TEXAS VOIR DIRE
The Rules Have Changed

By Judge Randy Wilson

Voir dire is one of the hardest skills to master as a trial lawyer. It is interactive, unpredictable, and sometimes contradictory. Lawyers are taught to emphasize their strong points while, at the same time, revealing their bad facts. One of the biggest stumbling blocks, however, is that most lawyers approach voir dire with at best only a rudimentary understanding of what questions are proper and improper. To compound the problem, the Texas Supreme Court has recently handed down three voir dire decisions that have dramatically changed the rules. This article sets out the basic fundamentals of voir dire and how the rules have changed.

Purpose of Voir Dire

The right to a fair and impartial trial is guaranteed by the Texas Constitution[1] and by statute.[2] Texas courts permit a broad range of questions on voir dire.[3] As a result, courts give broad latitude to litigants during voir dire examination to enable parties to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised or determine whether grounds exist to challenge for cause.[4]

Statutory Provisions

Curiously, there are few rules in the Texas Rules of Civil Procedure governing the conduct of voir dire. Rather, voir dire examination is largely governed by and is largely within the sound discretion of the trial judge.[5]

Rules 221 to 235 of the Texas Rules of Civil Procedure pertain to the jury selection process, but provide only limited guidance as to the types of questions that can be asked. Similarly, section 62 of the Government Code defines the qualification of jurors, but again does not dictate what questions are appropriate. The Government Code merely says that a potential juror may be disqualified if he or she has a bias or prejudice in favor of or against a party in the case.[6] Rather, one must look to the cases to determine what questions a lawyer may ask in voir dire.

Past Efforts to Reform Voir Dire

There have been a number of efforts over the years to reform perceived abuses in voir dire. For example, in 1997, the Texas Supreme Court appointed a task force to consider various voir dire reforms.[7] Similarly, at least one current Supreme Court justice, the Hon. Scott A. Brister, has previously written publicly on the need to overhaul the voir dire process.[8] Although these past recommendations were not addressed either statutorily or in rule making, it appears that the current court is moving toward adoption of many of these reforms.

What Is Bias or Prejudice? Is "Leaning" Enough?

The first major issue the Supreme Court addressed this past term was what constitutes bias or prejudice. The courts have always recognized that bias and prejudice "form a trait common in all men."[9] However, "certain degrees thereof must exist."[10] Specifically, the court has defined bias as:

> An inclination toward one side of an issue rather than to the other, 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. Prejudice is more easily defined for it means prejudgment, and consequently embraces bias; the converse is not true.[11]

Trial lawyers frequently ask potential jurors whether they are "leaning" to one side or whether one side is "starting out ahead." In *Cortez v. HCCI-San Antonio,*

Inc.,[12] the first of the three recent Supreme Court voir dire cases, the court was confronted with the question of whether a potential juror who states that one side is "starting out ahead" is grounds for disqualification. In *Cortez*, the issue concerned a veniremember who had worked as an insurance adjuster which gave him "preconceived notions" concerning these types of cases, that he would feel a "bias," that he had seen "lawsuit abuse … so many times" and that the defendant was "starting out ahead."[13] Specifically, the court summarized the venireman's answers:

> 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."[14]

However, he went on to say that he was "willing to try" to listen to the facts and decide the case based on the law and the evidence.[15] The trial court denied the plaintiff's motion to strike for cause and the court of appeals affirmed.[16] The Supreme Court affirmed and held that the fact that the defendant was starting out ahead before the juror even got into the jury box "cannot be grounds for disqualification."[17]

The *Cortez* court was not persuaded that the venireman admitted that he was somewhat biased. The court held that there are no magic words for striking a potential juror for cause:

> Nor do challenges for cause turn on the use of "magic words." Cortez argues, and we do not disagree, that veniremembers may be disqualified even if they say they can be "fair and impartial," so long as the rest of the record shows they cannot. By the same token, veniremembers are not necessarily disqualified when they confess "bias," so long as the rest of the record shows that is not the case.[18]

The court held that merely stating that one party was ahead or that the potential juror was leaning one direction was insufficient to mandate a strike for cause. "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 unshakable conviction."[19] In *Cortez*, the "leaning" question followed an extensive and emotional statement of the facts by the plaintiff's attorney. "A statement that is more a preview of a veniremember'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."[20] The court left open the possibility that a "leaning" might be a ground for a cause strike if it was before any discussion of the facts.[21]

Shortly after *Cortez*, the Supreme Court again considered the leaning and bias or prejudice issue of voir dire in *El Hafi v. Baker*.[22] There, a potential juror in a medical malpractice case stated that he had worked as a personal injury defense lawyer for almost his entire career, that he would relate very much to the defense attorney, and that he would tend to look at the evidence from the defense perspective.[23] However, the potential juror stated that the plaintiff was not "starting out a little behind" the defendant and that he "would do [his] best to be objective."[24] The court held that the juror should not be struck for cause. "Having a perspective based on 'knowledge and experience' does not make a veniremember biased as a matter of law."[25]

Can a Juror Be Rehabilitated?

It has long been held that once a veniremember states that he is biased no further questions can be asked and that no ability to rehabilitate exists.[26] Indeed, several prior decisions support this view.[27] In *Cortez*, the Supreme Court flatly rejected that idea.[28] If a veniremember commits to a position that demonstrates legal bias or prejudice, opposing counsel should not be precluded from asking

additional questions. While further questioning might be futile, it should at least be permitted.[29] "If a veniremember 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."[30] This is particularly so since, as previously discussed, disqualification does not turn on the utterance of a few "magic words," but rather upon the record as a whole.

Cases subsequent to *Cortez* reflect the extent to which "rehabilitation" is permitted and, in addition, the extent to which the appellate courts defer to the trial court's discretion in voir dire. For example, in *McMillin v. State Farm Lloyds*,[31] the trial court refused to disqualify three potential jurors who expressed considerable skepticism over plaintiff's case. Veniremember Roberts said that the mold crisis in homes was "very much overstated," that such lawsuits could raise her premiums which "could bias" her, and that the plaintiffs were starting out behind. But, she also said she could listen to the facts and could award $5 million in damages if the evidence supported it. Veniremember Emmons, among other things, said that plaintiff would have to bring more than 51 percent proof before she would award mental anguish damages and proof beyond all doubt to award punitive damages. But, she also said she could follow the judge's instructions concerning the burden of proof. Finally, veniremember Flores said he could not award the full amount of damages "no matter what," but later said he could award damages if proven. For all these potential jurors, the trial court denied the motion to disqualify and the court of appeals affirmed, stating that this was the type of rehabilitation approved by *Cortez*.[32] Other courts have recently affirmed the trial court's discretion in refusing to disqualify potential jurors who, at first blush, appear to express bias or prejudice.[33]

Can Questions Be Asked Eliciting Comments on the Evidence?

The third, and perhaps most significant, of the recent Supreme Court voir dire cases is *Hyundai Motor Co. v. Vasquez*.[34] The case had a checkered history.

Four-year-old Amber Vasquez died in an automobile collision when her airbag deployed and broke her neck; she was not wearing a seatbelt. Plaintiffs sued Hyundai for defective design. The trial judge had to dismiss the first two voir dire panels before a jury could be seated from the third panel. During the first voir dire, plaintiff's counsel asked whether the fact that Amber was not wearing her seatbelt would determine their verdict; 60 percent said yes and the judge dismissed the panel. During the second voir dire, about one-third said yes to the same question and the judge again dismissed the panel. During the third voir dire, the trial judge permitted general questions about personal seatbelt usage, but did not allow questions that disclosed that Amber was not wearing her seatbelt at the time of the accident.[35]

The jury returned a verdict in Hyundai's favor and a take-nothing judgment was entered. A panel of the San Antonio Court of Appeals affirmed, but the whole court en banc reversed, holding that the trial court abused its discretion in disallowing inquiry concerning the potential jurors' attitudes concerning the fact that Amber was not wearing a seatbelt.[36] The Supreme Court reversed in a 6-3 opinion, holding that the trial court has discretion to refuse to permit questions about the weight jurors would give relevant case facts.[37]

The primary holding of *Hyundai* is that the trial court has discretion whether to permit questions about the weight to be given (or not to be given) to a particular fact or set of facts.[38] The court noted that permitting such questions is fraught with problems. Such questions could skew the jury by pre-testing their opinions;[39] moreover, such questions could be con-

fusing since the jury is told that voir dire is not evidence, yet jurors are asked their opinions to "evidence" revealed by the attorneys.[40]

The court held that the trial court must have discretion to exclude questions that seek to gauge the weight a juror will place on specific evidence. Significantly, the court held:

> In *Cortez*, we held improper both 1) a juror's disqualification based on answers that previewed the juror's vote, and 2) the actual questions that sought the same. Depending on the circumstances, a trial judge may choose to hear juror's responses before deciding whether an inquiry pries into potential prejudices or potential verdicts, but if the question reaches for the latter, a trial court does not abuse its discretion in refusing to allow it. 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.[41]

In *Hyundai*, the specific question that plaintiff sought to ask was "their preconceived notion … that if there is no seatbelt in use, no matter what else the evidence is, [whether] they could be fair and impartial."[42] The trial court's refusal to permit this question was affirmed in *Hyundai*. The Supreme Court reasoned that the trial court reasonably could have determined that the question seeks to gauge the jurors' verdicts. Merely because the question includes such phrases as "regardless of the evidence" or "no matter what else the evidence is" does not render the question permissible since it focuses the jury on one relevant piece of evidence. Thus, a lawyer may ask whether a juror will listen to all the evidence, or whether he will ignore all the evidence. The answer to that question could reveal a bias or prejudice.[43] However, asking whether one fact will so influence the jury that they cannot consider all the remaining evidence merely reflects that jurors think a presented fact is important, based on what they have been told by counsel.[44]

Following *Hyundai*, courts have affirmed trial courts' rulings refusing to permit questions asking jurors reactions or comments to certain evidence. In *In re Commitment of Barbee*,[45] the trial court refused to permit counsel to ask the following question: "Who could not be fair and impartial if the evidence showed that the crimes for which Mr. Barbee was convicted involved children?" The court of appeals concluded it was not an abuse of discretion to prohibit such questions, citing *Hyundai*.

Voir Dire After *Cortez/Baker/Hyundai*

These three Supreme Court decisions change the landscape on Texas voir dire. In the past, questions like these formed the heart of virtually every Texas voir dire:

- After hearing that my client was convicted of DWI, are you leaning ever so slightly against my client?
- Based on this fact of the case, is the other side starting out ahead?
- Is hearing that my client was a decorated war hero a fact that you will consider?
- Is the fact that my client was convicted of child abuse going to make you biased or prejudiced against my client?

Some individual trial courts may permit these questions and others may not, but the answers to those questions cannot form the basis of a cause strike. Similarly, gone are the old familiar arguments:

- Judge, in response to my questions, juror no. 2 agreed that he was biased against my case because of [fill in the blank bad fact].
- Judge, juror no. 2 admitted he was biased, and therefore no rehabilitation is permitted.

In the final analysis, the trial judge has been vested with considerable discretion in the conduct of voir dire. Trial lawyers will have a very difficult time in the future overturning a trial judge's decision

on what questions are permitted and whether a potential juror is biased or prejudiced.

Three of Justice Brister's prior suggested voir dire reforms have now been implemented, *i.e.,* eliminate "leaning" questions, eliminate questions asking whether jurors will consider certain evidence, and permit rehabilitation.[46] Whether the court will continue to reform voir dire remains to be seen.

Notes

1. TEX. CONST. art. I, §15.
2. TEX.GOV'T CODE ANN. §62.105 (Vernon 1988).
3. *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989); *Texas Employers Ins. Assoc. v. Loesch,* 538 S.W.2d 435, 440 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); *Green v. Ligon*, 190 S.W.2d 742 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.).
4. *Babcock*, 767 S.W.2d at 708-09; *Lubbock Bus Co. v. Pearson*, 277 S.W.2d 186, 190 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.).
5. *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793, 801 (Tex. App.—Texarkana 2001, no pet); *Texas Employers Ins. Assoc. v. Loesch*, 538 S.W.2d at 440; *Babcock*, 767 S.W.2d at 709.
6. TEX. GOV'T CODE ANN. §62.105 (Vernon 1988).
7. Supreme Court of Texas, Jury Task Force, Final Report, Sept. 8, 1997 <http://www.courts.state.tx.us/commtask/juryf2.PDF>. The task force recommended that 1) there be a clarification of the prohibition on inquiries as a juror's probable vote, or attempt to commit a prospective juror to a particular verdict; and 2) questions rehabilitating jury panelists be allowed within the trial court's exercise of discretion. The Task Force voted not to prohibit leading questions during voir, albeit with a "vigorous minority." *Id.* at 14.
8. *See* Hon. Scott A. Brister, *Lonesome Docket: Using the Texas Rules to Shorten Trials and Delay*, 46 BAYLOR L. REV. 525 (1994); Hon. Scott A. Brister, *Wanted: Docile, Uninformed Jurors?* TEX. LAWYER, Jan. 27, 1997, at 26; Hon. Scott A. Brister, *Don't Ask, Don't Tell; 10 Possibilities for Reforming Voir Dire*, IN CHAMBERS, Winter 1997, at 7. Among Justice Brister's prior suggestions are: 1) eliminate leading questions; 2) eliminate "leaning" questions; 3) eliminate questions asking whether jurors will consider certain evidence; 4) permit rehabilitation; 5) don't permit lawyers to ask jurors if they have any questions; 6) eliminate questions about hypothetical damage awards; 7) limit the use of questionnaires; 8) limit the time for voir dire.
9. *Compton v. Henrie*, 364 S.W.2d 179, 181 (Tex. 1963).
10. *Id.* at 182.
11. *Id.*
12. 159 S.W.3d 87 (Tex. 2005).
13. *Id.* at 90.
14. *Id.*
15. *Id.*
16. *Cortez ex rel. Puentes v. HCCI-San Antonio, Inc.*, 131 S.W.2d 113 (Tex.App.—San Antonio 2004).
17. 159 S.W.3d at 94.
18. *Id.* at 93.
19. *Id* at 94
20. *Id.*
21. The court cited Jim M. Purdue, *A Practical Approach to Jury Bias*, 54 TEX. B.J. 936, 940 (1991), recommending that disqualification turns on the follow-up question, "Had you formed this opinion before you entered this courtroom?"
22. 164 S.W.3d 383 (Tex. 2005)(per curiam).
23. *Id.* at 385.
24. *Id.*
25. *Id.*
26. H. Lee Godfrey, *Civil Voir Dire: Winning the Appeal Based on Bias or Prejudice*, 31 S. TEX. L. REV. 409 (1990) ("the corollary rule has evolved so that once a juror admits bias, the trial court must excuse that panelist, despite statements that he could decide the case on the evidence and be fair to both sides").
27. *See State v. Dick*, 69 S.W.3d 612, 620 (Tex. App.—Tyler 2001, no pet.); *White v. Dennison*, 752 S.W.2d 714, 718 (Tex.App.—Dallas 1988, writ denied); *Gum v. Schaefer*, 683 S.W.2d 803, 808 (Tex.App.—Corpus Christi 1984, no writ); *Erwin v. Consolvo*, 521 S.W.2d 643, 646 (Tex.Civ.App.—Fort Worth 1975, no writ); *Carpenter v. Wyatt Constr. Co.*, 501 S.W.2d 748, 750 (Tex.Civ.App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Lumbermen's Ins. Corp. v. Goodman*, 304 S.W.2d 139, 145 (Tex.Civ.App.—Beaumont 1957, writ ref'd n.r.e.).
28. 159 S.W.3d at 92.
29. *Id.*
30. *Id.* at 93.
31. 180 S.W.3d 183, 2005 WL 2043847 (Tex. App.—Austin 2005, no pet.).
32. *Id.* at 196.
33. *See Jones v. Lakshmikanth*, 2005 WL 2036739 (Tex. App.—Corpus Christi, Aug. 25, 2005) (veniremember not struck for cause notwithstanding statement that she would have trouble acting fairly since she felt medical malpractice lawsuits hurt patient care); *Silsbee Hospital, Inc. v. George*, 163 S.W.3d 284 (Tex. App.—Beaumont 2005)(no error for trial court to refuse to strike a potential juror who said that she "would have trouble not giving [plaintiff] money—something, anyway" even if he didn't carry his burden of proof).
34. *Hyundai Motor Co. v. Vasquez,* ____ S.W.3d ____, 49 Tex. Sup. Ct. J. 420 (Tex., March 10, 2006).
35. *Id.* at ____.
36. 119 S.W.3d 848 (Tex. App.—San Antonio, 2003)(en banc).
37. ____ S.W. 3d at ____. Two members of the court, Justices Jefferson and Green, were recused. The governor appointed Justice Bland of the First Court of Appeals in Houston and Justice Cayce of the Second Court of Appeals to hear the case. Justice Bland wrote the opinion of the court. The court was apparently divided. The case was initially argued on Jan. 6, 2005. After Justices Cayce and Bland were appointed, the case was reargued more than a year later on Feb. 15, 2006, and the opinion was released on March 10, 2006.
38. ____ S.W.3d at ____.
39. *Id.*
40. *Id.*
41. *Id.* at ____.
42. *Id.* at ____.
43. *Id.* at ____.
44. *Id.*
45. ____ S.W. 3d at ____, 2006 WL 1043203, Tex App.—Beaumont, April 20, 2006.
46. *See* note 8, *supra*.

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