

**VOIR DIRE – DO’S AND DON’TS
UNDER TEXAS AND FEDERAL LAW
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Jennifer Doan is a founding partner with **HALTOM & DOAN**, a boutique trial and appellate firm with offices throughout East Texas that handles a diverse array of complex litigation for Fortune 500 companies and individuals. Having tried over 75 civil trials, Ms. Doan has been selected twice as national ALM Litigator of the Week for leading the defense of Amazon.com and Hewlett Packard Enterprises in securing victorious jury verdicts in patent cases in the Eastern District of Texas. She is double board certified in both Civil Trial Law and Personal Injury Trial Law by the Texas Board of Legal Specialization, and is named among the Top 50 Women Lawyers in Texas and is listed among the top 100 Civil Defense Litigators in America. Ms. Doan currently serves as Immediate Past Chair of the Litigation Section of the State Bar of Texas, as Secretary for the American Board of Trial Advocates (ABOTA), and as Vice-President of the Texas Chapters of ABOTA (TEX-ABOTA). She chaired the Intellectual Property Committee of the International Association of Defense Counsel, and was selected as a charter fellow of the Litigation Counsel of America. Ms. Doan served on the faculty of the ABOTA Trial College at Harvard University and Yale Law School, and led the Plaintiff's team at the Trial Academy at Stanford University for the International Association of Defense Counsel. She is a Life Fellow of the Texas Bar Foundation, Arkansas Bar Foundation and College of the State Bar of Texas.

Ms. Doan has developed a notable presence in the courtroom in her thirty years of experience as a trial lawyer. She has the unique ability to connect with members of the jury and compellingly paint the facts of a case. She has lead trial teams and procured wins for both plaintiffs and defendants in federal court matters in a number of states including Texas, California, Arkansas and Pennsylvania and she has argued in the Fifth, Eighth, Ninth and Federal Circuit Courts of Appeals.

Ms. Doan has received a number of awards and recognitions including being selected as Lawyer of the Year for East Texas by Best Lawyers and included in *Best Lawyers in America* each year since 2007 and as a Texas Super Lawyer each year since 2005. Most importantly, Jennifer is married to her partner, Darby Doan, and together they have two outstanding daughters, Katherine Anne, a graduate student at the University of Texas, and Johanna Claire, a junior at Baylor University.



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Cole is licensed to practice in all Texas and Arkansas state courts, the Texas Supreme Court and the Arkansas Supreme Court. He is admitted to practice in the United States District Courts for the Eastern District of Texas, Northern District of Texas, Western District of Texas, Southern District of Texas, Eastern District of Arkansas and Western District of Arkansas. He is a member of the American Bar Association, State Bar of Texas, Texas Association of Defense Counsel, Texarkana Bar Association, Texarkana Young Lawyers Association, Intellectual Property Law Section of the State Bar of Texas, the Litigation Section of the State Bar of Texas and the Arkansas Bar Association. He is currently the President of the Texarkana Young Lawyers Association and a 2019 graduate from Leadership Texarkana.

Cole received a Bachelor of Science degree from Southern Methodist University in Dallas, Texas. He was awarded his Juris Doctor degree from the University of Arkansas School of Law in Fayetteville, Arkansas.

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VOIR DIRE – DO’S AND DON’TS UNDER TEXAS AND FEDERAL LAW

I. INTRODUCTION

This paper covers a variety of issues relating to voir dire, “[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury,”¹ at both the state and federal level. Specifically, this paper discusses (1) the law of voir dire under Texas and Federal law, and (2) how to effectively use voir dire within these restrictions, including questions you should ask prospective jurors, how to use social media as a research tool, and how to approach voir dire in light of the COVID-19 pandemic.

II. THE LAW OF VOIR DIRE

Voir dire, the jury-selection phase of a trial, allows lawyers to examine prospective jurors and ensure they are qualified and suitable to serve on the jury. Voir dire may be conducted by either the court or counsel. Generally, the trial court asks the jury panel basic, introductory questions first and then counsel takes over.

“[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.” *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006). Under both Texas and Federal law, litigants are guaranteed a right to trial by a fair and impartial jury, and various restrictions and limitations are in place to protect this right. Tex. Const. art. I, § 15; Tex. Gov’t Code Ann. § 62.105; *see also Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (Sixth Amendment guarantees “a fair trial by a panel of impartial, ‘indifferent’ jurors”).

A. VOIR DIRE UNDER TEXAS LAW

In Texas, the right to a fair and impartial jury is guaranteed by the Constitution and by statute. *See* Tex. Const. art. I, § 15; Tex. Gov’t Code Ann. § 62.105. Jurors are automatically disqualified if he or she:

- (1) is a witness in the case;
 - (2) is interested, directly or indirectly, in the subject matter of the case;
 - (3) is related by consanguinity or affinity within the third degree, as determined under Chapter 573, to a party in the case;
 - (4) has a bias or prejudice in favor of or against a party in the case;
- or
- (5) has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.

Tex. Gov’t Code Ann. § 62.105.

¹ Black’s Law Dictionary (11th ed. 2019).

Additionally, jurors may be disqualified “for cause” or by a “peremptory challenge.” Tex. R. Civ. P. 227. 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.” Tex. R. Civ. P. 228.

Regarding peremptory challenges, Texas courts allow “broad latitude to counsel to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised.” *Hyundai Motor Co.*, 189 S.W.3d at 749 (internal quotations omitted). A peremptory challenge, also referred to as a “strike,” may be made to a juror without reason. Tex. R. Civ. P. 232. Although peremptory challenges are not intended to allow a party to select a “favorable jury,” they “allow parties to reject jurors they perceive to be unsympathetic to their position.” *Hyundai Motor Co.*, 189 S.W.3d at 749-50. Peremptory challenges may NOT be used for the discriminatory purposes of removing all jurors of a certain race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). To challenge an opposing party’s use of a preemptory challenge for a discriminatory purpose (i.e. a *Batson* challenge), the opposing party must lodge an objection as to the use of the peremptory challenge before the jury is sworn and the remainder of the venire is discharged.²

The trial court controls the voir dire examination and ensures that these challenges are not abused. *See Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92 (Tex. 2005). Trial courts have broad discretion in conducting voir dire, and they may impose “reasonable restrictions,” including reasonable time limits on the amount of time each party can question the jury panel. *See Wappler v. State*, 183 S.W.3d 765, 772 (Tex. App. 2005); *Hyundai Motor Co.*, 189 S.W.3d at 753.³

1. Do’s and Don’ts

Although the scope of your voir dire examination depends on what your trial judge will allow, certain rules, statutes, and cases provide counsel with guidance for conducting a proper (or improper) voir dire. Generally, a party is entitled to inquire into matters reasonably related to the issues presented in the case. *See Babcock v. Nw. Mem’l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). Below is a list of subjects that Texas courts have held to be proper or improper.⁴

² For more information on *Batson* challenges and juror misconduct, see Judge Les Hatch’s “Disorder in the Court: Voir Dire with a Focus on *Batson* and Juror Misconduct” presented at the 36th Annual Litigation Update Institute by the Litigation Section of the State Bar of Texas. Judge Hatch’s article is available through TexasBarCLE.com (<http://www.texasbarcle.com/CLE/Home.asp>).

³ Notably, Texas courts make no distinction between the voir dire standards for civil cases and criminal cases. *See Hyundai Motor Co.*, 189 S.W.3d at 753 (“As the statutory standards for bias or prejudice in civil and criminal cases are the same, voir dire standards should remain consistent.”).

⁴ *See generally* O’Connor’s Texas Rules, Civil Trials Ch. 8-A § 5.3 (2020 ed.); Tex. Prac. Guide Pers. Inj. 2d § 11:174.

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