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

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