts and numerous state courts have recognized this principle, and applied it in the context of a criminal trial.[177] Texas is one of the jurisdictions that followed the *Herbert* opinion in the context of criminal proceedings. In *Jones v. State*, the Texas Court of Criminal Appeals found that an error in granting an improper challenge for cause was not of a constitutional dimension and that there was no reversible error.[178] The Court stated that "a defendant has no right that any particular individual serve on the jury. The defendant's only substantial right is that the jurors who do serve be qualified."[179] The Court then adopted a new harm standard to be applied when a juror is erroneously excused. Such error will only require reversal if the record shows that the error deprived the defendant of a lawfully constituted jury.[180] Significant in the Court's decision was that "no claim [was] made that the jury, as finally constituted, was biased or prejudiced; or that appellant was deprived of a trial by an impartial jury."[181]

In the context of civil cases in Texas, courts have held that where a challenge for cause is improperly sustained, a party can show no reversible error unless it can show it was denied a trial by a fair and impartial jury.[182] In *Couts*, the Texas Supreme Court stated that when a trial court exercises a for cause strike: "it ought not to be reversed in any case unless it be made clearly to appear that thereby the party complaining has been deprived of a trial by a fair and impartial jury."[183] Courts have also stated that an error in sustaining a challenge for cause is not a ground

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[176] 116 U.S. 642, 646, 29 L. Ed. 755, 6 S.Ct. 590 (1886).

[177] *See, e.g., United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1222 (5th Cir. 1994); *United States v. Prati*, 861 F.2d 82, 87 (5th Cir. 1988); *Shettel v. United States*, 113 F.2d 34, 36 (D.C. Cir. 1940); *State v. Walden*, 905 P.2d 974, 988 (Ariz. 1995); *People v. Holt*, 937 P.2d 213 (Cal. 1997); *Wheeler v. People*, 165 P. 257, 258 (Colo. 1917); *Wells v. State*, 404 S.E.2d 106, 107 (Ga. 1991); *State v. Clark*, 278 P. 776, 777-78 (Idaho 1929); *State v. Kendall*, 203 N.W. 806, 807 (Iowa 1925); *Hunt v. State*, 583 A.2d 218, 234 (Md. 1990); *State v. Hurst*, 193 N.W. 680, 682 (Minn. 1922); *State v. Hill*, 827 S.W.2d 196, 199 (Mo. 1992); *State v. Huffman*, 296 P. 789, 790 (Mont. 1931); *Bufford v. State*, 26 N.W.2d 383, 386 (Neb. 1947); *State v. Martinez*, 278 P. 210, 210-11 (N.M. 1929); *State v. Carson*, 249 S.E.2d 417, 423 (N.C. 1978); *State v. Wells*, 103 S.E. 515, 516 (S.C. 1920); *State v. Larkin*, 228 P. 289, 289 (Wash. 1924); State v. Mendoza, 596 N.W.2d 736 (Wis. 1999).

[178] 982 S.W.2d 386 (Tex. Crim. App. 1998).

[179] *Id*. at 393.

[180] *See id.* at 394.

[181] *See id.* at 391.

[182] *Couts v. Neer*, 70 Tex. 468, 9 S.W. 40 (1888); *City of Hawkins v. E.B. Germany & Sons*, 425 S.W.2d 23, 26 (Tex.Civ.App.--Tyler 1968, writ ref'd n.r.e.).

[183] *Couts*, 9 S.W. at 40.

for reversal unless the appealing party shows prejudice.[184] For example in *Hawkins v. E. B. Germany & Sons*, the court held in dicta that even if a trial court erred in excusing venire members for cause, that under the facts of the case, the appealing party failed to show any harm:

> Appellant does not allege or attempt to demonstrate how any harm resulted by reason of the adverse ruling. It has long been the established rule in this state that even though the challenge for cause was improperly sustained, no reversible error is presented unless appellant can show he was denied a trial by a fair and impartial jury. The record brought forward by appellant fails to show appellant objected to any juror on the panel. Since it was not shown that the city was forced to try the cause before an objectionable juror, it must be presumed that the city was afforded a fair and impartial jury. Consequently, no harm could have resulted to appellant by reason of the action of the court in excusing the two jurors.[185]

However, in the context of a trial court improperly allowing a commitment question, one court has reversed finding harmful error. In *Parker v. Schrimsher*, the plaintiff's counsel was allowed to ask and to receive a negative answer to a question about certain evidence.[186] The court of appeals held that the jurors had a right to be influenced by the evidence, that it was error to permit them to make a pledge that they would not be influenced by it, and that this was a serious error which was not likely to be cure by the court's instructions.[187]

Most recently, in *Hyundai*, the Texas Supreme Court held in dicta that striking venire members for cause due to weight that they would place on evidence may infringe upon a party's right to a fair and impartial jury:

> Just as excluding jurors who weigh summarized facts in a particular way infringes upon the right to a 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 and 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.[188]

The *Hyundai* opinion reflects that the real effect of improperly striking jurors for cause due to the weight they give particular evidence is that it provides additional opportunities to remove unfavorable jurors to the party improperly moving to strike the juror for cause. For example, a party does not like the way that a particular venire member views his evidence and asks the trial court to strike him or her for cause. If the trial court does so, the party does not have to use a

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[184] *See, e.g., City of Hawkins v. E.B. Germany & Sons,* 425 S.W.2d 23, 26 (Tex. Civ. App.–Tyler 1968, writ ref'd n.r.e.); *Woolam v. Central Power & Light Co.,* 211 S.W.2d 792, 793 (Tex Civ. App.–San Antonio 1948, no writ); *City of Marshall v. McAllister*, 18 Tex. Civ. App. 159, 160, 43 S.W. 1043, 1044 (1898).

[185] *City of Hawkins,* 425 S.W.2d at 26.

[186] 172 S.W.2d 165, 170-71 (Tex. Civ. App.–Amarillo 1914, writ dism.).

[187] *See Id.*

[188] 189 S.W.3d at 743.

peremptory strike on that unfavorable juror. The result is that the party is entitled to more opportunities to strike unfavorable jurors who are qualified to sit than its opponent. The resulting panel is filled with venire members that favor one side's evidence over the other. This is unfair to the party opposing the for cause strike, and under some circumstances, should amount to reversible error.

For example, in the context of an improper allocation of peremptory challenges, there is a relaxed harmless error standard.[189] In *Patterson Dental Co. v. Dunn*, the Texas Supreme Court recognized that a complaining party who has been wronged by an error in awarding of peremptory strikes theoretically has an overwhelming burden.[190] Therefore, the Court only required the complaining party show that "the trial which resulted against him was *materially unfair* without having to show more."[191] Whether an error in awarding strikes resulted in a materially unfair trial must be decided from an examination of the entire trial record. The Court held that if the trial is hotly contested and the evidence sharply conflicting, the error in awarding strikes results in a materially unfair trial without showing more.[192]

Moreover, in *Mann v. Ramirez*, the San Antonio Court of Appeals held that appellate courts should review errors occurring in the jury selection process by seeing if the trial of the case resulted in a "materially unfair trial."[193] The court held that requiring strict compliance with a rule 44.1 harm analysis would result in the "subtle erosion of the standards of the jury system" and should therefore not require a showing of injury.[194] The court noted that parties have a constitutional right to trial by a jury selected in substantial compliance with law and that this right is guaranteed by both the federal and state constitutions.[195] The Fort Worth Court of Appeals applied this relaxed harmless error standard in the context of a trial court's improperly allowing a jury shuffle after voir dire had begun because the randomness of the selection had been affected.[196] This same relaxed harmless error standard should apply when a trial court improperly excuses a juror due to the weight that the juror places on evidence.

It is impossible to show exactly how the juror that replaced the improperly struck juror caused harm. The effect, though, is that the jury is composed of persons that view the evidence more favorably to one of the parties. This violates the opposing party's right to a fair and impartial trial. True, there may be some instances where harm may not be shown under even the relaxed standard. The case may not be hotly contested with sharply conflicting evidence.

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[189] *See, e.g., Lopez v. Foremost Paving, Inc.*, 709 S.W.2d 643 (Tex. 1986); *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734 (Tex. 1986); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979); *Tamburello v. Welch,* 392 S.W.2d 114 (Tex. 1965). *See also Lorusso v. Members Mut. Ins. Co.,* 603 S.W.2d 818 (Tex. 1980); *Dunlap v. Excel Corp.,* 30 S.W.3d 427 (Tex. App.–Amarillo 2000, no pet.).

[190] 592 S.W.2d 914 (Tex. 1979).

[191] *Id*. at 921 (Emphasis added).

[192] *Garcia*, 704 S.W.2d at 734.

[193] 905 S.W.2d 275, 278-79 (Tex. App.--San Antonio 1995, writ denied).

[194] *Id*. at 280.

[195] *See id*. at 281 (quoting *Tamburello v. Welch*, 392 S.W.2d 114, 117 (Tex. 1965)).

[196] *See Carr v. Smith*, 22 S.W.3d 128, 135 (Tex. App.–Fort Worth 2000, pet. denied).

Moreover, the weight of the evidence question may only go to a relatively unimportant fact. If members are excused due to the weight that they give unimportant facts that the case does not revolve around, a party may not be harmed in having them excused from the panel. Absent these circumstances, under the relaxed standard, an appellate court should reverse the judgment and remand for a new trial so that both parties can have a fair trial before impartial jurors. The Texas Supreme Court has not so held at this time, but a fair reading of the *Hyundai* opinion leads to this conclusion.

## F. IMPROPER COMMENTS BY COURT

If a trial court makes an improper comment or instruction, a party must object to such at the time it is made during voir dire and obtain a ruling. If a party waits until after trial, it will waive any error.[197]

## G. VENIRE MEMBER STRIKES

A challenge to a particular venire member is done either through a challenge for cause or through a peremptory strike.[198] Thereafter, "[t]he court shall decide without delay any such challenge, and if sustained, the juror shall be discharged from the particular case."[199]

### 1. "For Cause" Strikes

A challenge for cause is an objection to a panelist, alleging some fact that by law disqualifies the person from serving as a juror or renders the person unfit to sit on the jury.[200] Rule 228 states:

> A challenge for cause is an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror 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. Upon such challenge the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge.[201]

There is no limit to the number of "for cause" strikes that a party can urge to a trial court.

#### a. Basis of "For Cause" Strikes

Generally, there are two areas that can be the basis of a "for cause" strike — juror qualifications and bias/prejudice.

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[197] *See In re C.S.*, 79 S.W.3d 619, 624-25 (Tex. App.–Texarkana 2002, no pet.) (Ross, J., concurring).

[198] *See* TEX. R. CIV. P. 227

[199] *Id.*

[200] *See* TEX. R. CIV. P. 228; *Wooten v. Southern P.T. Co.*, 928 S.W.2d 76, 80 (Tex. App.--Houston [14th Dist.] 1995, no writ).

[201] *See* TEX. R. CIV. P. 228.

## I. Juror Qualifications

If a venire member is not qualified to sit on a jury, then the trial court should grant a "for cause" objection and remove the member from the panel. A juror is disqualified to serve as a petit juror unless he:

- Is at least 18 years of age;
- Is a citizen of this state and of the county in which he is to serve as a juror;
- Is qualified under the constitution and laws to vote in the county in which he is to serve as a juror;
- Is of sound mind and good moral character;
- Is able to read and write;
- Has not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court;
- Has not been convicted of a felony; and
- Is not under indictment or other legal accusation of misdemeanor or felony theft or any other felony.[202]

Several courts have held that an objection that a juror does not meet these statutory qualifications may be waived where a party fails to timely object prior to the empaneling and swearing of the jury.[203] Additionally, a juror may be struck where he:

- Is a witness in the case;
- Is interested, directly or indirectly, in the subject matter of the case;
- Is related by consanguinity or affinity within the third degree, as determined under Chapter 573, to a party in the case;
- Has a bias or prejudice in favor of or against a party in the case;
- Has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.[204]

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[202] TEX. GOV'T CODE ANN. §§ 62.102. S*ee also R.R.E v. Glenn*, 884 S.W.2d 189, 192 (Tex. App.--Fort Worth 1994, writ denied).

[203] *See e.g., Mayo v. State,* 4 S.W.3d 9, 12 (Tex. Crim. App. 1999); *Transcontinental Ins. Co. v. Smith*, 135 S.W.3d 831, 839 (Tex. App.–San Antonio 2004, no pet.); *Collum v. State*, 96 S.W.3d 361, 366 (Tex. App. – Austin 2002, no pet.); *In re J.O.*, 38 S.W.3d 718 (Tex. App.–San Antonio 2000, no pet.); *Mercy Hosp. of Laredo v. Rios*, 776 S.W.2d 626, 628 (Tex. App.–San Antonio 1989, writ denied).

[204] *See* TEX. GOV'T CODE ANN. §62.105.

If a party determines that a venire member is not qualified as set forth above, the trial court should grant a "for cause" challenge and remove the member from the venire. Often a panel member will ask to be removed due to a financial hardship. A trial court may excuse a panel member for cause due to a financial hardship only where all parties are present and approve the excuse.[205] A trial court may excuse a panel member with a physical or mental impairment, or has the inability to comprehend or communicate the English language where this would make his or her jury service impossible or very difficult.[206]

A panel member may also assert the following exemptions to avoid jury service if he or she so desires:

- Over the age of 70;
- Has legal custody of a child under the age of 10 if jury service would leave the child without adequate supervision;
- Is a student of a public or private secondary school;
- Is enrolled and in actual attendance at an institution of higher education;
- Is an officer or employee of the Senate, House of Representatives, or any department, commission, board, office, or other agency in the legislative branch;
- Is a person who is the primary caregiver of an invalid;
- Is a member of the U.S. military serving on active duty and deployed to a location away from their home station and out of their county of residence;
- Has been summoned for service in a county with a population of at least 200,000 who has served as a petit juror in the county in the past 24-month period;
- Has been summoned for service in a county with a population of at least 250,000 who has served as a petit juror in the county during the three-year period preceding the date on which the person is to appear for jury service.[207]

## II. Juror Bias/Prejudice

Texas Government Code section 62.105 provides multiple grounds that a trial court can dismiss a venire member for cause. The most prevalent type of for cause challenge is that the venire member is impermissibly biased or prejudiced. The disqualification of bias or prejudice

[205] *See* TEX. GOV. C. § 62.110.

[206] *See* TEX. GOV. C. § 62.109.

[207] *See* TEX. GOV'T CODE ANN. § 62.101.

"extends to the subject matter of the litigation" as well as to the litigants personally.[208] For that reason, questions that deal with a venire member's bias or prejudice concerning the applicable law of the case, attorneys, or other witnesses are proper and permissible.[209]

Some bias does not require removal from the venire — "[t]o a greater or lesser extent, bias and prejudice form a trait common in all men; however, to fall within the disqualifying provision . . . certain degrees thereof must exist."[210] Bias is an inclination toward one side of an issue rather than the other such that it leads to the inference that the individual will not act with impartiality.[211] Prejudice is defined as a venire member having a prejudgment.[212]

To disqualify a potential juror for bias as a matter of law, the record must conclusively show that the potential juror's state of mind led to the natural inference that he or she would not act with impartiality.[213] Merely showing that a venire member has a potential for bias or prejudice is not sufficient, the voir dire examination must reveal that a fixed opinion or bias actually exists.[214] Some courts of appeals and commentators have stated that the key response by a venire member that shows bias and that supports a successful challenge for cause is that the member cannot be fair and impartial because the venire member's feelings are so strong in favor of or against a party or against the subject matter of the litigation that the member's verdict will be based on those feelings and not on the evidence.[215]

However, an expression of a bias that is subject to more than one interpretation or is uncertain, referred to as equivocal bias, is not a ground for disqualification as a matter of law.[216] It is clear that simply stating that a juror might lean towards one side is not sufficient to prove bias as a matter of law.[217] Bias is not shown by answers to general questions, which are usually

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

[209] *Swap Shop v. Fortune*, 365 S.W.2d 151, 154 (Tex. 1963) (law); *Bum v. Schaefer*, 683 S.W.2d 803 (Tex. App.–Corpus Christi 1984, no writ) (attorneys); *Employer's Mut. Liab. Ins. Co. v. Butler*, 511 S.W.2d 323, 325 (Tex. Civ. App.–Texarkana 1974, writ ref'd n.r.e.) (witnesses).

[210] *Compton v. Henrie*, 364 S.W.2d 179, 181-82 (Tex. 1963).

[211] *See Compton v. Henrie*, 364 S.W.2d at 181-82; *Houghton v. Port Terminal R.R. Assn*., 999 S.W.2d 39, 46 (Tex. App.--Houston [14th Dist.] 1999, no writ); *State v. Dick*, 69 S.W.3d 612, 618 (Tex. App.–Tyler 2001, no pet.).

[212] *Compton v. Henrie*, 364 S.W.2d at 182.

[213] *Houghton v. Port Terminal R.R. Assn*., 999 S.W.2d at 46. *See also, Goode v. Shoukfeh*, 943 S.W.2d 441, 453 (Tex. 1997).

[214] *See Swap Shop v. Fortune*, 365 S.W.2d 151, 154 (Tex. 1963); *Powers v. Palacios*, 794 S.W.2d 493, 496 (Tex. App.–Corpus Christi 1990), *rev'd on other grounds*, 813 S.W.2d 489 (Tex. 1991); *Sullemon v. U.S. Fidelity & Guaranty Co*., 734 S.W.2d at 15. *See also*, Julie A. Wright, Comment, *Challenges for Cause Due to Bias or Prejudice: The Blind Leading the Blind Down the Road to Disqualification*, 46 BAYLOR L. REV. 825, 836 (1994).

[215] *See Buls v. Fuselier*, 55 S.W.3d 204 (Tex. App.--Texarkana 2001, no writ); *Gant v. Dumas Glass and Mirror, Inc.,* 935 S.W.2d 202, 208 (Tex. App.–Amarillo 1996, no writ). *See also*, Julie A. Wright, *Challenges for Cause Due to Bias or Prejudice: The Blind Leading the Blind Down the Road of Disqualification*, 46 BAYLOR L. REV. 825, 838 (1994); H. L. Godfrey*, Civil Voir Dire in Texas: Winning the Appeal Based on Bias or Prejudice*, 31 S. TEX. L. REV. 409 (1990).

[216] *Silsbee Hospital, Inc. v. George*, 163 S.W.3d 284 (Tex. App.—Beaumont 2005, pet. denied).

[217] *See Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App.--Amarillo 2001), *rev'd on other grounds*, 81 S.W.3d 817 (Tex. 2002). *See e.g., Swan Shop v. Fortune,* 365 S.W.2d 151, 154 (Tex. 1963) (member was friend of defendant's

insufficient to satisfy the diligence required to determine the mind set of a venire member with respect to disqualification for bias.[218] Therefore, an attorney must follow up when a juror states that he is leaning one direction and must show that the venire member's feelings are so strong that any verdict would be based upon his feelings and not the evidence.

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

In *Cortez v. HCCI-San Antonio, Inc.*, the plaintiff challenged a venire member who was an insurance claims adjuster in a nursing home personal injury case where.[219] The venire member's statements were:

> During voir dire, counsel questioned venire member Snider, who had handled automobile claims as an insurance adjuster. Snider said that his experience might give him "preconceived notions." "I would feel bias," he said, "but I mean, I can't answer anything for certain." When the trial judge asked him to explain his bias, he said that he had seen "lawsuit abuse . . . so many times." He said that "in a way," the defendant was "starting out ahead," and explained:
>
> > Basically – and I mean nothing against their case, it's just that we see so many of those. It's just like, well, I don't know if it's real or not. And this type [of] case I'm not familiar with whatsoever, so that's not a bias I should have. It's just there.[220]

The venire member went on to state that he was "willing to try" to listen to the case and decide it on the law and evidence. The trial court denied the plaintiff's for-cause strike, and the court of appeals affirmed.

The Texas Supreme Court granted the plaintiff's petition for review and affirmed the judgment of the court of appeals. Aside from an interesting preservation of error discussion, the Court discussed three main voir dire issues: 1) whether a party can "rehabilitate" a venire member after an expression of bias; 2) whether certain "magic words" can prove bias as a matter of law; and 3) whether a venire member's response to a party's question about whether one party starts a little ahead of the other after a discussion of the evidence can provide a basis for a for cause strike.

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son in law and was concerned that trial may affect friendship); *Glenn v. Abrams/Williams Bros*., 836 S.W.2d 779, 782-83 (Tex. App.–Houston [14th Dist.] 1992, writ den.); *Fazzino v. Guido*, 836 S.W.2d 271, 276-77 (Tex. App.–Houston [1st dist.] 1992, writ denied); *Powers v. Palacios,* 794 S.W.2d 493, 496 (Tex. App.--Corpus Christi 1990), *rev'd on other grounds*, 813 S.W.2d 489 (Tex. 1991) (members may have difficulty in calculating damages); *Sulleman v. U.S. Fidelity & Guaranty Co.*, 734 S.W.2d 10, 15 (Tex. App.--Dallas 1987, no writ) (member expressed doubt at ability to follow definition of incapacity).

[218] *See Gant v. Dumas Glass and Mirror, Inc*., 935 S.W.2d 202, 208 (Tex. App.--Amarillo 1996, no writ).

[219] 159 S.W.3d 87 (Tex. 2005) (court of appeals opinion at 131 S.W.3d 113 (Tex. App.–San Antonio 2004)).

[220] *Id*.

### a. Rehabilitation Questions Are Permitted

Some courts of appeals held that once a venire member indicated bias as a matter of law, the member could not be rehabilitated by averring that he could decide the case fairly.[221] Those courts held that any declaration that the venire member will be able to set aside the bias and render a verdict based upon the evidence should be disregarded.[222] The Court reversed this precedent, and held that depending upon the facts of the case a party can continue to question a venire member even after the member makes an expression of bias:

> We agree that if the record, taken as a whole, clearly shows that a venire member 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. . . .
>
> [Trial courts] may place reasonable limits on questioning that is duplicative or a waste of time. But whether further questioning would be a waste of time may depend on factors that may not appear in the record, such as a venire member's tone and demeanor. As in any other part of voir dire, the proper stopping point in efforts to rehabilitate a venire member must be left to the sound discretion of the trial court.
>
> At the same time, trial judges must not be too hasty in cutting off examination that may yet prove fruitful. Statements of partiality may be the result of inappropriate leading questions, confusion, misunderstanding, ignorance of the law, or merely "loose words spoken in warm debate." If a venire member expresses what appears to be bias, we see no reason to categorically prohibit further questioning that might show just the opposite or at least clarify the statement. . . .
>
> In reviewing such decisions, we must consider the entire examination, not just answers that favor one litigant or the other.

### b. Magic Words Do Not Prove Bias or Prejudice

The Court also held that there are no magic words for the purposes of striking a venire member for cause. The fact that a venire member may state that he is "biased" does not preclude the trial court from reviewing all of his testimony and determining that he was not biased as a matter of law:

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[221] *See Sulleman v. U.S. Fidelity & Guaranty Co.*, 734 S.W.2d 10, 14 (Tex. App.--Dallas 1987, no writ); *Gum v. Schaefer,* 683 S.W.2d 803, 807 (Tex. App.--Corpus Christi 1984, no writ); *Carpenter v. Wyatt Const. Co.*, 501 S.W.2d 748 (Tex. Civ. App.--Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Flowers v. Flowers*, 397 S.W.2d 121, 122-23 (Tex. Civ. App.–Amarillo 1965, no writ); *Lumberman's Insurance Corp. v. Goodman*, 304 S.W.2d 139, 145 (Tex. Civ. App.--Beaumont 1957, writ ref'd n.r.e.).

[222] *See White v. Dennison*, 752 S.W.2d 714 (Tex. App.--Dallas 1988, writ denied).

> Nor do challenges for cause turn on the use of "magic words." Cortez argues, and we do not disagree, that venire members 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, venire members are not necessarily disqualified when they confess "bias," so long as the rest of the record shows that is not the case.
>
> . . . .
>
> 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 venire member here expressed willingness to do that. Any bias he did express was equivocal at most, which is not grounds for disqualification. Snider was therefore not biased as a matter of law, and it was within the trial court's discretion to refuse to strike him.[223]

#### c. "Leaning" Questions After Factual Description Are Improper

Finally, the Court held that the fact that the venire member states that "one party starts a little ahead of the other" is not grounds for a for cause strike where the statement is made after a description of the evidence:

> As we long ago stated, "bias and prejudice form a trait common in all men," but to disqualify a venire member "certain degrees thereof must exist." "Bias, in its usual meaning, is an inclination toward one side of an issue . . . but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not *act* with impartiality." Accordingly, the relevant inquiry is not where jurors *start* but where they are likely to *end.* An initial "leaning" is not disqualifying if it represents skepticism rather than an unshakeable conviction.
>
> Asking a venire member which party is starting out "ahead" is often an attempt to elicit a comment on the evidence. Such attempts to preview a venire member's likely vote are not permitted. Asking which party is "ahead" may be appropriate before any evidence or information about the case has been disclosed, but here, the plaintiff's attorney gave an extended and emotional opening statement summarizing the facts of the case to the venire. A statement that one party is ahead cannot disqualify if the venire member's answer merely indicates an opinion about the evidence. A statement that is more a preview of a venire member's likely vote than an expression of an actual bias is no basis for disqualification. Litigants have the right to an impartial jury, not a favorable one.[224]

This case is very important precedent and will impact the way that voir dire and for cause strikes are conducted. A party is no longer constrained to take the initial response of a venire

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[223] *Id*.

[224] *Id*.

member as irrefutable. Further questioning is allowed, and if the testimony as a whole (not including magic words) indicates that the member's leaning is not to the point of an "unshakeable conviction" in the outcome, the for cause strike should not be granted. Finally, responses regarding the weight that a venire member may attribute to particular evidence will be a basis for disqualification.

### 3. Post-*Cortez* Precedent

The Texas Supreme Court most recently addressed bias a matter of law in *El Hafi v. Baker*, where the medical malpractice plaintiff attempted to strike a venire member who had worked as a personal injury defense lawyer for almost his entire career.[225] The venire member stated that he thought the plaintiff would want to know that he had spent his entire career defending malpractice lawsuits, would relate to the defense attorney in the case, and would tend to look at the case from the defense perspective. However, the venire member disagreed with the plaintiff's attorney's statement that the plaintiff would start a little behind, and the venire member stated that he would do his best to be objective. The trial court denied the plaintiff's for cause strike. On appeal the court of appeals reversed the judgment holding that the venire member was bias as a matter of law and that the trial court should have granted the for cause strike. In a per curiam opinion, the Texas Supreme Court held that the trial court was correct in denying the for cause strike:

> A bias is disqualifying if "it [] appears that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality." "The relevant inquiry is not where jurors *start* but where they are likely to *end.*" We therefore recently held in *Cortez* that a venire member was not disqualified merely for having a better understanding of the defendant's side, even though he stated that "in a way," the defendant was "starting out ahead."
>
> Here, the venire member protested when counsel suggested that perhaps, in his mind, the plaintiffs were "starting out a little behind." He further explained that he "would do [his] best to be objective." The venire member's most "biased" statements were his affirmative answers to leading questions suggesting that because of his career as a defense attorney, he could relate to the defendants' attorneys and might see things more from the defendants' perspective. Having a perspective based on "knowledge and experience" does not make a venire member biased as a matter of law. Taken as a whole, venire member 25's statements reflect more of an attempt to "speak the truth" so that the examining counsel could intelligently exercise peremptory challenges rather than any genuine bias.[226]

The Court reversed the court of appeals judgment and remanded for further consideration of other issues. This opinion reaffirms the Court's decision in *Cortez* that in order to be bias as a

[225] 164 S.W.3d 383 (Tex. 2005).

[226] *Id*.

matter of law, the venire member must state that due to his or her bias that the outcome is already determined – not that one party may or may not start out ahead of the other.

In *GMC v. Burry*, the plaintiff sued GM on a products liability claim after the plaintiff was severely injured in an accident.[227] After the jury returned a verdict for the plaintiff, the defendant appealed arguing among other issues that the trial court erred in failing to excuse two venire members for cause.[228] The trial court denied a for cause strike to one member who had a brother die in an accident, and who subsequently had a "fight" with GM.[229] However, when asked if he would be against GM, the member stated that he had no idea.[230] The court of appeals affirmed the trial court's decision to not strike the member for cause as his statements did not show an unequivocal bias.[231]

The second member had a relative die in a car accident and had sympathy for the plaintiff. When GM asked her whether she could set aside her sympathy, she said "I don't think I can."[232] The court of appeals affirmed the trial court's decision not to strike this member for cause.[233] The court of appeal found that the member's statement could be interpreted as proof of unequivocal bias, but that technically, the statement was equivocal.[234] The court stated that the trial court was in the best position to decide whether the member had unequivocal bias because the trial court could review the member's demeanor, expressions, tone, and voice inflection.[235]

In *Brooks v. Armco, Inc.,* the plaintiff sued the defendant due to the death of her husband from mesothelioma allegedly caused by asbestos that her husband was exposed to at work.[236] During the plaintiff's voir dire questioning regarding the burden of proof, three panel members stated that they would use the criminal "beyond a reasonable doubt" standard in this tort case. The plaintiff moved to strike those members for cause. The trial court instructed the jury on the proper burden of proof, and upon further questioning, all members stated that they could follow the trial court's instructions. The trial court denied the strikes for cause. The court of appeals affirmed this decision stating:

> For a bias to disqualify a juror, it must appear that the state of the mind of the juror leads to the natural inference that he will not or cannot act with impartiality. . . . [W]e find that [the panel members] were not biased as a matter of law, and the trial court did not abuse its discretion in refusing to strike them for cause. A

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[227] 203 S.W.3d 514 (Tex. App.—Fort Worth 2006, pet. filed).

[228] *See id*. at 546.

[229] *Id*.

[230] *See id*.

[231] *See id*.

[232] *Id*.

[233] *See id*.

[234] *See id*.

[235] *See id*.

[236] 194 S.W.3d 661 (Tex. App.–Texarkana 2006, pet. denied).

> reasonable construction of the record is that the prospective jurors in question simply stated what they thought the law ought to be on the burden of proof requirement, but when the trial court explained that it would instruct them as to the burden of proof required in this case, they indicated to counsel for both sides that they had no problem applying the burden of proof the court said they must use and that they would not try to apply any higher burden of proof. None indicated they could not or would not follow the law on the burden of proof as given to them by the trial court.

After resolving two other voir dire issues, the court affirmed the judgment for the defendant.

In *Greer v. Seales*, the plaintiff in a personal injury action appealed the trial court's denial of several for cause strikes.[237] Regarding one question dealing with retaining counsel after an accident, one venire member stated that "accidents happen." Two other venire members stated that they agreed that damages for pain and suffering should be limited. The court of appeals affirmed the trial court's decision to deny the for cause strikes. The court stated: "The key response that supports a successful challenge for cause is that the venire member cannot be fair and impartial, because the venire member's feelings are so strong in favor of or against a party or against the subject matter of the litigation that the venire member's verdict will be based upon those feelings and not on the evidence."[238] The court held that the record did not indicate the challenged venire members met this standard, and that the trial court acted within its discretion.

In *McMillin v. State Farm Lloyds*, the plaintiff sued their insurer due to a mold claim.[239] The plaintiff appealed the trial court's denial of multiple for cause strikes. One juror stated that: 1) the mold crises was very much overstated; 2) she was concerned that her insurance premiums would go up; 3) she may be bias; 4) it would be difficult for her to award the amount that the plaintiff requested, but that she was willing to listen to the evidence and would award the plaintiff's requested amount if proved; 5) the plaintiff was starting behind; and 6) she was not the best juror for the case.[240]

The second juror stated that: 1) she could not under any circumstances award what the plaintiff was asking; 2) she had a problem awarding mental anguish damages and punitive damages; 3) the plaintiffs would have to present more than 51% of proof to convince her to award mental anguish and proof beyond almost all doubt to award punitive damages; and 4) she would follow the judge's instructions and would apply the evidentiary standards for proof of mental anguish and punitive damages.[241] The third juror stated that that the plaintiff's request for damages was "too much" but later conceded that he could award damages if proven.[242] The court of appeals affirmed the trial court's denial of the for cause strikes:

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[237] No. 09-05-001-CV, 2006 Tex. App. LEXIS 1524 (Tex. App.–Beaumont February 23, 2006, no pet.).

[238] *Id*. at *6-7.

[239] 180 S.W.3d 183 (Tex. App.–Austin 2005, no pet.).

[240] *See id.* at 196.

[241] *See id*. at 196-97.

[242] *See id.* at 197.

> Under the applicable legal standards as clarified by Cortez, and giving due deference to the district court's front-line assessment of credibility and demeanor, we find no abuse of discretion in the district court's refusal to strike these jurors for cause. Although some of these jurors said in various ways that the McMillins "started out behind" because of the nature of their claims and the amount they claimed, when questioned further they said that they would listen to the evidence and apply the relevant standards of proof; this is the type of rehabilitation approved by *Cortez*. The jurors' statements that the $ 5 million demand far exceeded the estimated $ 500,000 value of the house was a statement of fact, not evidence of bias.[243]

In *Jones v. Lakshmikanth*, the plaintiff sued the defendant for medical malpractice.[244] The plaintiff complained on appeal about the trial court's denial of several for cause strikes. The court of appeals held that the trial court did not err in refusing the strikes. Basically, the plaintiff's counsel failed to follow up with venire members' general statements or positions in the health field and never established any actual bias. For example, the following general statements were not sufficient to establish bias as a matter of law: 1) it would not be a good case for the member to be on; 2) expressions of sympathy for doctors and nurses; and 3) belief that medical malpractice cases were bad for patient care.[245] Further, bias as a matter of law was not shown just because some members worked in the health care field, worked at the defendant's hospital, were former patients of the defendant, and were related to former patients of the defendant.[246]

In *Silsbee Hospital, Inc. v. George*, the court of appeals held that the trial court reversibly erred in denying a defendant's for cause strikes against two venire members who stated that they would award the plaintiff damages even if the plaintiff did not carry his burden of proof.[247] The court held that the venire members' statements were unequivocal and there was nothing in the record indicating that either would try to follow the instructions of the trial court. The court of appeals did hold, however, that the trial court correctly refused the defendant's for cause strikes against two other venire members: one who acknowledged that he was acquainted with the plaintiff but stated that it would not play a role in his service as a juror, and the other who stated that she would have *trouble* not awarding the plaintiff damages but who implied that she still had the capacity to follow the trial court's instructions.[248]

The post-*Cortez* precedent shows that courts are reluctant to reverse a trial court's decision on a for cause strike. Unless a statutory disqualification applies, no venire member is bias or prejudice as a matter of law solely due to his or her employment or relationship to a party. An attorney must follow up with the venire member and get specific responses. The key response is that the venire member cannot be fair and impartial, because the venire member's

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[243] *Id.*

[244] No. 13-03-662-CV, 2005 Tex. App. LEXIS 6937 (Tex. App.–Corpus Christi August 25, 2005, no pet.).

[245] *See id*. at *6-11.

[246] *See id*. at 11-16.

[247] 163 S.W.3d 284, 294-96 (Tex. App.–Beaumont 2005, pet. denied).

[248] *See Id*.

feelings are so strong in favor of or against a party or against the subject matter of the litigation that the venire member's verdict will be based upon those feelings and not on the evidence. Absent that, a trial court will likely not err in refusing to strike a venire member for cause.

### a. Preserving Error in Refusing "For Cause" Strike

To complain of the refusal by the trial court to permit a challenge for cause, the party must follow the following procedure:

- During voir dire, challenge the panelist for cause and show the court overruled the challenge on the record; and
- Object to the exhaustion of peremptory strikes before the party gives its peremptory strikes to the clerk.[249]

The objection to the exhaustion of peremptory strikes must inform the court that as a result of the court's refusal to strike the "for cause" panelist, the party will exhaust its peremptory challenges before striking another objectionable panelist.[250] Further, the party must identify the objectionable panelist who will remain on the jury list if the party uses its last peremptory strike on the "for cause" panelist and request the court to reconsider its ruling on the "for cause" strike, or as an alternative, to grant the party an additional peremptory strike to compensate for the erroneous ruling on the challenge for cause.[251] However, the objecting party does not need to specify a reason why the panelist is objectionable – a party can use a peremptory strike for any reason.[252] Moreover, the fact that the objecting party later is successful does not mean that he cannot complain about error in denying a for cause strike. As the Supreme Court stated: "The fact the [objecting party] prevailed at trial is not relevant, because we held in *Hallett* that 'harm occurs' when 'the party uses all of his peremptory challenges and is thus prevented from striking other objectionable jurors from the list because he has no additional peremptory challenges.'"[253]

A party should not lump all for cause challenges together but should do them independently.[254] Only after the court overrules the request should the party file its peremptory

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[249] *See Cortez v. HCCI-San Antonio, Inc.,* 159 S.W.3d 87 (Tex. 2005); *Shepherd v. Ledford,* 962 S.W.2d 28, 34 (Tex. 1998); *Hallett v. Houston Northwest Med. Ctr*., 689 S.W.2d 888, 890 (Tex. 1985); *McMillin v. State Farm Lloyds,* No. 03-04-00171-CV, 2005 Tex. App. LEXIS 6956 (Tex. App.—Austin August 26, 2005, no pet.); *Wayne v. Hybner*, No. 13-00-00054-CV, 2001 Tex. App. LEXIS 6085 (Tex. App.–Corpus Christi August 31, 2001, no pet.) (not design. for pub.); *Operation Rescue v. Planned Parenthood, Inc*., 937 S.W.2d 60, 68-69 (Tex. App.--Houston [14th Dist.] 1996), *modified on other grounds*, 975 S.W.2d 546 (Tex. 1998); *Beavers v. Northrup Worldwide Aircraft Servs., Inc*., 821 S.W.2d 669, 681 (Tex. App.--Amarillo 1991, writ denied).

[250] *See Lucas v. Titus City Hosp. Dist.*, 964 S.W.2d 144, 157-58 (Tex.App.—Texarkana 1998, pet. denied).

[251] *See Shephard v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998).

[252] *See Cortez v. HCCI-San Antonio, Inc.,* 159 S.W.3d 87 (Tex. 2005).

[253] *Id.*

[254] *See Shamrock Communs. Inc. v. Wilie*, No. 03- 99-00852-CV, 2000 Tex. App. LEXIS 8284 (Tex. App.–Austin December 14, 2000, pet. denied) (not. design. for pub.).

strikes with the clerk.[255] One commentator has suggested the following as a form objection to the denial of a "for cause" strike:

> Because the court refused to remove Mr. Smith for cause, the defendant will be forced to use one of its peremptory strikes on Mr. Smith. As a result, the defendant will have no peremptory strikes left to challenge another objectionable panelist, Ms. Jones. To cure the error, the defendant asks the court to strike Mr. Smith for cause, or in the alternative, to grant the defendant an additional peremptory strike. [If the request is denied, counsel should then state:] Having stated my objection on the record, I now hand my list of peremptory challenges to the clerk.[256]

Without this lengthy objection, the party will not be able to show any harm, and the judgment will be affirmed.

### b. Determining Disqualification After Voir Dire

Preservation of error can be difficult when a venire person does not answer truthfully to a question regarding the person's qualification to sit on the jury. Typically, this may occur where the venire member gives an answer, participates on the jury, and either during trial or after trial, one party learns that the jury member was not qualified to sit on the jury. An erroneous or incorrect answer given by a potential juror during voir dire constitutes grounds for a new trial based on jury misconduct.[257] A new trial must be granted if the movant establishes: (1) that the misconduct occurred; (2) it was material; and (3) probably caused injury.[258] Merely because a prospective juror's answer to a question during voir dire was inaccurate does not establish that the failure to answer correctly was intentional and thus amounted to misconduct.[259] "[D]etermining whether jury misconduct occurred is a question of fact for the trial court, and if there is conflicting evidence on this issue the trial court's finding must be upheld on appeal."[260]

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[255] *Compare Cortez v. HCCI-San Antonio, Inc.,* 159 S.W.3d 87 ("While it is unclear whether [the objecting party] gave his notice to the trial court before or after he delivered his strike list, it does appear that the two events were roughly contemporaneous. More importantly, notice was given before the jury was seated, and the trial court stated on the record "it's preserved." We therefore hold that error was preserved.").

[256] MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES, CIVIL TRIALS, JURY SELECTION, 505 (2002).

[257] TEX. R. CIV. P. 327(a).; *see Greenpoint Credit Corp. v. Perez*, 75 S.W.3d 40, 48 (Tex. App.--San Antonio 2002, no pet.).

[258] *See Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000); *Greenpoint Credit Corp. v. Perez*, 75 S.W.3d at 48.

[259] *See Wachtendorf v. Harkins & Co.*, 518 S.W.2d 599, 603 (Tex. Civ. App.--San Antonio 1974, no writ); *Greenpoint Credit Corp. v. Perez*, 75 S.W.3d at 48.

[260] *Pharo v. Chamber County*, 922 S.W.2d 945, 948 (Tex. 1996); *Greenpoint Credit Corp. v. Perez*, 75 S.W.3d at 48.

To preserve error as to the unqualified juror sitting on the jury, the party should present a motion for mistrial (if during trial) or a motion for new trial (if after trial) objecting to the service by the unqualified juror. The party must show diligence in learning of the disqualification.[261]

For example, in *Palmer Well Services, Inc. v. Mack Trucks, Inc.*, the Texas Supreme Court reversed a trial where the party found out after trial that one of the jurors necessary to the verdict was not qualified.[262] Palmer Well Services, following a 10-2 verdict against it, discovered that a juror voting in favor of the verdict was under felony indictment.[263] Palmer Well Services moved for a new trial, but the motion was overruled by the trial court.[264] On appeal, the court of appeals affirmed, holding that the juror should have been excluded because of the indictment and that Palmer Well Services did not lack diligence in failing to discover the fact of the indictment earlier. However, the court held that Palmer Well Services failed "to demonstrate that the unqualified juror's presence on the jury was a material factor which was reasonably calculated to, and probably did, cause the rendition of an improper judgment." The supreme court reversed the court of appeals and remanded the case to the trial court for a new trial.[265] In so doing, the court observed that the statutory disqualification was not discovered until after the jury's verdict was returned, the failure to discover the pending felony indictment was not due to Palmer Well Services' lack of diligence, and material injury occurs when a verdict is returned by fewer than ten qualified jurors.[266] Of particular concern to the court was the fact that an unqualified juror voted in favor of the verdict:

> [I]f the rules and statutes governing the qualifications of jurors and the requisites of verdicts are to have any effect, litigants similarly situated to Palmer [Well Services] must be held to have suffered material injury as a matter of law. Therefore, because this is not an instance in which a verdict could have been rendered by less than ten jurors, as a matter of law Palmer [Well Services] was materially injured by the rendition of an unfavorable verdict by less than the requisite number of qualified jurors.[267]

Therefore, a party should voir dire specifically on jury qualifications, if a juror is later found to have not been qualified, the party shows diligence, and the juror was material, then the party is entitled to a new trial.[268]

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[261] *See Preiss v. Moritz*, 60 S.W.3d 285 (Tex. App.--Austin 2001), *rev'd on other grounds*, 121 S.W.3d 715 (Tex. 2003).

[262] 776 S.W.2d 575 (Tex. 1989).

[263] *Id*. at 576; *see* TEX. GOV'T CODE ANN. §§ 62.102(8).

[264] *Palmer Well Servs.*, 776 S.W.2d at 576.

[265] *Id*. at 577.

[266] *Id.*

[267] *Id*. at 577; *accord Dunlap v. Excel Corp*., 30 S.W.3d 427, 433 (Tex. App.--Amarillo 2000, no pet.); *see* TEX. R. CIV. P. 292 (stating that verdict may be rendered by no fewer than same ten members of original jury of twelve).

[268] *See Preiss v. Moritz*, 60 S.W.3d 285 (Tex. App.--Austin 2001) (answer to jury questionnaire was sufficient to prove due diligence, and party was entitled to a new trial where complaint was raised for first time in motion for new trial), *rev'd on other grounds*, 121 S.W.3d 715 (Tex. 2003).

### 4. Peremptory Strikes

After the parties end the voir dire questioning period, and after the "for cause" strikes are made, each party makes his peremptory strikes. When a party delivers its list of peremptory strikes to the court, it has "exercised its peremptory challenges."[269] Peremptory strikes are strikes allocated to each party where the party can strike any juror for any non discriminatory reason. Texas Rule of Civil Procedure 232 states: "If there remain on such lists not subject to challenge for cause, . . . the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefore."[270] The purpose of allowing peremptory strikes is not to allow a party a means for selecting a jury.[271] Rather, peremptory challenges are intended to permit a party to reject certain members of the venire based upon the subjective perception that those prospective jurors might be unsympathetic to the party's position.[272]

In a district court case, each party is entitled to six peremptory strikes, whereas each party is entitled to only three in a case in county court.[273] Additionally, each party is entitled to an additional peremptory strike if one or two alternative jurors are impaneled, and each party is entitled to two additional peremptory strikes if the court impanels three or four alternative jurors. The additional peremptory strikes may only be used in selecting the alternative jurors.[274]

#### a. Allocation of Peremptory Strikes

In multiparty suits, the allocation of peremptory strikes is often an objectionable matter. In such a case, it is the trial court's duty to determine whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. Texas Rule of Civil Procedure 233 provides:

> Except as provided below, each party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court.
>
> **Alignment of the Parties.** In multiple party cases, it shall be the duty of the trial judge to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury, before the exercise of peremptory challenges.

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[269] *See Ortiz v. Fort Motor Credit Co*., 859 S.W.2d 73, 75 (Tex. App.--Corpus Christi 1993, writ denied); *Lopez v. S. Pacific Transp. Co*., 847 S.W.2d 330, 333 (Tex. App.--El Paso 1993, no writ); *Beavers v. Northop Worldwide Aircraft Serv. Inc.*, 821 S.W.2d 669, 681 (Tex. App.--Amarillo 1991, writ denied).

[270] *See* TEX. R. CIV. P. 232.

[271] *See Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 919 (Tex. 1979).

[272] *See id.*

[273] *See* TEX. R. CIV. P. 233.

[274] *See* TEX. GOV'T CODE ANN. §62.020(e).

> **Definition of Side.** The term "side" as used in this rule is not synonymous with "party," "litigant," or "person." Rather, "side" means one or more litigants who have common interests on the matters with which the jury is concerned.
>
> **Motion to Equalize.** In multiple party cases, upon motion of any litigant made prior to the exercise of peremptory challenges, it shall be the duty of the trial judge to equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side. In determining how the challenges should be allocated the court shall consider any matter brought to the attention of the trial judge concerning the ends of justice and the elimination of an unfair advantage.[275]

In a multiparty suit, 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.[276] If the court refuses to realign the parties or erroneously realigns the parties, then generally the objecting party must file a motion before the exercise of its peremptory strikes but after the voir dire examination.[277]

In *Van Allen v. Blackledge*, prior to jury selection, the trial court held a hearing in chambers to allocate peremptory challenges among the parties.[278] The trial court ordered the defendants to exercise their strikes independently. The defendants proceeded to exercise their strikes in separate rooms. Immediately after the jury was selected and the panel was seated and sworn, plaintiffs moved for a mistrial on the grounds that the defendants had violated the court's mandate and collaborated in exercising their strikes. The trial court denied their motion.[279] On appeal, the defendants argued that plaintiffs had waived their objection to the allocation of the strikes because they did not object in a timely manner. The appellate court held that the plaintiffs did not waive their objection under the circumstances because they objected at the earliest possible moment after it became clear that the defendants had coordinated their strikes in violation of the trial court's mandate.[280]

In *In the Interest of M.N.G.*, the court held that error was preserved where the complaining party objected after exercise of peremptory strikes because that was the earliest time he could have reasonably made objection where one of the opposing parties stated that he was not going to exercise any strikes.[281] After finding that the error was preserved, the court addressed whether the error was reversible:

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[275] TEX. R. CIV. P. 233.

[276] *See Van Allen v. Blackledge*, 35 S.W.3d 61, 64 (Tex. App.--Houston [14th Dist.] 2000, pet. denied).

[277] *See In re T.E.T.*, 603 S.W.2d 790, 798 (Tex. 1980).

[278] 35 S.W.3d 61, 64 (Tex. App.--Houston [14th Dist. 2000, pet. denied).

[279] *Id.* at 65.

[280] *Id*. at 66-67.

[281] 147 S.W.3d 521 (Tex. App.–Fort Worth 2004, pet. denied).

> Once error in the apportionment of peremptory jury challenges has been found, a reversal is required only if the complaining party can show that the trial was materially unfair. This showing is made from an examination of the entire trial record. If the trial is hotly contested and the evidence sharply conflicting, the error in awarding peremptory challenges results in a materially unfair trial.[282]

However, the court affirmed the judgment where there was no harm proven because the record indicated that the failure to apportion strikes among the parties did not result in a materially unfair trial that caused the rendition of an improper judgment.[283]

### b. Striking Venire Member Due to Prohibited Classification

A party can object to the opposing party's use of his peremptory challenges in that he excluded a panelist because of some prohibited classification — a *Batson* objection.[284] For example, a party may not use a peremptory strike to remove a venire member solely due to race[285] or due to ethnicity.[286] The objection must be made after the peremptory strike is exercised but before the jury is sworn and the remainder of the venire is excused.[287] The procedure to make a *Batson* objection is a three step process.

First, the opponent of the challenge must make a prima facie case of discriminatory use of peremptory challenges: 1) the other lawyer exercised peremptory challenges to remove from the venire a member of a protected class, and 2) these facts, and any other relevant circumstances, raise an inference that the other lawyer excluded a person from the venire because of his or her status.[288] This objection must be made in a timely fashion, i.e., before the court impanels the jury and dismisses the excluded panel members.[289] Also, the moving party should make a record that illustrates the first *Batson* requirement: introduce the jury information cards into evidence; ask the court to take judicial notice of the race, gender, etc. of the panel; state the race, gender, etc. of the panel on the record; and identify the panelists who were excluded by name and their position on the jury.

Second, if the movant makes a prima facie case, the party making the peremptory strike must come forward with a neutral explanation for the strike.[290] If the party making the

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[282] *Id.*

[283] *See id*.

[284] *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Palacios*, 813 S.W.2d 489 (Tex. 1991); Elaine A. Carlson, *Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 958 (1994).

[285] *See Price v. Short*, 931 S.W.2d 677 (Tex. App. --Dallas 1996, no writ).

[286] *See Benavides v. American Chrome & Chem., Inc*., 893 S.W.2d 624 (Tex. App.--Corpus Christi 1994, writ denied).

[287] *See Pierson v. Noon*, 814 S.W.2d 506 (Tex. App.--Houston [14th Dist.]1991, writ denied).

[288] *See Goode v. Shoukfeh,* 943 S.W.2d 441, 445 (Tex. 1997); *Lott v. City of Fort Worth*, 840 S.W.2d 146, 150 (Tex. App.--Fort Worth 1992, no writ).

[289] *See Pierson v. Noon*, 814 S.W.2d 506, 508 (Tex. App.--Houston [14th Dist.] 1991, writ denied).

[290] *See Good v. Shoukfeh*, 943 S.W.2d 441, 445 (Tex. 1997).

peremptory strike offers a neutral reason for the strike, the burden shifts back to the moving party to show that the neutral reason is a mere pretext for discrimination — the third step.[291] The moving party should attempt to show one of the following: 1) the reason given was not related to the facts of the case; 2) there was little or no questioning of the stricken juror; 3) disparate treatment, other similar jurors were not stricken; or 4) disparate examination, the challenged lawyer questioned the stricken juror with questions that were not asked of other jurors. The *Batson* hearing must be on the record and in open court, and the court's ruling must also be on the record.[292]

## VIII. *BATSON* CHALLENGE TO JURORS THAT ARE SELECTED

So the Court announces who is on the jury, and you notice that the other side used all their preemptory strikes eliminating all of the potential African American jurors, or used their preemptory strikes on all female jurors and you have suspicions about the motive behind those strikes, what do you do?

Make a Batson challenge, objecting that a juror was excluded because of some protected classification. It violated the Equal Protection Clause to exclude a juror due to a protected classification.[293] One need not show that the struck panelist and the party challenging or making the strike are of the same cognizable group.[294]

It violates the Equal Protection Clause of the United States Constitution to exclude jurors because of their race.[295] The Supreme Court has held *Batson* applies in civil cases.[296] Thus, a party to a civil suit can object to another party's use of a preemptory challenge that excludes panelist because of the panelist's race.[297] Both the litigants and the panelists have an equal protection right to jury-selection procedures that are not impermissibly discriminatory.[298] The U.S. Supreme Court has held that racial discrimination in jury selection harms the litigants, racial minorities, and the integrity of the courts.[299]

A party may not exercise a pre-emptory strike to exclude panelists because of the following characteristics:

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[291] *See id.*

[292] *See id.*

[293] *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

[294] *Powers v. Ohio*, 499 U.S. 400, 402 (1991); *Davis v. Fisk Elec Co.*, 268 S.W.3rd 508, 516 n.5 (Tex. 2008).

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

[296] *Flowers v. Mississippi*, __ U.S. ___, 139 S.Ct. 2228, 2243 (2019).

[297] *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628-31 (1991); *Great Plain Equip. v. Koch Gathering Sys.*, 45 F.3d 962, 964 (5th Cir. 1995).

[298] *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994); *Edmonson*, 500 U.S. at 629-30; *U.S. v. Huey*, 76 F.3d 638, 640 (5th Cir. 1996); *Shaw v. Hahn*, 56 F.3d 1128, 1130-31 (9th Cir. 1995); *see Flowers*, __ U.S. at __, 139 S.Ct. at 2242.

[299] *Miller-El v. Dretke*, 545 U.S. 231, 237-38 (2005); *see Flowers*, __ U.S. at ___, 139 S.Ct. at 2242-43; *Johnson v. California*, 545 U.S. 162, 172 (2005).

- RACE.[300]

- ETHNICITY.[301]

- GENDER.[302] Strikes based on characteristics that are disproportionately associated with one gender are not necessarily prohibited.[303]

Others may be protected. Other "cognizable" groups under Batson may include the following:

- Native Americans.[304]

- Italian-Americans.[305]

- Asian-Americans.[306]

- Disabled persons. Protections similar to *Batson* may prevent litigants from striking disabled persons from the jury panel solely because of their disability. The Americans with Disabilities Act (ADA) and the Texas Government Code prohibit the automatic exclusion of a person on the grounds of disability.[307] The ADA applies to everything the State does, including acts of the judiciary.[308]

- Persons of particular religious affiliation. No Texas civil court has addressed this issue. The Court of Criminal Appeals has held that *Batson* does not prohibit strikes based on religion.[309]

After voir dire, if one party (*Batson* movant) believes the other party (*Batson* respondent) used its preemptory strikes in a discriminatory manner, the *Batson* movant should follow the three-step procedure.[310]

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[300] *Batson*, 476 U.S. at 96; *Davis*, 268.

[301] *Hernandez v. New York*, 500 U.S. 352, 355 (1991)(Hispanic); *Benavides v. American Chrome & Chems., Inc*., 893 S.W.2d 624, 626-27 (Tex.App. – Corpus Christi 1994)(same), *writ denied*, 907 S.W.2d 516 (Tex. 1995).

[302] *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994); *Davis*, 268 S.W.3d at 510.

[303] *E.G., J.E.B*., 511 U.S. at 143 & n.16 (challenges to all nurses would not be gender-based even though it would disproportionately affect women).

[304] *See U.S. v. Childs*, 5 F.3d 1328, 1337 (9th Cir. 1993); *U.S. v. Iron Moccasin*, 878 F.2d 226, 229 (8th Cir. 1989); *U.S. v. Chalan*, 812 F.2d 1302, 1313-14 (10th Cir. 1987).

[305] *See U.S. v. Biaggi*, 853 F.2d 89, 95-96 (2nd Cir. 1988). But *see U.S. v. Bucci*, 839 F.2d 825, 832-33 (1st Cir. 1988)(whether Italian-Americans are a cognizable group is a question of fact).

[306] *See U.S. v. Sneed*, 34 F.3d 1570, 1578-79 (10th Cir. 1994).

[307] See 42 U.S.C. §12132 (any disability), Tex. Gov't Code §62.104(a)(blindness), §62.1041(a)(deafness).

[308] *E.g., Galloway v. Superior Court*, 816 F.Supp. 12, 18-19 (D.D.C. 1993)(ADA prevented federal courts from automatically excluding blind persons from juries).

[309] *Casarez v. State*, 913 S.W.2d 468, 495-96 (Tex.Crim.App. 1995).

A party must make a *Batson* challenge before the Court empanels the jury and dismisses the potential jurors who were not selected.[311]

A *Batson* challenge usually follows a three-step process: (1) movant establishes prima facie case by showing other party exercised a pre-emptory strike on a suspected class and that along with other circumstance raises an inference of discrimination; (2) the *Batson* respondent articulates a neutral explanation: (3) Court analyzes arguments and direct and circumstantial evidence to determine if the neutral explanation was pretextual for discrimination against a protected class.[312]

Statistics and side by side comparisons are strong evidence to establish *Batson* challenges.[313] In *Miller-El*, the Court conducted a comparative juror analysis, noting that "[m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists who were allowed to serve."[314] The Court explained that if an attorney's "proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Baston's* third step."[315]

If the Court decides the panelist was unlawfully excluded, it can reinstate the challenged panelist or may dismiss the panel and call for a new one.[316]

*Batson* challenges are an important tool to ensure a trial by jury of one's peers in their community, not just an exclusive group.

## IX. SEATING OF JURY

After each party makes its for-cause strikes and peremptory strikes, the clerk of court is to call those individuals remaining on the panel to serve on the jury.[317] These persons are to be called in the order in which they appear on the panel.[318] One court has recently addressed the situation where the clerk mistakenly fails to call a panel member to the jury – skips her name – and as a result a panel member is seated on the jury that should not have been.[319] After the verdict, but before rendition of judgment, appellant filed a motion for new trial asserting, among

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[310] *Goode*, 943 S.W.3d at 445-46.

[311] *In re K.M.B*., 91 S.W.3d 18, 27 (Tex. App.—Fort Worth, no pet.).

[312] *Davis*, 268 S.W.3d at 525.

[313] *Miller–El v. Dretke,* 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005); *see also Davis v. Fisk Elec. Co*., 268 S.W.3d 508, 511 (Tex. 2008).

[314] *Id.* at 241.

[315] *Id*. at 241.

[316] *Pierce v. Short*, 931 S.W.3rd 677, 681 Tex. App.—Dallas, no writ).

[317] *See* TEX. R. CIV. P. 234.

[318] *See id*.

[319] *Wells v. Barrow*, 153 S.W.3d 514 (Tex. App.–Amarillo 2004, no pet.).

other grounds, that the jury was not properly selected. Appellant's motion argued in support of her challenge to the jury that she was "entitled to a new trial because the jury chosen by the parties was not the jury that was impaneled to hear the case." The court of appeals held that although an error occurred, that it was harmless and affirmed the judgment.[320] Accordingly, if a clerk or bailiff fails to call the names for the jury in the correct order, a party should immediately point his error out to the trial court so that it can be corrected. Otherwise, the party may have a difficult time on appeal proving reversible error.

## X. CONCLUSION

Voir dire is an opportunity to hear from the people who will decide your case and eliminate potential jurors who have their mind made up against you. It is also an opportunity to build in error in case the jury selected delivers an adverse verdict. In a post COVID world, you cannot be too careful in jury selection or risk a jury who is ready to send a message.

[320] *See id*.