

**TEXAS VOIR DIRE:
AN AERIAL VIEW
OF JURY DE-SELECTION**

Steven C. Laird

**Law Offices of Steven C. Laird, P.C.
PERSONAL INJURY ATTORNEYS**

**1824 8th Avenue
Fort Worth, Texas 76110**

(817) 531-3000
www.texlawyers.com
laird@texlawyers.com
November 2, 2010

TABLE OF CONTENTS

A.	Introduction	5
B.	Purpose of Voir Dire	5
C.	Preliminary Matters	6
	1. Jury Shuffle	6
	2. Equalization of Strikes	7
	3. Length of Voir Dire	8
D.	Challenges to Jurors	
9		
	1. Strikes for Cause	9
	a. Statutory Grounds for Striking Jurors	9
	b. Striking Jurors for Bias	10
	1. What Constitutes Bias?	10
	2. Rehabilitation After an Expression of Bias	11
	3. Delving Into Issues of Bias	
12		
	2. Peremptory Challenges	14
	a. Generally	14
	b. <i>Batson</i> - Using Peremptory Challenges for Improper Reasons	14
E.	Preservation of Error in Voir Dire	
15		
	1. Equalization of Strikes	15
	2. Challenges for Cause	16
F.	Tips	17

TABLE OF AUTHORITIES

A. Cases

<i>Babcock v. Northwest Mem. Hosp.</i> , 767 S.W.2d 705 (Tex. 1989)	5
<i>Barrett v. State</i> , 516 S.W.2d 181 (Tex. Crim. App. 1974)	8
<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S.Ct. 1712 (1986)	14
<i>Brumfield v. Exxon Corp.</i> , 63 S.W.3d 912 (Tex. App. — Dallas 2002, pet. denied)	14, 15
<i>Carr v. Smith</i> , 22 S.W.3d 128 (Tex. App. — Fort Worth 2000, pet. denied)	7
<i>Compton v. Henrie</i> , 364 S.W.2d 179 (Tex. 1963)	10
<i>Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.</i> , 159 S.W.3d 87 (Tex. 2005)	
<i>passim</i>	
<i>Cortez v. HCCI-San Antonio, Inc.</i> , 131 S.W.3d 113 (Tex. App. — San Antonio 2004), <i>aff'd</i> 159 S.W.3d 87 (Tex. 2005)	10
<i>Davis v. Fisk</i> , 187 S.W.3d 570 (Tex. App. — Houston [1st Dist.] 2006, pet. granted)	18
<i>Edmonson v. Leesville Concrete Co., Inc.</i> , 500 U.S. 614, 111 S.Ct. 2077 (1991)	14
<i>Goode v. Shoukfeh</i> , 943 S.W.2d 441 (Tex. 1997)	14, 15
<i>Gum v. Schaffer</i> , 683 S.W.2d 803 (Tex. App. — Corpus Christi 1984, no writ) (per curiam), <i>overruled by Cortez ex rel Estate of Puentes v. HCCI-San Antonio, Inc.</i> , 159 S.W.3d 87 (Tex. 2005)	22
<i>Hafi v. Baker</i> , 164 S.W.3d 383 (Tex. 2005) (per curiam)	10, 12, 13
<i>Hyundai Motor Co. v. Vasquez</i> , 189 S.W.3d 743 (Tex. 2006)	<i>passim</i>
<i>Lassiter v. Bouche</i> , 41 S.W.2d 88 (Tex. Civ. App. — Dallas 1931, writ ref'd)	6
<i>Lopez v. Foremost Paving, Inc.</i> , 709 S.W.2d 643 (Tex. 1986) (per curiam)	8
<i>In re M.N.G.</i> , 147 S.W.3d 521 (Tex. App. — Fort Worth 2004, pet. denied)	8, 15, 16
<i>McCoy v. Wal-Mart Stores, Inc.</i> , 59 S.W.3d 793 (Tex. App. — Texarkana 2001, no pet.)	8
<i>Molina v. Pigott</i> , 929 S.W.2d 538 (Tex. App. — Corpus Christi 1996, writ denied)	11
<i>Odom v. Clark</i> , 215 S.W.3d 571 (Tex. App. — Tyler 2007, pet. denied)	9
<i>Patterson Dental Co. v. Dunn</i> , 592 S.W.2d 914 (Tex. 1979)	7
<i>Pojar v. Cifre</i> , 199 S.W.3d 317 (Tex. App. — Corpus Christi 2006, pet. denied)	16

<i>Powers v. Palacios</i> , 813 S.W.2d 489 (Tex. 1991)	14
<i>Purkett v. Elem</i> , 514 U.S. 765, 115 S.Ct. 1769 (1995)	14
<i>Ratliff v. State</i> , 690 S.W.2d 597 (Tex. Crim. App. 1985) (en banc)	8
<i>Van Allen v. Blackledge</i> , 35 S.W.3d 61 (Tex. App. — Houston [14th Dist.] 2000, pet. denied)	15
<i>Vickery v. Behar</i> , 2006 WL 1140685 (Tex. App. — Houston [14th Dist.] Apr. 26, 2006, no pet.) (mem. op.)	16
<i>Welch v. McLean</i> , 191 S.W.3d 147 (Tex. App. — Fort Worth 2005, no pet.)	15
<i>White v. Dennison</i> , 752 S.W.2d 714 (Tex. App. — Dallas 1998, writ denied)	11
<i>Whiteside v. Watson</i> , 12 S.W.3d 614 (Tex. App. — Eastland 2000, pet. w'drawn)	7
B. <u>Other Authorities</u>	
Tex. Const. art. 1, § 15	5
Tex. Gov't Code § 62.102	10
Tex. Gov't Code § 62.105	10
Tex. R. Civ. Pro. 223	6, 7
Tex. R. Civ. Pro. 233	
7	
A. <u>Introduction</u>	

In many cases, the de-selection of the jury is at least as important as the facts and the law. Given the deference appellate courts are required to give to the jury's right to weigh the evidence, decide which witness is to be believed, to find facts, etc., the makeup of the jury can have an enormous effect not only on the outcome of the case but also of any subsequent appeal. Despite this, voir dire as a process can often receive surprisingly short shrift, being overlooked in the flurry of trial preparation, pretrial motions, witness preparation and the like.

Voir dire is a tricky thing. Compared with other aspects of trial practice, there are few hard and fast rules governing the conduct of voir dire. As crucial as voir dire is, there are no rules of civil procedure specifically governing how the entire process is to be conducted, or its permissible scope. In fact, it often seems as if every judge

handles it in his or her own preferred way.

Voir dire also involves a balancing act on the part of the court. It must be limited enough to ensure it may be completed in a reasonable amount of time but flexible enough to accomplish its goal of identifying and removing those jurors who should not serve on the jury. On top of all this, it must be fair to both sides.

The following paper is intended to be a brief overview of voir dire as it occurs in the courtroom.

B. Purpose of Voir Dire

To effectuate the purpose of voir dire — to expose possible bias and prejudice in potential jurors — litigants must be given broad latitude to question potential jurors. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006); *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 93 (Tex. 2005); *Babcock v. Northwest Mem. Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). Under the Texas Constitution litigants are entitled to a fair and impartial jury, Tex. Const. art. 1, § 15, and one of the few tools available to accomplish this goal is the examination of the jury pool in voir dire. This fundamental purpose necessarily means the scope of voir dire cannot be overly limited by inflexible rules, because in order to expose the delicate nature of a potential bias voir dire must be inherently subjective, *Hyundai Motor Co.*, 189 S.W.3d at 750, but this lack of inflexible rules does not mean voir dire cannot be subject to reasonable limits are necessary to protect against litigants using the examination improperly.

Since strict rules cannot be applied to such a subjective process, the best method of applying reasonable limitations is through the discretion of the trial court. It is well established that trial courts have broad discretion in conducting voir dire. *Hyundai Motor*, 189 S.W.3d at 753; *Cortez*, 159 S.W.3d at 92; *Lassiter v. Bouche*, 41 S.W. 2d 88, 90 (Tex. Civ. App. — Dallas 1931, writ ref'd). This is the case because trial judges are in the courtroom when the questions are asked, observe the demeanor of the jurors, and are in a better position altogether than outsiders to grasp the context in which voir dire questions are asked. *Hyundai Motor*, 189 S.W.3d at 755.

C. Preliminary Matters

1. Jury Shuffle

Before beginning the actual Q and A of voir dire, counsel should first consider whether to seek a jury shuffle. A jury shuffle (colloquially known as a “shake”) is the

act of asking the Court to take all the jurors who have been seated, shuffle their names, and have them seated once again. Usually this is done because the party requesting the shuffle does not like the faces seated in at least places 1 through 24. (Although see the discussion of *Batson* challenges below for the limits of counsel's ability to make decisions regarding the jury based on perceptions unrelated to information gleaned through voir dire.)

A jury shuffle is permitted by Rule 223. A request that the jury be shuffled must be made before voir dire begins, or else it is waived. *Carr v. Smith*, 22 S.W.3d 128, 133-34 (Tex. App. — Fort Worth 2000, pet. denied). In those counties which use a juror questionnaire, the shuffle must be requested before the questionnaires are completed, because the questionnaire constitutes the beginning of voir dire. *Carr*, 22 S.W.3d at 133-34. What this means in counties where potential jurors complete their questionnaires before they even appear at the courthouse is not clear.

Once a jury shuffle has been requested, the court is to place the names of all the members of the panel into a "receptacle," shuffle them and then draw them out one at a time. Tex. R. Civ. Pro. 223. Interestingly, Rule 223 specifies that there may only be one jury shuffle per case, *not* one per side, so it is first come, first served. However, the shuffle that occurs must be in compliance with the provisions of Rule 223; a shuffle done in some other way is not treated as a shuffle for the "one shuffle per case" provisions of the rule. *Whiteside v. Watson*, 12 S.W.3d 614, 618 (Tex. App. — Eastland 2000, pet. w'drawn) (first jury shuffle was done by physically shuffling juror cards rather than drawing them from a receptacle; permitting second shuffle to be done in accordance with the rule was not error).

2. Equalization of Strikes

Another issue that is best addressed before voir dire actually begins is the equalization of strikes. The general rule is that litigants in district court are each entitled to six peremptory challenges and those in county court to three, but this general rule only applies strictly where there is one party on each side of the "v". Tex. R. Civ. Pro. 233. In those cases where there are multiple parties, it is the trial court's "duty" to decide how the interests of the parties actually align, although only on the motion of a party. *Id.* Based on the determination of who is actually adverse to whom, the court is supposed to "equalize the number of peremptory challenges," *Id.*, although to the extent it implies equal numbers the term "equalization" is a misnomer. Instead, the "equalization" is to prevent any side from enjoying an unfair advantage. *Id.*

If it sounds like this gives trial courts a considerable degree of freedom in equalizing peremptory challenges, this is only because it does. The leading case on

the issue is *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979). In *Patterson Dental* the Supreme Court approved a court either increasing the number of strikes afforded one side or decreasing the number of strikes afforded the other, and rejected the idea that a fixed ratio of strikes-to-sides was required, although at some point too great a disparity (in the case, four-to-one) was so high as to itself be unfair. *Patterson Dental*, 592 S.W.2d at 920-21. Additionally, the question of when litigants are allowed to coordinate the use of their strikes can also affect equalization determinations; permitting coordination can show the number of strikes given a side is unfairly high, since coordination implies the parties are not genuinely antagonistic (and therefore likely do not need more than the normal number of strikes non-antagonistic parties are allowed), and because allows the strikes they are given to be used as efficiently as possible, i.e., without the danger of double strikes. *Lopez v. Foremost Paving, Inc.*, 709 S.W.2d 643, 645 (Tex. 1986) (per curiam); *In re M.N.G.*, 147 S.W.3d 521, 532 (Tex. App. — Fort Worth 2004, pet. denied).

As a matter of good practice, if you are litigating a case with a number of parties on the other side, you should consider filing a motion to equalize the strikes and have it heard before the jury is cooling its heels out in the hall. At the very least it will allow you to know going in how many strikes you and your opponents will have to work with when it comes time to seat the jury.

3. Length of Voir Dire

Finally, there is the question of how long you will get for voir dire. This time can vary wildly from court to court, and there is no set rule (or even fixed practice) governing the amount of time provided, although it has been recognized that trial courts have the right to limit the time spent on voir dire, *Cortez*, 159 S.W.3d at 92, and the time allowed seems more frequently gets shorter and shorter. Many of the cases discussing this issue in any detail are criminal cases, but their holdings are instructive and show that no time limit on voir dire is per se proper or improper, and the analysis of the question will depend on the facts. Thirty minutes is enough where counsel questioned the panel in a way that wasted everyone's time, *Barrett v. State*, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974); *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793, 796 (Tex. App. — Texarkana 2001, no pet.), while 81 minutes might not be enough. *Ratliff v. State*, 690 S.W.2d 597, 598-600 (Tex. Crim. App. 1985) (en banc).

This suggests trial counsel needs to be cognizant of three things. First and foremost, don't waste time, especially time spent asking those pointless, open-ended questions that rarely result in any useful information. Second, if you think the court is likely to limit you to a voir dire period you do not believe is long enough, move to increase the time (or fix the time) before trial. You may need to explain the reasons why additional time is necessary.

Finally, if the court calls time before you are done, be able to articulate specific questions you wish to ask and/or specific panel members you wish to question about some matter in support of your request for additional time. Towards this end, it might help to have a few clearly proper voir dire questions written out and held in “reserve.” When the court calls time, approach and present it with the questions you have, and a request for time to ask them. If this request is granted, you have your additional time. If it is not, you can dictate the questions into the record to complain about the lack of sufficient time on appeal. *Odom v. Clark*, 215 S.W.3d 571, 574 (Tex. App. — Tyler 2007, pet. denied) (counsel afforded one hour for voir dire, and then asked for more time to ask questions in ten additional areas; refusal to allow more time was not error because counsel failed to clearly tell the court what questions he would ask if given more time).

D. Challenges to Jurors

1. Strikes for Cause

a. Statutory Grounds for Striking Jurors

There are certain minimum qualifications a juror must meet before they are allowed to serve on a jury, and the increased use of driver’s license records rather than voter registration records to pick jurors means the chance of an unqualified juror being called to serve are increasing. On the other hand, many counties now “pre-screen” jury pools to cull the disqualified out before they even arrive at the courthouse, reducing the number of disqualified jurors being called to service. Because one can never be sure:

A juror must be:

- at least 18 years old;
- a citizen of Texas;
- a citizen of the county in which the case is being tried;¹
- qualified (although not necessarily registered) to vote in the county;
- “of sound mind and good moral character”;²
- able to read and write;

A juror cannot:

- have served on another jury for six days in the prior three months;

- have been convicted of misdemeanor theft or any felony;
- be accused of having committed misdemeanor theft or felony;
- be a witness in the case;
- be interested, directly or indirectly, in the outcome of the case;
- be related within the third degree of consanguinity to a party, either by blood or marriage; or
- have any “bias or prejudice in favor of or against a party in the case.”

Tex. Gov’t Code §§ 62.102, 62.105.

Most of the foregoing grounds for disqualification of a juror are uncontroversial and easy to apply, except for the last. The question of when a juror is biased enough that they must be found to be disqualified to serve is often *the* question in any voir dire.

b. Striking Jurors for Bias

1. What Constitutes Bias?

In deciding whether a juror may or may not be stricken for cause on the basis of bias or prejudice, it is first necessary to understand what kind of bias or prejudice is sufficient to support a challenge for cause. In order to support a challenge for cause, the “bias” is an inclination on the part of the juror towards one side or the other. *Cortez v. HCCI-San Antonio, Inc.*, 131 S.W.3d 113, 117 (Tex. App. — San Antonio 2004), *aff’d* 159 S.W.3d 87 (Tex. 2005). “Prejudice” means a prejudgment about the matter at issue, *Vasquez*, 189 S.W.3d at 751, and therefore necessarily indicates the existence of a disqualifying bias. *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963) (prejudice necessarily embraces the concept of bias). However, in either case this inclination or prejudgment cannot just be a mild preference or an inclination to see one side as more likely to win; rather, the bias or prejudice must rise to a level where the natural inference is the juror cannot act impartially. *Vasquez*, 189 S.W.3d at 751; *Hafi v. Baker*, 164 S.W.3d 383, 385 (Tex. 2005) (per curiam).

2. Rehabilitation After an Expression of Bias

For many decades the rule was clear about not being able to rehabilitate a biased panel member. Once a juror said something indicating he could not fairly judge the case, either because of a bias against one of the parties, against the kind of case or against all lawsuits generally, that juror should be struck for cause. *See, e.g., White v. Dennison*, 752 S.W.2d 714, 718 (Tex. App. — Dallas 1998, writ denied) (an expression of bias or prejudice removed all discretion and forced the court to strike the juror for cause); *accord*,

Molina v. Pigott, 929 S.W.2d 538, 541 (Tex. App. — Corpus Christi 1996, writ denied). The biased juror could not be rehabilitated, he could not be saved, he could not sit on the jury. *Gum v. Schaffer*, 683 S.W.2d 803, 807-08 (Tex. App. — Corpus Christi 1984, no writ) (per curiam), overruled by *Cortez ex. rel Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005) (explicitly rejecting attempt to rehabilitate juror after expression of bias and finding exclusion for cause was required). The largest change in voir dire practice in the century has been the recent change to this rule.

This rule was changed by the Supreme Court in *Cortez*, largely by redefining what it meant to “rehabilitate” a potential juror. Rehabilitation had always been understood to mean the asking of additional questions in an attempt to get that potential juror to “recant” his statement showing bias or prejudice. In *Cortez*, the Supreme Court changed this definition: although it stated the “ultimate recantation” of a statement showing bias or prejudice “at the prodding of counsel” will “normally” not be sufficient to prevent the juror from being stricken for cause, further questioning of what the juror meant in an attempt to show no bias or prejudice actually exists is not impermissible rehabilitation. *Cortez*, 159 S.W.3d at 92. How courts and counsel are supposed to recognize the difference between impermissible “prodding” and mere “further questioning” is left unclear.

The rationale for *Cortez* is that an expression that may on its face appear to show bias or prejudice can mean one of two things: (1) the potential juror is, in fact, biased; or (2) the potential juror is not biased, and his statement was the product of a mistake, given in response to an unclear question, an infelicitous expression of his actual views, etc. *Id.* at 93. The later, additional questioning may show a mistake has been made or a misunderstanding has occurred, thereby preventing “an impartial venire member from being disqualified by mistake.” *Id.* These additional questions must be specific and intended to further delve into the previous expression that may show bias, but the degree to which this is true is also left unclear in light of the Supreme Court’s warning that trial courts should not be “too hasty” in cutting off any line of examination that may end up showing a particular juror is not actually biased. *Id.* at 92-93. Ultimately, the Court seemed to say that extensive questioning regarding the particulars of any expression of bias was to be permitted, and if in the aggregate the record showed the juror would at least try to be fair, he should not be disqualified. *Id.* at 94; *accord, Hafi*, 164 S.W.3d at 385

3. Delving Into Issues of Bias

It was not long before the issue presented itself, in *Hyundai Motor Company v. Vasquez*. *Hyundai Motor* was a tragic case, involving a small child who was killed by a deploying air bag when the car in which he was riding was involved in an accident. *Hyundai Motor*, 189 S.W.3d at 747. However, the plaintiffs had to deal with a bad fact: the child was not belted in at the time of the collision. *Id.* Recognizing this was a problem, plaintiff’s counsel asked

the members of the jury panel whether this fact would influence their verdict. When a large number of potential jurors said that it would, the trial court dismissed not one, but two complete panels. *Id.* at 747-48. The third time around, the trial court prevented plaintiff's counsel from asking about the specific fact that the child was not belted, although it did permit more general questions about seatbelt use. *Id.* at 748.

The plaintiff lost, and on appeal argued that the trial court's refusal to allow the jury panel to be questioned about the specifics of seat belt use meant the plaintiff was denied a fair opportunity to determine the biases and prejudices of the panel members. *Id.* at 749. The Supreme Court found the trial court acted properly, holding that while parties had the right to use voir dire to determine how to exercise their peremptory challenges intelligently, they do not have the right to use them as a mechanism for selecting a favorable jury. *Id.* at 749-50. In so doing, it rejected the claims that specific questions regarding the facts of the case were a vehicle for making determinations regarding potential bias or prejudice, finding: (1) whether one is biased is a broad issue, and involves an inquiry into attitudes, not specific evidence; and (2) questions regarding specific pieces of evidence do not tend to show bias, because the weight to be afforded particular evidence cannot be determined in a vacuum. *Id.* at 752. Accordingly, courts have the right to refuse to permit counsel to ask questions that seek to have potential jurors commit about the weight they will give any particular piece of evidence. *Id.* at 753-55.

Cortez says an indication of bias or prejudice is not automatically disqualifying. Instead, additional questions should be asked to determine the existence and scope of the bias or prejudice a juror may have. Courts should allow parties broad latitude to ask these follow up questions to make sure a baby of an impartial juror is not thrown out with the bathwater of the biased, prejudiced and otherwise unqualified panel member.

But *Hyundai Motor* appears to go on and create a significant exception to this rule. The questions used to ferret out potential bias cannot be based on what the evidence in case will actually show. In *Hyundai Motor*, the Court seemed more concerned that specific questions about the facts of the case might be confusing and elicit answers from jurors that are misleading rather than enlightening. This ignores the fact that while bias and prejudice may be general, they usually rear their heads in a civil jury trial in relation to particular facts. The fact a potential juror is prejudiced against men named Gustav is relevant if one of the parties or witnesses is named Gustav — otherwise, the issue will not come up.

While *Hyundai Motor* may have come out the way it did because of the particular wording of the questions plaintiff's counsel wanted to ask, it is widely understood to mean that asking questions that appear to be too fact specific of potential jurors constitutes an impermissible attempt to have jurors commit about the weight to be given a piece of evidence. In fact, such questions often seek no such commitment, but rather represent an attempt to determine whether a general

statement indicative of bias or prejudice was actually meant and will come into play in the suit at bar.

It remains to be seen what effect *Cortez*, *Hafi* and *Hyundai Motor* have on jury practice — will it result in great discretion being vested in trial courts, or will it provide yet another mechanism for appellate courts to review the outcome of a case in a lower court, or both?

2. Peremptory Challenges

a. Generally

Once all challenges for cause have been sustained or overruled, counsel then has a chance to exercise his peremptory challenges. This is usually a fairly straightforward exercise in striking those left in the jury pool who you believe are less favorable to your position than they should be, or who are unlikely to see the case the way your client does.

b. Batson — Using Peremptory Challenges for Improper Reasons

However, just because a peremptory challenge can be used to strike a juror for reasons other than cause does not mean it can be used to strike a juror for any reason. In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) it was held that striking a juror in a criminal case on the account of his race violates the juror's right to serve on the jury, *Powers v. Palacios*, 813 S.W.2d 489, 490 (Tex. 1991), a holding later extended to civil cases in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077 (1991). If a litigant believes his opponent has used his peremptory strikes to remove jurors for such an impermissible reason, resolution of this issue involves a three step process: (1) the opponent of the peremptory challenge must establish a prima facie case of discrimination; (2) the party who used the peremptory strike must provide a neutral explanation for his actions; and (3) if he does, then the challenging party must prove purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769 (1995); *Goode v. Shoukfeh*, 943 S.W.2d 441, 445 (Tex. 1997).

The first step — a prima facie showing of discrimination — is usually easy to show. The second step — the explanation of why the strikes affected a particular protected group — is also easy, as all it requires is that the party making the strikes to offer some explanation for its actions other than the race, gender, etc. of the stricken panel members. *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 916 (Tex. App. — Dallas 2002, pet. denied). It is only in the third step that the question of whether this explanation is persuasive

or even plausibly considered, and requires determining: (1) whether the explanation relates to the facts of the case; (2) the lack of meaningful questioning of the challenged juror; (3) disparate treatment of members of the jury pool who answered the same question similarly or who exhibited similar characteristics; (4) disparate treatment of members of the jury pool by asking particular questions of some but not of others; and (5) whether the explanation is based on bias against a group without a showing the trait in question applies to the particular juror. *Brumfield*, 63 S.W. 3d at 916-17. The burden of showing an impermissible basis for a strike lies with the party challenging the strike, and the determination of the issue is committed to the trial court. *Goode*, 943 S.W.2d at 445-46; *Welch v. McLean*, 191 S.W.3d 147, 163 (Tex. App. — Fort Worth 2005, no pet.).

The most recent pronouncement on racial discrimination in voir dire was stated in *Davis v. Fisk*, 268 S.W.3d 508 (Tex. 2008), in which five of the six peremptory strikes were used on African Americans, and the sixth used on an Asian American. The Court noted that the statistical disparity was striking. Eighty-three percent of the Defendant's peremptory strikes (five out of six) were used on African Americans, with only one (5.5%) of the eligible non-black prospective jurors being stricken. This "happenstance is unlikely to produce this disparity." *Id.* at 516. The Court also goes to great length to describe what the record should reflect, as well as obtaining a ruling or confirmation from the Court, when non-verbal cues or body language is used as a race-neutral justification for striking a venireman. This case is must read for a proper *Batson* challenge.

E. Preservation of Error in Voir Dire

Claims of error most frequently occur in two contexts: when a party believes the trial court has fouled up the equalization of strikes, and when a party believes a potential juror should have been stricken from the jury pool for cause, but he was not.

1. Equalization of Strikes

As is the case with an error made by a trial court, step one is to make a timely objection to the apportionment of peremptory challenges. *Patterson Dental*, 592 S.W. 2d at 918. Generally, such a challenge is timely only if it is before the peremptory strikes have been used, *Id.* at 919, although there may be a limited exception to this rule in cases where the need to equalize strikes did not become apparent until after they were exercised. This occurred in a recent case in Fort Worth, where parties who might have been presumed to be antagonistic acted without antagonism in coordinating their exercise of peremptory challenge; under these circumstances, an object to this coordination made after it occur was timely. *M.N.G.*, 147 S.W.3d at 533.

Because there is a split in authority on the issue, cautious litigants should also

make it a point to inform the court of the identity of the juror he would have stricken had the peremptory challenges been properly apportioned. *Compare M.N.G.*, 147 S.W.3d at 521 (such notice is required) *with Van Allen v. Blackledge*, 35 S.W.3d 61, 66 n. 3 (Tex. App. — Houston [14th Dist.] 2000, pet. denied) (no such notice required).

Finally, the appellant (having preserved error) may also have to show the error was harmful. *Compare Pojar v. Cifre*, 199 S.W.3d 317, 323-24 (Tex. App. — Corpus Christi 2006, pet. denied) (error is harmful) *with M.N.G.*, 147 S.W.3d at 533 (finding any error that occurred harmless).

2. Challenges for Cause

In order to preserve error on the claim that a proper challenge for cause was not properly granted, the objecting party must do three things: (1) use a peremptory challenge on the juror he believes should have been stricken for cause; (2) exhaust his remaining peremptory challenges; (3) inform the court that all peremptory challenges have been exhausted; and (4) notify that court that a specific, objectionable person remains on the jury panel before exercising his strikes. *Vasquez*, 189 S.W.3d at 743; *Cortez*, 159 S.W.3d at 87.

While telling the court that an objectionable person who you wish to strike remains on the panel would seem to imply you have used all of your peremptory strikes (after all, if you had one left you would use it, right?), do not take this third step for granted. *See, e.g., Vickery v. Behar*, 2006 WL 1140685 at * 2 (Tex. App. — Houston [14th Dist.] Apr. 26, 2006, no pet.) (mem. op.). It probably would not hurt to ask the trial court to grant you as many additional peremptory challenges as you need to strike all the objectionable panel members, just to make clear what it is you want the trial court to do and what mistake you believe it has made.

Interestingly, while you have to tell the court the identity of the remaining panel member to which you wish to object, you are not required to tell the court why you object to the presence of that person on the jury. *Cortez*, 159 S.W.3d at 91. However, on the theory that it is always better to take more steps to preserve error than it is to take fewer steps, you might consider telling the court why you do not want the jury, so long as the reason will not run afoul of the limitations imposed by *Batson*.

F. Tips

No overview of voir dire issues would be complete without a section on tips, tricks of the trade learned through hard experience and/or rules of thumb passed down from one's elders that may or may not be true. Here is a list of my favorites.

- Remember the first rule of voir dire: Everyone hates lawyers. The trick is to be the least-hated lawyer in the courtroom.
- A caveat to this first rule is the avoid appearing to “slick.” I would never pretend to suggest exactly what to wear, but more panel members expect you to look like a lawyer. They will be looking at you and your client from the moment they walk in (or see you in the hallway). This will include see your facial expressions and mannerisms, as well as dress. Don't take for granted that your client will know how to dress. Tell him or her.
- A second caveat to the first rule is that when you speak you should speak like a human being, not like a lawyer. It is “Mr. Smith” not “the Plaintiff,” “the collision” not “the incident in question,” and “last Monday,” not “on or about the twenty-fifth of this month.”
- You are on stage from the moment you walk into the Courthouse until the moment you leave. You never know when a potential juror might be watching; do you really want them seeing you berate a clerk?
- Be cognizant of your nervous tick. Everyone has one; the good lawyers hide it. If you click a pen, don't carry one with you. If you say “Uh” too much, practice until you do not. You may not realize that you do these things, but the members of the jury pool do.
- Potential jurors tend to remember: (1) the first thing they hear; (2) the last thing they hear; and (3) something they hear three times. Makes sure you open and close with what you want them to remember, and mention it again in the middle. Use your theme from voir dire on.
- Don't spend too much time with a single panel member on a single topic. A good rule of thumb is three questions is the maximum; then thank the member and move on. Never argue with a potential juror; you will not change their mind.

- You use visual aids at trial, so why not during voir dire? Instead of standing before the jury panel acting like a scale to illustrate the burden of proof, perhaps you may use a Powerpoint or a blow-up of key general questions.
- Just as at trial, never promise something you cannot deliver.
- Use voir dire to inspire the jurors about your case. Make them understand that it is important, not just to the litigants, but generally. Help them see why. It may be too much to think you can get them inspired to serve on the jury, but perhaps you can get them to be at least as interested in the case as you are.

¹ This is a real trap. Some people list an office address on their driver's licenses, even though they live in another county.

² If anyone has ever had a member of the jury pool disqualified on this ground the author would love to hear the story.