

**HOW TO WIN YOUR CASE IN VOIR DIRE - A DEFENSE PERSPECTIVE**

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**South Texas College of Law Affiliated with Texas A&M University  
Texas Insurance Law Symposium  
July 30-31 1998**

## How to Win Your Case in Voir Dire - A Defense Perspective

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In truth, you cannot win your case in voir dire. The overwhelming majority of bad faith cases are won or lost well before they ever see the inside of a courtroom. Generally, the defendant determines the cases that are tried, and should make that selection wisely. Assuming defense counsel has prepared properly, the defendant should win most of the time.

In the close cases that are tried, however, you can — indeed you must — profoundly influence the outcome in the first few hours of trial. How the jury frames the issue will determine the outcome. Voir dire is the first and most critical step in the overall trial process, and your one and only opportunity to frame the issue for the jury.

### I. BACKGROUND

Representing an insurance carrier in a bad faith trial is like being caught in a bank lobby after hours — you'd better have a good reason to be there. Selling that reason to a jury early is essential — and the key is providing jurors a reasonable framework for decision making. You need a jury that will listen to your evidence and actually deliberate. You must keep that jury focused on your reason for trying the case; to do that you must have a reason. "You didn't see me officer — you'll never prove a thing!" just won't do.

A well conducted voir dire is critical to the trial process because:

- A. Each lawyer has some influence over who sits in judgment of the facts;
- B. Each lawyer can learn about those "fact judges" before they are selected;
- C. The law of primacy dictates that jurors begin forming opinions early.

Unfortunately, we know that all jurors have some experience with insurance companies. The state has mandated liability coverage for all drivers; most workers are covered by worker's compensation and some form of health insurance; many people

have dealt with life insurance salesmen or have had insurance claims. Most jurors assume they know how insurance works; most jurors assume the industry has dirty secrets; most jurors are wrong. Their "knowledge" is just enough to be dangerous. This makes finding a balanced panel difficult. You are not writing on a blank slate.

As a result, in a bad faith trial, you are not defending the case in front of you — you are defending an industry that on a daily basis affects many of the jurors. Your job is to focus the jury on the facts in front of it — not on its guess about other claims. Anything that focuses the jury on the case in front of it is good; anything that distracts the jury from the case at hand is bad.

### II. LAYING THE PREDICATE FOR A VOIR DIRE

What follow are seven steps I find necessary before trial even begins:

1. **Know the court's charge.** How many lawyers complete their discovery and begin trial without a clear understanding of the questions that will be asked of the jury at the end of the case? The jury's findings control destiny. It makes no sense to defend a case without a clear understanding of the court's charge. Bad faith cases have clearly defined jury questions and instructions. Knowledge of the charge will affect the questions you ask, the information you gather and the objections you raise.

**How can you effectively voir dire the jury without knowing the questions it will be asked?**

2. **Evaluate your case early, well, and often.** I am amazed at lawyers who do not examine their cases closely when they first come in. How many times do lawyers charge enthusiastically into the defense of a case only to make that hated phone call the weekend before trial attempting to settle a case once they realize it shouldn't be tried?

Both the insurance claim itself and the claim handling should constantly be evaluated on the merits. If the claim handling is bad, or if the claim

appears meritorious and is a probable loser for the carrier, your best course of action is simply to pay the claim and move on. Remember to evaluate both the merits of the underlying claim and the claim handling. When first filed, most cases can still be settled for policy benefits, before time and effort has been extended by plaintiffs and their counsel. Many lawyers file suit in part to force someone else at the insurance company to review the file. Unfortunately, litigation tends to inflame an already bad situation. Don't waste the court's time or your client's money attempting to defend the indefensible. Make the phone call early.

**How can you effectively voir dire the jury when you yourself are not sure how the jury questions should be answered?**

3. **Write your closing argument before you take the first deposition (and rewrite it all the way through discovery; rewrite it again before voir dire).** Keep yourself focused on the ultimate issues and how you want them presented to the jury.

Discovery should not only be for development of information, it should be a sounding board for themes and ideas to be used with a jury. It also should have a case-specific purpose. Before walking into the courtroom, know what you need to prove.

**How can you effectively voir dire the jury if you don't know what you want to argue in summation?**

4. **Establish credibility with the court.** Trial judges make important discretionary rulings on admissibility of evidence and consequently the scope of a trial. If you arrive at trial having exhausted the court's patience on petty discovery objections and frivolous motions, you may not have the court's full attention (and confidence) when you need it the most — with a jury in the box. Most discovery issues are well settled and should be resolved by agreement. File motions only when necessary and when you genuinely believe you are entitled to prevail. Establish a reputation you can count on at trial when there is a close call. You would be amazed how quickly a jury recognizes which attorneys have the court's respect.

Maintaining credibility with court while conducting the voir dire examination should not be difficult to do. Counsel is permitted broad latitude on voir dire. *Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App. — Houston [14<sup>th</sup> Dist.] 1993, writ denied) (citing *Texas Employers Ins. Assoc. v. Loesch*, 538 S.W.2d 435, 440 (Tex. Civ. App. — Waco 1976, writ ref'd.

n.r.e.). The scope of a voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent a clear abuse of the discretion. *Id*; see also, *Blount v. Bordens, Inc.*, 802 S.W.2d 932, 953 (Tex. App. — Houston 1<sup>st</sup> Dist., 1994, rev'd on other grounds at 910 S.W.2d 932). The court abuses its discretion only when its denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for a cause or denies an intelligent use of peremptory challenges. *Haryanto*, 860 S.W.2d at 918, citing *Loesch*, 538 S.W.2d at 440 (citing *Dickson v. Burlington, N.R.R.*, 730 S.W.2d 82, 85 (Tex. App. — Fort Worth 1987, writ ref'd n.r.e.)).<sup>1</sup>

**How can you effectively voir dire the jury if you don't command the court and the jury's respect?**

5. **Use the claim file.** Not only is it clear that most of the claim file is discoverable (less redaction for specific privileges), it is your only tangible evidence of claim handling. Use the file aggressively to establish what happened when and why your position is reasonable. If you don't think the file helps you, refer to step number two.

**How can you effectively voir dire the jury when/if your own records undermine your case?**

6. **Don't play games with witness preparation.** Testifying is not a game. If it were, it would be better played by professional attorney with multiple trials and numerous years of experience rather than a witness who is not professionally trained, has not been to law school, has never tried a case, and has never taken or been in a deposition. The witness can win the confrontation only by being what the witness uniquely is: a highly trained, competent, compassionate, sincere and honest claim representative. An attorney cannot change the basic personality of a witness, and cannot (and should not want to) turn the witness into a lawyer or mere

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<sup>1</sup> In order to preserve complaint on appeal regarding improper voir dire examination, timely objections should be made to improper statements and questions or error may be waived. *Haryanto*, 860 S.W.2d at 918 (citing *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 707-08 (Tex. 1989)). If complaining on an appeal regarding improper portions of a voir dire examination, the record on appeal should contain the entire voir dire examination so the court can determine if the questions objected to were proper or duplicitous, or whether the answers sought were not otherwise obtained. *Dickson v. Burlington*, 730 S.W.2d at 85.

advocate. Many of the poor witness performances in bad faith cases can be traced directly to the attorney's mis-preparation of the witness.

This is not to suggest that a witness should be served up without preparation; rather, the attorney needs to solidify the witness' knowledge of the file, educate the witness on his or her role, and advise the witness of the major themes (pro and con) in the case. For an inexperienced witness, give three or four parameters, and advise the witness to stay in that box. Under no circumstances should you script answers. Above all have the witness be genuine.

**How can you effectively voir dire the jury when your witnesses (and by extension, you) have no credibility?**

7. **Be flexible.** Even the most prepared lawyer gets surprised. Even the most polished witnesses will say something foolish. Even the most respected judge will make an error (or at least disagree with you) on the admission or exclusion of evidence. **DEAL WITH IT!**

Do not let the unexpected throw you off your game. The great courtroom advocates are not necessarily those who can give a great speech. Instead, they are quick on their feet, quick with a skillful riposte and devastating on cross-examination. The more prepared you are, the easier it is to respond to the unexpected.

**How can you effectively voir dire the jury if your case is not secure enough to handle a little adversity?**

### III. CONDUCTING VOIR DIRE ITSELF.

Once you reach the courtroom, it is still not time to unload your vast knowledge on the jury. Conduct a little more discovery — this time about your potential jurors. But, that doesn't mean you can't educate members of the jury panel while you get to know them. Successful voir dire is a blend of learning and teaching at the same time, of persuading and listening. You might try to follow these guidelines:

1. **Be the first to frame the issue persuasively.** Psychologists tell us that primacy rules — jurors begin forming opinions almost immediately, and remember and weigh evidence as funneled through those opinions. If you don't persuade a jury quickly you've lost. My rule of thumb is to undo the plaintiff's voir dire and "hook"

the jury with my theory in the first four sentences — before I even introduce myself.

Plaintiff's counsel's best asset (besides bias/sympathy) is that of primacy. Plaintiff's counsel has the ability to frame the issues for the jury, not only by the order and presentation of facts but also by telling the jury: "Ladies and Gentlemen, this case is about \_\_\_\_\_" (usually an elderly widow who has paid premiums for decades and now can't get her claim paid).

Defendant's counsel, on the other hand, has "clean up" duty. If plaintiff's counsel does not effectively frame the case the job is easy. Defendant's counsel can and should provide a frame from the defense perspective. "This claim is about \_\_\_\_\_" (usually attorneys or other experts misleading plaintiff about whether her claim is owned or, plaintiff herself trying to inflate the value of her claim).

If, however, plaintiff's counsel has framed the case well, defendant's counsel must break that frame quickly and replace it with another one. It is not enough to offer an alternative; the plaintiff's frame must be broken! For example:

"Ladies and Gentlemen, an insurance policy is not a savings account, where you put money in and can withdraw it at anytime. An insurance policy is a contract, like any other contract, and plaintiff is only entitled to recover when certain events occur. Does everyone understand that? Those events did not occur, and here's why. . ."

You cannot conduct your voir dire while the jury is listening to you in a framework provided by your adversary.

2. **Use Word Pictures to illustrate your message.** "Word Pictures" are colorful, everyday examples that illustrate a point. The New Testament parables are word pictures. Politicians' anecdotes are word pictures. The "savings account" analogy used above is a form of word picture.

Word pictures are a powerful tool of persuasion. Imagine an arson/bad faith case where plaintiff's counsel attacks your case on voir dire for all the evidence you don't have (no confession, no eyewitness, no removal of contents, etc.) Consider opening voir dire as follows:

"Ladies and Gentlemen, an arson

investigation is like a jig saw puzzle. If you have enough time, and if you have all of the pieces, you can put in every piece. But you don't need every single piece of the puzzle to know what the picture is. Mr. Plaintiff has hidden many of the puzzle pieces. But enough remain that can tell you what happened..."

Then proceed to the introduction of your client and its case.

From there, it is not a tough sell that the jury should base its decision on the evidence that exists, as opposed to the evidence that will never exist. And the jury is ready, and open, to hear your side of the story.

Do not describe your case in legal or technical terms. Use everyday language and situations a jury can understand. A jury cannot side with you until it can understand your argument.

**3. Keep your argument short.** Voir dire is not the time to argue your case or put on your evidence. Once you have framed the issue (and broken the plaintiff's frame), don't waste time persuading an audience you don't yet know. Proceed as soon as possible to number 4.

**4. Listen to the jury.** Some lawyers spend so much of their voir dire time talking they never listen to what the jury says. A reminder: the jury decides the facts of the case. Juries cannot get reversed; only judges get reversed. Don't spend all of your voir dire time trying to prejudice the jury in your favor. Advise the jury of your major points, give an effective rebuttal to any points raised by the plaintiff's attorney, and then spend the vast majority of your time getting to know the prospective jurors. You can only do this if you listen to what the potential jurors are trying to tell you. Not only will you make more intelligent strikes, your listening to them motivates their listening to you. If you don't listen at the beginning of the case, you may not like what the jury tells you at the end.

**5. Blend leading and open ended questions.** Leading questions can make points and persuade, but they don't tell you much about your audience. Open ended questions tell you a lot about the audience, but risk losing control of the process, and also risk having jurors "blurt out" prejudicial information. "Does everyone understand you are to decide this case based on the evidence, not based on sympathy?" is a leading question; "How many of you know someone who works for an insurance

company?" is non-leading.

The trick is to gather as much information as possible without losing control, all the while subtly continuing to persuade. My solution is to blend the two types of questions. This has the side benefit of varying the pace of your voir dire.

**6. When in doubt, learn more about the juror.** Don't bury your head in the sand about potentially hostile jurors. Ask more questions. More lawyers are burned by the unknown than by the known. If you fear contamination of the panel, question the juror privately at the bench. Make knowledgeable strikes.

**7. Never use a peremptory strike when a strike for cause will do.** How many times do we settle for a peremptory strike when a little more questioning will disqualify the juror for cause? For example, a juror (with a profile similar to the plaintiff) has had a bad claim experience of his own. You are tempted to write him off and just use a peremptory. Take a shot at having him removed for cause. The questions might go like this:

- Q. You must be pretty angry about how you were treated?
- Q. Have you ever wanted to get back at the insurance company?
- Q. Are you suspicious that other insurers treat people the way you were treated?
- Q. Are you cynical about insurers?
- Q. Do you see the plaintiff as someone similar to you?
- Q. Would it be easier to vote for the plaintiff than against him?
- Q. Would I have to overcome your experience in order to objectively discuss the facts of this case with you?
- Q. Can you weigh the evidence in this case without calling up your own experience?
- Q. Are both sides really starting out even in your mind?

The honest answer to any of these questions could disqualify the juror, allowing you to use a peremptory on a more dangerous, but less obviously disqualified, juror.

**8. Do not discriminate based on stereotypes.** No defendant wants a jury of twelve people just like the plaintiff — same age, sex, race, profession and residential neighborhood. On the other hand, not all people of any single category (such as age) think alike. That is, not all 60 year olds tend toward plaintiff or defendant jurors. The same applies to each class described above.

Discrimination in jury selection is illegal and could cost you a strike. It is also short-sighted. There are too few strikes to waste them on surface issues or outdated views of how people think. For every Phyllis Schlafly there is a Geraldine Ferraro; for every Clarence Thomas a Jessie Jackson; and for every Ted Kennedy a Ronald Reagan.

Invest the time necessary to know each individual you are striking.

Other than it being a bad idea to make stereotyped decisions regarding which jurors to strike from your jury, it is necessary to keep in mind that the United State Supreme Court as well as courts of this State have held that a strike of a juror because of race is unconstitutional. *Batson v. Kentucky*, 476 U.S.79, 106, S.Ct. 1712, 90 L. Ed.2d 69 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-28, 111 S.Ct. 2077, 2081-87, 114 L.Ed.2d 660 (1991); *Goode v. Shoukfeh*, 943 S.W.2d 441 (Tex. 1997). Race discrimination in jury selection is the only constitutionally prohibited discrimination which has been adopted and applied to civil cases in Texas by the Texas Supreme Court. However, there is authority that strikes based on ethnicity or gender are also impermissible. *Hernandez v. New York*, 500 U.S.352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (ethnicity); *J.E.B. v. Alabama Ex. Rel T.B.*, 511 U.S.127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (gender).

The analysis used to challenge a party's peremptory strike as being unconstitutional consists of three steps. First, the opposing party must establish a prima facie showing of discrimination against an eligible venire member. *Mandujano v. State*, 966 S.W.2d 816 (Tex. App. — Austin 1998); *Goode*, 943 S.W.2d at 445. Only minimal evidence is needed to support a rational inference or to support a prima facie case. *Id.* If a prima facie case of discrimination is made, the party that made the strike has the burden to come forward with a race-

neutral reason for the strike. *Id.* The explanation must be clear and reasonably specific and must contain legitimate reasons for the strike related to the case being tried. *Id.* Once the party making the strike offers a race-neutral explanation, the opponent of the strike must prove by a preponderance of the evidence that the reasons given by the party making the strike in support of its strike are a sham or a pretext for discrimination. *Johnson v. State*, 959 S.W.2d 284, 290 (Tex. App. — Dallas 1997, pet. ref'd). The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Purkett v. Elem*, 514 U.S. 765, 767-69, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam). If, after the opposing party attempts to make a prima facie case of racial discrimination, the striking party offers race-neutral explanations for its strikes without objecting to the opponent's failure to establish a prima facie, showing the striking party waives that objection. *Graff v. Whittle*, 947 S.W.2d 629, 632 (Tex. App. — Texarkana 1997, writ denied).

The Court of Appeals gives the trial court's decision on the ultimate question of discriminatory intent great deference. *Id.*, citing *Hernandez v. New York*, 500 U.S. at 364; *Vargas v. State*, 838 S.W.2d 552, 553 (Tex. Crim. App. 1992) (en banc); *Dominguez v. State Farm Ins. Co.*, 905 S.W.2d 713, 716 (Tex. App. — El Paso 1995, writ dism'd by agr.); *In Re A.D.E.*, 880 S.W.2d 241, 243-45 (Tex. App. — Corpus Christi 1994, no writ); *Mayr v. Lott*, 943 S.W.2d 553 (Tex. App. — Waco 1997, no writ). In reviewing a *Batson/Edmonson* challenge, an Appellate Court will apply an abuse of discretion standard of review. *Goode*, 943 S.W.2d at 446. The issue of whether the race-neutral explanation should be believed is purely a question of fact for the trial court. *Goode*, 943 S.W.2d at 446 (citing *Hernandez*, 500 U.S. at 367). Consideration of this type of challenge is by its very nature adversarial. *Goode*, 943 S.W.2d at 451. The proceeding should be held in open court. *Id.* Unsworn statements of counsel may be offered as an explanation of why the peremptory challenges were exercised. *Id.* Juror information cards may be made a part of the record. *Id.* To the extent any party wishes to include any other information in the record, the rules of evidence and procedure apply. *Id.* The party challenging the strike has the right to examine the voir dire notes of the opponent's attorney when that attorney relies upon the voir dire notes while giving sworn or unsworn testimony in an *Edmonson* hearing. *Goode*, 943 S.W.2d at 449. Absent such reliance, even if the lawyer witness uses the writing to refresh his or her recollection before testifying, the voir dire notes are privileged work product and the movant

may not examine them. *Id.*

The following is a list of explanations for use of peremptory strikes which have been held to be "racially neutral";

- Striking a juror because of his long, unkempt hair, a mustache, and beard, *Purkett*, 514 U.S. at 789;
- Striking a juror for wearing sunglasses during voir dire, *Alexander v. State*, 866 S.W.2d 1, 8-9 (Tex. Crim. App. — 1993);
- Striking a juror wearing "only a t-shirt," *Hernandez v. State*, 808 S.W.2d 536, 544 (Tex. App. — Waco 1991, no pet.);
- Peremptory strikes based on a panel member's employment status are allowed *Earhart v. State*, 823 S.W.2d 607, 625 (Tex. Crim. App. 1991); *Tompkins v. State*, 774 S.W.2d 195, 205 (Tex. Crim. App. 1987) (en banc), aff'd 490 U.S. 754, 109 S. Ct. 2180, 104 L.Ed. 2d 834 (1989) (per curiam);
- A panel member may be struck based on a hunch, for failure to make eye contact, inattentiveness, or other non-quantifiable characteristics, *Molina v. Pigott*, 929 S.W.2d 538, 545 (Tex. App. — Corpus Christi 1996, writ denied) (citing *Vargas*, 838 S.W.2d at 554-55); *Doby v. State*, 910 S.W.2d 79, 82 (Tex. App. — Corpus Christi 1995, pet. ref'd); and
- Youth is a proper consideration in making peremptory challenges, *Jack v. State*, 867 S.W.2d 942, 947 (Tex. App. — Beaumont 1993, no pet.); *Barnes v. State*, 855 S.W.2d 173, 174 (Tex. App. — Houston [14<sup>th</sup> Dist.] 1993, pet. ref'd).

In determining whether a striking party's racial-neutral explanation is a pretext, the court may consider the following:

1. The reasons given are not related to the facts of the case.

2. There is a lack of questioning to the challenged juror or a lack of meaningful questions.
3. Disparate treatment — persons with the same or similar characteristics as the challenged juror were not struck.
4. Disparate examination of members of the venire; for example, a questions designed to provoke a certain response that is likely to disqualify the juror and was asked only to minority jurors.
5. Any explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically. *Lott*, 943 S.W.2d at 557.

9. **Take your time but don't waste time.** Voir dire is your one opportunity to speak conversationally with the jury. It is your one chance to get to know prospective jurors before they are selected. Take your time and be thorough. Your case is important. Jury selection is important. A jury knows and respects this.

On the other hand, don't waste time. Be prepared, don't get off track, and keep it moving. The jury's time is as important as your case. By respecting the jurors' time, you earn their attention.

10. **Maintain your personal credibility.** Don't get carried away with grandiose predictions of how good your case is, or how much evidence you have. If anything, understate your evidence, particularly early in the trial. Make sure your evidence is weighed against the court's charge, not against your voir dire promises to the jury. In a close case, I want to be the lawyer the jury trusts the most, having proven myself reliable throughout the trial.

#### IV. CONCLUSION

Jurors are smart enough to know insurance carriers have their choice of counsel. Jurors instinctively know the carrier controls the cases that are tried (by either settling or not settling a case). Jurors identify the defense lawyer with the insurer. They want to know why they are there, suspect that something is up, and look to you for a reasonable answer. Yet their suspicion of your client taints their view of you. You can only address them effectively

if you genuinely are what you want them to believe  
your client is: honest, sincere, competent, well  
prepared and credible.

Voir dire is your first, and most important,  
chance to get acquainted.