

THE JURY SELECTION TRIAL NOTEBOOK

DAN CHRISTENSEN
The Carlson Law Firm, P.C.
3410 Far West Blvd., Ste. 235
Austin, Texas 78731
(512) 346-5688

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THE JURY SELECTION TRIAL NOTEBOOK

Dan Christensen

USING THIS NOTEBOOK

This notebook is intended to provide the trial lawyer with a handy, practical tool he or she can take into their personal injury jury trials to assist them in selecting their jury. It is not intended to serve as a treatise on the law of jury selection, nor is it intended to provide a comprehensive collection of the case law regarding jury selection issues.

This notebook is most useful if supplemented with tabs and highlighted court opinions, and placed in a three-ring binder. The last two Tabs in the notebook are reserved for the relevant chapters of the Texas Government Code and the Texas Rules of Civil Procedure regarding jury selection. Counsel should include copies of any relevant statutes, rules or cases after the outline in each section. The easier it is for counsel to access the relevant cases and statutes on a particular issue, the better prepared they will appear and the more effective they will be at persuading the court.

TAB A

TAB A

JUROR QUALIFICATIONS

I. GENERAL RULE

Individuals are qualified to serve unless there is a specific statutory disqualification. TEX. GOVT. CODE §62.101.

II. GENERAL QUALIFICATIONS

A. Texas Government Code §62.102 sets forth the general qualifications, which are:

- a. at least 18 years old;
- b. a citizen of Texas and of the county in which he is to serve. See, Mayo v. State, 4 S.W.3d 9 (Tex. Crim App. 1999) (requirement can be waived).
- c. qualified to vote in the county in which he is to serve;
- d. of sound mind and good moral character;
- e. able to read and write. Mercy Hosp. of Laredo v. Rios, 776 S.W.2d 626 (Tex. App. – San Antonio 1989, writ denied) (requirement was waived by untimely objection).
- f. has not served as a petit juror for six days during the preceding three months in county court or during the preceding six months in district court;
- g. has not been convicted of a felony. See Volkswagen v. America v. Ramirez, 79 S.W.3d 113 (Tex. App. – Corpus Christi 2002, rev'd on other grounds) (ex-felon who had conviction set aside after successfully serving probation was qualified to serve as juror). A juror cannot be questioned about any conviction that disqualifies him or about any charged offense of theft or felony. TEX. R. CIV. PROC. 230; and
- h. is not under indictment or other legal accusation of misdemeanor or felony theft or any other felony. Preiss v. Moritz, 60 S.W.3d 285 (Tex. App. – Austin 2001, no petition h.) (court reversed take nothing judgment and granted new trial when juror misrepresented on questionnaire that she had never been accused or convicted of any criminal conduct when, in fact, she was under legal accusation for theft by check at the time).

The court may suspend disqualification under subsection e and f above under certain limited circumstances. TEX. GOVT. CODE §62.103.

B. Jurors who are legally blind, deaf or hard of hearing as defined in the Texas Government Code are also disqualified. See TEX. GOVT. CODE §§62.104 and 62.1041; Nobles v. State, 843 S.W.2d 503 (Tex. Crim. App. 1992); Woolls v. State. 665 S.W.2d 455 (Tex. Crim. App. 1983).

III. EXEMPTIONS FROM JURY SERVICE

- A. A person otherwise qualified, may still be exempted from service, if the person:
- a. is over 70 years old;
 - b. has legal custody of a child younger than 10 years old and service would require leaving the child without adequate supervision;
 - c. is a student of a public or private secondary school;
 - d. is enrolled and in actual attendance at an institution of higher education;
 - e. is an officer or an employee of the senate, the house of representatives, or any agency or department in the state's legislative branch;
 - f. is summoned for service in a county with a population of at least 200,000 and has served as a petit juror in the county during the preceding two years; or
 - g. is a member of the U.S. military serving on active duty and deployed out of the county.

TEX. GOVT. CODE §62.106.

- B. Persons who are physically or mentally impaired or do not have the ability to comprehend English, as defined in the Texas Government Code, may also be exempted from jury service. See TEX. GOVT. CODE §62.109.

IV. CASE SPECIFIC QUALIFICATIONS

A juror may be disqualified for a particular jury if he:

- a. is a witness in the case;
- b. is interested, directly or indirectly, in the subject matter of the case. See Guerra v. Wal-Mart Stores, 943 S.W.2d 56 (Tex. App. – San Antonio 1997, writ denied) (member of big box discount retailer affiliated with defendant was not disqualified); City of Hawkins v. E.B. Germany and Sons, 425 S.W.2d 23 (Tex. Civ. App. – Tyler 1968, writ ref'd n.r.e.) (taxpayer's interest in case against city did not disqualify); Tex. Power & Light Co. v. Adams, 404 S.W.2d 930 (Tex. Civ. App. – Tyler 1966, no writ) (shareholder of a party is disqualified); King v. Aetna Cas. & Sur. Co., 373 S.W.2d 875 (Tex. Civ. App. – Beaumont 1964, writ ref'd n.r.e.) (taxpayers do not have pecuniary interest in litigation against the government); Parker v. Traders & Gen. Ins. Co., 366 S.W.2d 107 (Tex. Civ. App. – Eastland 1963) (one person involved in insurance business and another who had Defendant as their worker's compensation carrier were not disqualified); Stevens v. Smith, 208 S.W.2d 689 (Tex. Civ. App. – Waco 1958, writ ref'd n.r.e.) (employees have a pecuniary interest in litigation against their employer); Texas Emp. Ins. Ass'n v. Lane, 251 S.W.2d 181 (Tex. Civ. App. – Ft. Worth 1952) (insured of insurance company defendant disqualified).
- c. is related by consanguinity or affinity within the third degree, as determined under Chapter 573, to a party in the case;

- d. has a bias or prejudice in favor of or against a party in the case. See discussion *infra* under TAB K for what constitutes bias or prejudice warranting disqualification; or
- e. 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. GOVT. CODE §62.105.

V. OTHER BASES FOR DISQUALIFICATION/EXEMPTION

- A. While Texas Government Code §62.101 states that persons who are not disqualified under Subchapter B (regarding juror qualifications) are liable for jury service, the cases have permitted disqualification for reasons not specifically listed in the statutory scheme. Garza v. Tan, 849 S.W.2d 430 (Tex. App. – Corpus Christi 1993, no writ) (courts may exercise discretionary powers to grant excuse jurors when there are grounds to disqualify other than statutory grounds).
- B. The court, or the court’s approved designee, may discharge any juror entirely or until another day of the term for any reasonable excuse. TEX. GOVT. CODE §62.110. If, however, the excuse is an economic reason, the court may not excuse the juror unless all parties are present and approve the release. TEX. GOVT. CODE §62.110(c).

VI. OBJECTING TO JUROR BASED ON QUALIFICATIONS

Generally, an objection must be raised before the panel is sworn. Jenkins v. Chapman, 636 S.W.2d 238 (Tex. Civ. App. – Texarkana 1982, writ dism’d) (holding that a party could not wait until after receiving an unfavorable verdict to object to a juror’s qualification on the basis that he could not read or write).

TAB B

TAB B

CHALLENGE TO THE ARRAY

I. DEFINITION

A challenge to the array is made if counsel believes there is a defect in the manner in which the petit jurors were selected and/or summoned in violation of the relevant statutes. Mann v. Ramirez, 905 S.W.2d 275 (Tex. App. – San Antonio 1995) (case reversed because clerk who selected jury had intimate relationship with defendant's corporate representative and improperly excused a number of jurors who were allegedly unfavorable to defendant).

II. PROCEDURE FOR PETIT JUROR SELECTION

Texas Government Code sets forth the proper procedure for selection of petit jurors. Specifically, the following sections are most relevant:

- A. §62.001 Jury Source; Reconstitution of Jury Wheel
- B. §62.004 Drawing Names for Jury Lists
- C. §62.005 Observation of Drawing of Names
- D. §62.011 Electronic or Mechanical Method of Selection
- E. §62.0111 Computer or Telephone Response to Summons
- F. §62.0131 Form of Written Jury Summons
- G. §62.0132 Written Jury Summons Questionnaire
- H. §62.0145 Removal of Certain Person from Pool of Prospective Jurors
- I. §62.016 Interchangeable Juries in Certain Counties

III. TIMING OF THE CHALLENGE

A challenge to the array must be made before the jury is drawn. TEX. R. CIV. PROC. 221. Hightower v. Smith, 671 S.W.2d 32 (Tex. 1984) (Defendant's challenge to the trial judge after the jury panel was organized was untimely).

IV. PROCEDURE FOR THE CHALLENGE

The motion must be in writing, supported by affidavit, and presented to the judge in charge of the local jury system. Martinez v. City of Austin, 852 S.W.2d 71 (Tex. App. – Austin 1993, writ denied); Hightower v. Smith, 671 S.W.2d 32 (Tex. 1984) (court would not consider merits because plaintiff did not present his complaint to the proper judge); Texas & N.O.R. Co. v. Jacks, 306 S.W.2d 790 (Tex. Civ. App. – Beaumont 1957, writ ref'd n.r.e.) (court held that error was waived because plaintiff complained to the trial court instead of the judge who organized panels).

V. WAIVER

Challenges to the array based on procedural defects are generally waived if not presented before jury selection. See, e.g., Sendejar v. Alice Physicians and Surgeons Hosp., Inc., 555 S.W.2d 879 (Tex. Civ. App. – Tyler 1977, writ ref'd n.r.e.) (challenge to improper excuses by sheriff, district clerk, and others waived if not presented prior to time jury was selected); Berner v. Southwestern Public Service Co., 517 S.W.2d 924 (Tex. Civ. App. – Amarillo 1974, writ ref'd n.r.e.) (appellant lacked diligence in questioning juror selection method, thereby waiving error, when he filed motion for new trial more than two and a half months after trial); Texas Elect. Serv. Co. v. Yater, 494 S.W.2d 271 (Tex. Civ. App. – El Paso 1973, writ ref'd n.r.e.) (using district court panel instead of proper county court panel was "matter of ready waiver"). If, however, the complaining party did not know, and could not have reasonably known, of the irregularities before jury selection, courts have refused to find waiver. Mann v. Ramirez, 905 S.W.2d 275 (Tex. App. – San Antonio 1995).

VI. IF CHALLENGE SUSTAINED

If the court hears evidence and sustains the challenge, the jurors shall be discharged and new ones will be summoned. TEX. R. CIV. PROC. 222.

TAB C

TAB C

JURY SHUFFLE

I. SELECTION OF PETIT JURORS

The jurors names are placed on the general panel in the order in which they are randomly selected. The jurors are assigned for service starting at the top of the general panel. Jurors returned to the general panel after service shall be enrolled at the bottom of the list in the order of their return. TEX. R. CIV. PROC. 223.

II. PROCEDURE FOR SHUFFLE

- A. Procedure of shuffle. The names of all petit jurors assigned to a jury panel in the case are placed in a receptacle, shuffled, and drawn. The names are then transcribed in the order in which they are drawn on the jury list. TEX. R. CIV. PROC. 223.
- B. Even if the above procedure for shuffling is not closely followed, the courts will not likely find harmful error as long as the method of shuffling ensured randomness in selection. Rivas v. Liberty Mut. Ins. Co., 480 S.W.2d 610 (Tex. 1972).
- C. Either side may demand a shuffle. TEX. R. CIV. PROC. 223.
- D. The court must grant a shuffle if one is timely requested. TEX. R. CIV. PROC. 223; Whiteside v. Watson, 12 S.W.3d 614 (Tex. App. – Eastland 2000, pet. denied), but see, Miller-El v. Cockrell, 537 U.S. 322 (2003) (holding that a party may not shuffle jury solely on the basis of race). If court refuses a shuffle, however, it may not be reversible error. Ford v. State, 73 S.W.3d 923 (Tex. Crim. App. 2002) (trial court’s refusal to grant shuffle in violation of criminal procedure statute requiring shuffle upon request was not harmful error).
- E. The demand must be made to the appropriate judge in a timely manner. Texas Employer’s Ins. Assoc. v. Burge, 610 S.W.2d 524 (Tex. App. – Beaumont 1980, writ ref’d) (upholding court’s denial of party’s shuffle request because party made request to the trial court judge and not to the judge organizing the panels for the jurisdiction’s interchangeable jury system).
- F. Only one shuffle is allowed. TEX. R. CIV. PROC. 223; Whiteside v. Watson, 12 S.W.3d 614 (Tex. App. – Eastland 2000, pet. denied).
- G. The demand must be made before the beginning of voir dire. Carr v. Smith, 22 S.W.3d 128 (Tex. App. – Fort Worth 2000, pet. denied) (holding that trial court should have denied party’s motion to shuffle as untimely because the jury had already been sworn and completed a questionnaire which constituted the beginning of voir dire). See also, TEX. R. CIV. PROC. 223.

TAB D

TAB D

JUROR QUESTIONNAIRE

I. EFFECT OF QUESTIONNAIRE ON RIGHT TO SHUFFLE

Use of a pre-trial supplemental juror questionnaire may constitute the “beginning” of jury selection and, therefore, deprive either party of their right to request a shuffle. Carr v. Smith, 22 S.W.3d 128 (Tex. App. – Fort Worth 2000, pet. denied) (holding that trial court should have denied party’s motion to shuffle as untimely because the jury had already been sworn and completed a questionnaire which constituted the beginning of voir dire).

II. FALSE ANSWERS ON THE QUESTIONNAIRE

- A. An incorrect material answer by a potential juror may be grounds for new trial. TEX. R. CIV. PROC. 327. See also, Preiss v. Moritz, 60 S.W.3d 285 (Tex. App. – Austin 2001, no petition h.) (court reversed take nothing judgment and granted new trial when juror misrepresented on questionnaire that she had never been accused or convicted of any criminal conduct when, in fact, she was under legal accusation for theft by check at the time).
- B. Generally, however, false responses by a juror on a pre-trial questionnaire will not result in reversal without a showing of actual prejudice. TEX. R. APP. PROC. 44.1.
- C. A party seeking relief must usually show that they would have been able to successfully challenge the juror for cause or otherwise get the juror discharged had they known the juror lied on the questionnaire. Hunt v. A.C.H.A.D. Enterprises, Inc., 454 N.W.2d 188 (Mich. App. 1990); Gustason v. Morrison, 226 N.W.2d 681 (Mich. App. 1975); Citizens Commercial and Savings Bank v. Engberg, 166 N.W.2d 661 (Mich. App. 1968).
- D. Typically, a false response will not amount to juror misconduct unless the concealment is in response to a direct, specific inquiry rather than a broad general question to the panel. Wooten v. Southern Pacific Transp. Co., 928 S.W.2d 76 (Tex. App. – Houston [14th Dist.] 1995, no writ); Durbin v. Dal-Briar Corp., 871 S.W.2d 263 (Tex. App. – El Paso 1994, no writ); Texaco Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. – Houston [1st Dist.] 1987, writ ref’d n.r.e.).

CAUSE NO. _____

**JOHN DOE,
Plaintiff,**

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§
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IN THE DISTRICT COURT

v.

_____ **COUNTY, TEXAS**

**NEGLIGENT TORTFEASOR,
Defendant.**

_____ **JUDICIAL DISTRICT**

**PLAINTIFF’S MOTION TO USE
A SUPPLEMENTAL JUROR QUESTIONNAIRE**

COMES NOW, Plaintiff, JOHN DOE, and requests this Honorable Court employ a Supplemental Juror Questionnaire in the above-referenced case.

I.

FACTS

This case involves a motor vehicle collision wherein Defendant rearended Plaintiff at a stop light causing her personal injuries, to wit, neck and back pain and TMJ.

The physical damage to the vehicles involved in the collision was relatively minor.

Defendant has indicated he intends on introducing evidence of the magnitude of the impact in an effort to argue Plaintiff’s injuries were not caused in the collision.

Trial is currently set for _____ in front of a jury.

II.

ARGUMENT

A. A Supplemental Juror Questionnaire Would Promote Judicial Economy.

Much of Plaintiff’s voir dire examination is spent asking routine questions about juror backgrounds, experiences, and knowledge of the parties, scene, or events at issue. These are typically straight-forward questions such as whether anyone knows counsel or the witnesses or

whether anyone has been involved in an automobile collision. Because these questions are relatively simple, they are appropriate for a juror questionnaire.¹ When asked during voir dire, these questions act to bore the panel, extend the time necessary for voir dire, and prevent counsel from focusing on genuine bias-producing issues in the case.

B. A Supplemental Juror Questionnaire Would Allow Counsel to More Quickly Focus Their Inquiry on the Issues Present in the Case.

If counsel can avoid spending time on asking many of the routine background questions, they will be able to spend the Court's valuable time questioning the potential jurors regarding the real issues in the case. Because this case involved a relatively low speed collision, Plaintiff's counsel will be forced to discuss at length with the venire their assumptions and beliefs concerning whether a person can be injured when the exterior of their vehicle is not very damaged. Most jurors have an unrealistic belief about the property damage required before occupant injury is likely.² Without a supplemental juror questionnaire, counsel would be forced to spend time on background questions rather than discussing more critical issues with the panel.

The efficiency of supplemental juror questionnaires has been recognized by courts all over Texas. In approximately 1997, the Dallas County Jury Questionnaire Committee released a standing juror questionnaire that has been used in numerous cases since and is what the attached questionnaire is based on.

C. Jurors Are More Likely to be Truthful and Fully Disclose their Experiences and Beliefs in a Written Questionnaire Completed Outside the Presence of Other Potential Jurors.

¹ *ABA Standards Relating to Juror Use and Management*, (1993), Standard 7; VOIR DIRE . . . "a) To reduce the time required for voir dire, basic background information regarding panel members should be made available in writing to counsel for each party" before the voir dire examination. *The Report of the Committee on Juries of the Judicial Council of the Second Circuit* at 93 (August 1984) ("Much time is presently consumed during the voir dire process by the asking of routine questions . . . Prospective jurors spend considerable periods of time in idleness . . . If some of this idle time were spent completing questionnaires . . . the time spent on routine questioning might be expended more productively.")

² Aubrey, J.B., *Laypersons' knowledge about the sequelae of minor head injury and whiplash*, *J. Neurol. Neurosurg. Psychiatry*, Jul; 52(7):842-6 (1989) (study that indicated laypersons believed highly exaggerated speeds were necessary to produce even the most common physical symptoms reported in motor vehicle collisions).

The ultimate purpose behind jury selection is to obtain the most fair and impartial jury as possible. The more information counsel and the Court has regarding the potential jurors, the more likely they can intelligently exercise and rule on challenges. Studies have shown that potential jurors are more likely to give truthful responses to questions when allowed to answer in writing outside of the presence of the other jurors, than when asked in person in front of the entire venire.³ Jurors with strongly held beliefs about lawsuits, lawyers, tort reform, or noneconomic damages will be more likely to disclose their true feelings in private on paper than in person in front of a room full of strangers. The supplemental juror questionnaire, therefore, furthers the goal of selecting a fair and impartial jury.

D. The Supplemental Juror Questionnaire Will Not Inconvenience the Court or Staff.

Plaintiff's counsel has provided the court with the attached questionnaire and cover letter to be sent to potential jurors. Plaintiff's counsel will also take care of any copying, postage, envelopes, etc. necessary in sending the questionnaire to potential jurors. Plaintiff merely requests the court include the costs associated with the supplemental juror questionnaire as taxable court costs to be paid by the losing party.

III.

PRAYER

Plaintiff requests that this Court direct that the written supplemental juror questionnaire attached to this Motion be submitted to prospective jurors in this case. The questionnaires will

³ Lilley, *Techniques for Targeting Juror Bias*, TRIAL 74-79 (Nov, 1994); P.B. Paulus, *Psychology of Group Influence* (2d ed. 1989); A. Paul Hare, *Handbook of Small Group Research*, (N.Y.: The Free Press, 2d ed. 1976); Haney, *Consensus Information and Attitude Change: Modifying Effects of Counter-Attitudinal Behavior with Information About the Behavior of Others*, J. Personality & Soc. Psychol. (1984); B. Latane, *Psychology of Social Impact*, 36 Am. Psychologist 343 (1981); J.M. Levine, "Reaction to Opinion Deviance in Small Groups," *Psychology of Group Influence* (P. Paulus ed., 1980); Bush, Neal, *The Case for Expansive Voir Dire*, 2 LAW AND PSYCHOLOGY REVIEW 9 (1976); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

be mailed by March 19th to be returned by March 24th. Plaintiff's counsel will provide all copies, envelopes, postage, and any administrative support necessary to the court. The completed questionnaires will not be disclosed to anyone other than the court, court personnel, counsel, counsel's staff, and the parties. The completed questionnaires will remain sealed in the court's file, unless the court rules otherwise.

Respectfully submitted,

THE CARLSON LAW FIRM, P.C.
3410 Far West Blvd., Ste. 235
Austin, Texas 78731
(512) 346-5688
(512) 527-0398 FAX

By: _____

Daniel J. Christensen
SBN: 24010695

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served in accordance with Rules 21 and 21a, Tex. R. Civ. Proc., on this ____ day of _____, 2005, to the foregoing attorney of record for Defendant, ATTORNEY, FIRM, ADDRESS.

Daniel J. Christensen

CAUSE NO. _____

**JOHN DOE,
Plaintiff,**

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§
§
§
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§

IN THE DISTRICT COURT

v.

_____ **COUNTY, TEXAS**

**NEGLIGENT TORTFEASOR,
Defendant.**

_____ **JUDICIAL DISTRICT**

ORDER

On this _____ day of _____, 2004, Plaintiff's Motion for Supplemental Juror Questionnaire came to be heard. After careful consideration of Plaintiff's Motion, Defendant's Response, evidence presented, and argument of counsel, if any, the Court GRANTS Plaintiff's Motion. Furthermore, it is hereby ORDERED that:

1. Copies of the questionnaire and cover letter attached to Plaintiff's Motion will be mailed to each prospective juror by _____ with instructions to be returned by _____;
2. Plaintiff's counsel will provide all copies, envelopes, postage, and any administrative support necessary to the court;
3. The completed questionnaires will not be disclosed to anyone other than the court, court personnel, counsel, counsel's staff, and the parties;
4. After jury selection, the completed questionnaires will remain sealed in the court's file, unless the Court rules otherwise;
5. The costs associated with sending the questionnaire and obtaining responses will be considered a taxable court cost to be paid by the losing party in the case.

SIGNED on this _____ day of _____, 2005.

PRESIDING JUDGE

APPROVED AND ENTRY REQUESTED:

Daniel J. Christensen
Attorney for Plaintiff

Exhibit ____

Letter from Court to Prospective Juror Accompanying Questionnaire:

Dear Prospective Juror:

You are currently scheduled to appear for jury duty on _____. After the completion of jury selection, you may or may not be asked to serve as a juror on a case. In order to expedite the jury selection process and assist counsel and the Court in picking a jury that is likely to be fair and impartial, certain questions must be answered by you for review by the Court. These questions are not intended to unnecessarily impose on you or pry into your personal affairs, but rather, they are important questions that must be asked in order to ensure a fair and impartial jury.

Your answers to the following questions will be kept strictly confidential and will be used solely for the purpose of jury selection. None of your responses will be disclosed to anyone not involved with the case at hand. The Court instructs you to answer the questions as completely and honestly as possible. Please make sure your answers are legible. You should not discuss the questions with others or obtain assistance from others in formulating your answers. The Court is seeking your own thoughts and feelings, not those of others.

Please complete the questionnaire and return it by mail to the Court in the enclosed self-addressed, stamped envelope no later than _____. If you fail to return the questionnaire by this deadline, you will be forced to complete the questionnaire on the morning of trial, in the presence of all the other potential jurors, which will significantly delay the proceedings and inconvenience all other potential jurors, the Court, counsel, and litigants. If you have any questions, please do not hesitate to contact the Court Administrator, _____, at (____) ____-____.

Sincerely,

Judge

Exhibit ____

JUROR QUESTIONNAIRE

The questions asked in this questionnaire could be asked in open court. You are under oath and required to answer these questions truthfully and completely. You must answer the questions yourself without discussing the question or your response with others, unless asked to do so by the Court. If you desire to more fully explain an answer or would like to discuss an answer in private, answer the question briefly and circle the question. **YOUR RESPONSES ARE COMPLETELY CONFIDENTIAL AND WILL NOT BE SHARED WITH ANYONE NOT INVOLVED IN THE CASE. PLEASE PRINT CLEARLY.**

PERSONAL DATA

Last Name		First Name		MI			
Date of Birth		Age		Gender			
Street Address		City		For How Long?			
Type of residence(circle one)		House	Apartment	Condo	Mobile home	Other	
Do you own or rent you residence? (circle one)		Own		Rent			
Marital Status: (circle one)		Single	Married	Divorced	Separated	Widow(er)	Yrs:_____
Race		Religious preference					
Serve in the military? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, list dates, branch, MOS, highest rank and type of discharge.							

FAMILY DATA

Spouse's Last Name		First Name		MI		
Date of Birth		Age		Gender		
Street Address (if different than yours)		City		For How Long?		
Race		Religious preference				
Children and Stepchildren (continue on back if necessary)						
Name	Age	Gender	Education	Occupation		

EMPLOYMENT & EDUCATIONAL BACKGROUND

Current occupation	Current employer's name & address
Prior occupations in the last 10 years	

Are you now, or have you ever been, in a supervisory position at work in charge of other rating, hiring or firing other people? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, please explain.	
Last grade you completed in school or degree received	
Spouse's current occupation	Spouse's current employer's name & address
Mother's last occupation	Mother's most recent employer
Father's last occupation	Father's most recent employer

EXPERIENCE WITH JUDICIAL SYSTEM

Have you, a family member, or loved one ever been arrested or charged with criminal offense (other than minor traffic ticket)? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, please explain.
Have you, a family member, or loved one ever filed a lawsuit or been sued? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, please explain.
Have you, a family member, or loved one ever worked for a company that has been sued? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, please explain.
Have you ever served on a jury before? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, how many times? _____ Criminal _____ Civil _____ Grand Jury _____ Were you ever the presiding juror (foreperson)? <input type="checkbox"/> Yes <input type="checkbox"/> No Where did you serve? When did you serve? If civil jury experience, what kind of case? What were your verdicts? (circle one) Criminal (guilty or not guilty) Civil (for Plaintiff or Defendant)
Have you ever been a victim, witness, plaintiff, or defendant in any civil or criminal lawsuit? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, please explain.
What is your opinion about lawyers and whether they are trustworthy or not? Please explain why you feel the way you do.
Have you, a family member, or loved one ever had to file a claim against an employer or insurance company for a personal injury? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, please explain.

Have you, a family member, or loved one ever worked in an insurance related business where the person evaluated, negotiated, approved, or denied claims? Yes No If so, please explain.

Have you, a family member, or loved one ever worked in a medical related business where the person treated or arranged for the medical treatment of others? Yes No If so, please explain.

Have you, a family member, or loved one ever worked in a law or law enforcement related business? Yes No If so, please explain.

What is your opinion about whether there are too many lawsuits? Why do you feel that way?

**Generally speaking, do you feel that jury verdicts or settlements in Austin are:
 Too High About right Too Low Please explain.**

If you, a family member, or loved one were injured because of someone else's negligence, would you bring a claim or file a lawsuit against that person? Yes No Please explain.

What is your opinion about whether the legislature should limit the ability of juries to award damages for pain and suffering and disfigurement? Why do you feel that way?

**What is your opinion about punitive damages (extra damages to punish a person or entity who has committed negligence?) (circle one) For Against They should be limited
Please explain.**

DRIVING EXPERIENCE

Texas Driver's License #	How many years licensed in any state?
Identify the Year, Make and Model of any vehicle currently owned by you or a family member living with you?	
Have you ever received a traffic ticket? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, please list date, location, offense, and how disposed.	
Have you, a family member, or loved one ever been involved in a motor vehicle collision? <input type="checkbox"/> Yes <input type="checkbox"/> No If so, please list date, location, whether the person was driving, whose fault it was, and whether anyone was injured.	

If a driver accidentally hits another car, do you think the driver should have to pay for any injuries he or she caused in the other car? Please explain why or why not.

If a collision results in very little damage to the vehicles, how likely is it that the occupants are injured? (circle one) Very likely Likely Not likely Impossible Please explain.

MEDICAL BACKGROUND

**Have you, a family member, or a loved one ever injured their neck or back? Yes No
If so, please state who, when, how injured, specific injury, whether they recovered, and whether they still have to seek treatment.**

**Have you, a family member, or a loved one ever suffered a serious injury? Yes No
If so, please state who, when, how injured, specific injury, whether they recovered, and whether they still have to seek treatment.**

Do you believe a person can seriously injure their neck or back without such injury appearing on a X-ray film? Please explain why or why not?

**Have you, a family member, or a loved one ever treated with a chiropractor? Yes No
If so, please state who it was, who the chiropractor was, when the person treated, for what injury they treated, and whether the treatment was helpful?**

What opinion do you have about the legitimacy and effectiveness of chiropractic medicine and why?

Do you believe it is easier or more difficult for a person to injure their neck or back in a motor vehicle collision if they have suffered neck or back injuries before? Please explain why or why not.

SOCIAL BACKGROUND

Please list all organizations, civic clubs, fraternal societies, religious organizations, etc. to which you have belonged or supported financially. State whether you currently belong and identify any offices you hold or have held as a member.

Are you a member of a political party? (circle one) Republican Democrat Other _____

Please list all magazines, periodicals, newsletters to which you currently subscribe or have subscribed to within the last three years.

Please list all television shows you watch regularly, including what your favorite show is and why.

Do you listen to any radio talk shows? If so, identify which ones and why you like them?

Do you currently have, or have you in the last three years had, any bumper stickers on any vehicle you owned or drove? If so, please state what it said and when you had it.

THIS CASE

Please indicate whether and how you know any of the following individuals or entities:

Name	Yes	No	How
1. Judge			
2. Plaintiff's attorney			
3. Defendant's attorney			
4. Plaintiff(s)			
5. Defendant(s)			
6. Witness			
7. Witness			
8. Witness			
9. Witness			
10. Witness			

Is there anything occurring in your personal life or at work that might affect your ability to concentrate if you were selected as a juror on this case? Yes No If so, please explain.

Is there anything else that you want the Court or counsel to know that you believe is important regarding whether you can serve as a fair and impartial juror in this case? Yes No If so, please explain.

T A B L E

TAB E

EQUALIZING STRIKES

I. GENERAL RULE

Each “party” is entitled to six peremptory challenges in district court and three in county court. TEX. R. CIV. PROC. 233. There is no limit to the number of causal challenges. Each side is also entitled to one additional peremptory challenge if one or two alternate jurors are to be impaneled, or two additional peremptory challenges if three or four alternate jurors are to be impaneled. TEX. GOVT. CODE §62.020. These additional peremptory challenges may be used only against an alternate juror and the original peremptory challenges may not be used against an alternate juror. TEX. GOVT. CODE §62.020.

II. MULTI-PARTY CASES

In multi-party cases, the judge must determine whether any of the parties aligned on the same side of the docket are antagonistic to each other. If they are, the judge has the discretion to equalize the number of strikes per “side” so that no party is given an unfair advantage. TEX. R. CIV. PROC. 233; Frank B. Hall & Co. v. Beach, Inc., 733 S.W.2d 251 (Tex. App. – Corpus Christi 1987, writ ref’d n.r.e.).

III. DETERMINING WHETHER PARTIES ARE “ANTAGONISTIC”

- A. “In determining whether antagonism exists, the trial court must consider the pleadings, information disclosed by pretrial discovery, information and representations made during voir dire, and any information brought to the attention of the trial court before the parties exercise their peremptory strikes.” In re J.T.G., 121 S.W.3d 117 (Tex. App. – Fort Worth 2003, no pet.). See also, Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986).
- B. Antagonism must exist regarding an issue of fact between the parties on the same side of the docket, rather than because of differing conflicts with the other side of the docket. Patterson Dental Co. v. Dunn, 592 S.W.2d 914 (Tex. 1979).
- C. Parties are prohibited from collaborating to avoid doubling up on their strikes in order to circumvent the effect of the trial court’s ruling to equalize. Van Allen v. Blackedge, 35 S.W.3d 61 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) (reversing trial court’s ruling allowing defendants to collaborate in using their peremptory strikes); see also, Vargas v. French, 716 S.W.2d 625 (Tex. App. – Corpus Christi 1986, writ ref’d n.r.e.) (reversing trial court’s ruling allowing similarly aligned defendants 12 peremptory strikes).

IV. MAKING A MOTION TO EQUALIZE

- A. Timing. The party seeking to equalize must make its request before the exercise of peremptory challenges. In re J.T.G., 121 S.W.3d 117 (Tex. App. – Fort Worth 2003, no pet.).

- B. Waiver. A party must object to the court's ruling before peremptory challenges are exercised. Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986). However, if a party does not become aware until after the jury is selected that their opponents really were not antagonistic, but rather, were collaborating to prevent doubling up on their peremptory strikes, that party will not waive their objection if they object immediately and move for a mistrial. Van Allen v. Blackedge, 35 S.W.3d 61 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) (finding that plaintiffs did not waive their objection to the court's ruling because they objected and moved for mistrial immediately upon learning of the defendants' collaboration in exercising their peremptory challenges).

V. **REVIEW OF TRIAL COURT'S RULING**

- A. The issue of whether to equalize strikes is a question of law for the trial court and will be reviewed under a de novo standard of review. The court should look, not only to the pleadings, but to the pre-trial discovery, and counsel's arguments to the jury. Garcia v. Cent. Power & Light Co., 704 S.W.2d 734 (Tex. 1986) (while pleadings reflected adverse defendants, in reality and during trial, they were not antagonistic at all and, therefore, court was in error in not equalizing the strikes).
- B. If the trial court errs in the allocation of peremptory challenges, reversal is required if the complaining party demonstrates either that the trial was materially unfair or that the trial was hotly contested and the evidence sharply conflicting. Patterson Dental Co. v. Dunn, 592 S.W.2d 914 (Tex. 1979).

TAB F

TAB F
SEATING CHARTS

31	32	33	34	35	36	37	38	39	40
21	22	23	24	25	26	27	28	29	30
11	12	13	14	15	16	17	18	19	20
1	2	3	4	5	6	7	8	9	10

TAB G

TAB G

TIME OF EXAMINATION

I. COURT CONTROLS

- A. As a general rule, the trial court has broad discretion on the propriety of voir dire. A trial court abuses its discretion, however, if it denies a party the ability to ascertain when grounds exist to challenge for cause or prevents the intelligent use of peremptory strikes. McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793 (Tex. App. – Texarkana 2001, no pet.).
- B. Trial courts are encouraged to grant counsel broad latitude in questioning. Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989).
- C. While “[i]t is always commendable for a trial court to dispatch business with promptness and expedition,...this salutary result must never be attained at the risk of denying to a party...a substantial right.” Smith v. State, 703 S.W.2d 641 (Tex. Crim. App. 1985).

II. FACTORS

- A. Whether counsel attempted to prolong voir dire.
- B. Whether the questions denied by the court were proper.
- C. Whether counsel was prevented from speaking with jurors who ultimately served on the jury.

McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793 (Tex. App. – Texarkana 2001, no pet.).

III. CASES

- A. McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793 (Tex. App. – Texarkana 2001, no pet).
 - 1. Facts: Trial court limited counsel to 30 minutes for voir dire. Ten minutes into plaintiff’s counsel’s voir dire, the court warned counsel that he was wasting time. After warning, counsel continued to ask open-ended questions. Defense counsel then elicited additional issues during his voir dire examination. Plaintiff’s counsel wanted to ask additional questions on those issues and was denied.
 - 2. Holding: Trial court’s ruling affirmed. The appellate court found that (1) plaintiff's counsel's voir dire examination had the effect of unnecessarily prolonging voir dire; (2) additional questioning by plaintiff's counsel as to matters elicited by defense counsel during voir dire was not warranted; and (3) plaintiff's counsel was not precluded from questioning jury panel members who actually served on the jury.

- B. **Glanton v. State**, 2002 WL 1308804 (Tex. App. – Dallas June 17, 2002, pet. denied) (not designated for publication).
1. **Facts**: Trial court gave the State 30 minutes and the defense 35 minutes for voir dire. Throughout the examination, counsel were given notice as to how much time they had remaining. When defense counsel was done, he requested to conduct further examination and was denied. Defense counsel then asked for more time and submitted a list of questions that he wanted to ask. The trial court denied his request.
 2. **Holding**: Trial court’s rulings affirmed. The appellate court found that the denial of defendant's request for more than the allotted 35 minutes for voir dire was not an abuse of discretion and the denial of challenges for cause for seven members of jury venire was not an abuse of discretion. Defense counsel was not precluded from examining prospective jurors who actually served on the jury. While the questions that counsel wanted to ask were relevant, the court put the onus on counsel to budget his time effectively. The court also stated that the fact that counsel could think of one more proper question to ask the venire does not suddenly make a reasonable time limit unreasonable.
- C. **Diaz v. State**, 2002 WL 31398949 (Tex. App. – Houston [14th Dist.] Oct. 24, 2002, no pet.) (not designated for publication).
1. **Facts**: Trial court allowed defense counsel to conduct 50 minutes of voir dire. The court repeatedly instructed counsel to “wrap it up” and finally cut her off. Counsel failed to timely object to the court’s limiting her examination and did not request additional time. Counsel also did not provide the court any guidance on what questions she wanted to ask until after she exercised her causal challenges.
 2. **Holding**: Trial court’s rulings affirmed. The appellate court found that counsel attempted to prolong voir dire by continuing questioning after repeated warning from the court. The court also found that counsel failed to properly preserve any alleged error.
- D. **Retzlaff v. Texas DPS**, 1999 Tex. App. LEXIS 5547 (Tex. App. – Austin 1999) (unpublished opinion).
1. **Facts**: Trial court gave each side 30 minutes and warned them when they had five minutes left. When counsel’s time expired, he objected and submitted a list of questions he didn’t get to ask.
 2. **Holding**: Trial court’s ruling was affirmed. Appellate court found that, while counsel’s unasked questions were probably relevant, he wasted too much time during his examination lecturing the panel. The court also found it significant that counsel struck no one for cause and spent a lot of time speaking with jurors outside the “strike zone.”

- E. **Singer v. Kan-Do Maintenance Co.**, 1996 Tex. App. LEXIS 1201 (Tex. App. – Houston [14th Dist.] 1996) (unpublished opinion).
1. **Facts:** Trial court initially limited counsel to 45 minutes per side and then extended it to one hour. After counsel was cut off, he objected and informed the court of four areas about which he wanted to inquire. The court invited counsel to submit a list of questions before final argument, however, counsel never did.
 2. **Holding:** Trial court’s rulings were affirmed. The appellate court examined counsel’s voir dire and found it to be largely unproductive. Counsel was advised of the time limitation before his examination, but failed to budget his time wisely. Counsel also failed to properly preserve the issue by not submitting a list of questions he was prevented from asking.
- F. **McCarter v. State**, 837 S.W.2d 117 (Tex. Crim. App. 1992).
1. **Facts:** Trial court limited counsel to 30 minutes per side. Court gave counsel warnings periodically during their examination. The court cut counsel off and counsel objected and submitted questions that he was prevented from asking.
 2. **Holding:** Trial court’s rulings were reversed. The appellate court affirmed the trial court and the Court of Criminal Appeals reversed. The court found that defense counsel’s questions were not intended to prolong voir dire, were relevant, and that the defense was harmed by the court’s restriction because it limited their ability to exercise their peremptory strikes.
- G. **Ratliff v. State**, 690 S.W.2d 597 (Tex. Crim. App. 1985).
1. **Facts:** Trial court allowed one hour for each side. The court then allowed defense counsel an additional 21 minutes. After being cut off, defense counsel objected and introduced a list of 15 questions that he did not get to ask the jurors. Defense counsel did not get to speak with three of the jurors who actually served.
 2. **Holding:** Trial court’s rulings were reversed. Appellate court found that arbitrary limitation was unreasonable, that defense counsel’s questions were relevant, and that he showed harm by showing that three of the jurors he did get to speak with actually served on the jury.
- H. **Thomas v. State**, 658 S.W.2d 175 (Tex. Crim. App. 1983).
1. **Facts:** Trial court allowed 35 minutes for defense counsel’s voir dire. When his time was up, the court allowed counsel to ask one question and follow up for ten more minutes. Then, counsel was cut off. He objected and submitted a list of questions he did not get to ask.

2. Holding: Trial courts ruling was reversed. Appellate court found that the arbitrary limitation before voir dire was unreasonable, that defense counsel's questions were relevant, and that the defense was harmed because counsel did not get to speak to some of the jurors who actually served on the jury.

I. **Whitaker v. State**, 653 S.W.2d 781 (Tex. Crim App. 1983).

1. Facts: Trial court placed a limit before voir dire of 45 minutes for each side. Defense counsel made a motion for more time and was denied. Counsel was provided the juror cards 25 minutes before voir dire. After 45 minutes of defense counsel's voir dire examination had elapsed, the trial court gave defense counsel an additional five minutes. When the five minutes was up, the trial court cut counsel off over his objection. Counsel did not get to speak to seven members of the venire, however, the record does not say whether any of them actually served on the jury. Counsel attempted to perfect a bill after his objection, and was denied.
2. Holding: Trial court's rulings affirmed. Court of Appeals reversed and then the Court of Criminal Appeals reversed the appellate court and affirmed trial court's ruling. The court found it significant that counsel had the juror's information to review before his voir dire examination. Also, there was no indication in the record that any of the venire members counsel was unable to speak with actually served on the jury.

J. **Clark v. State**, 608 S.W.2d 667 (Tex. Crim App. 1980).

1. Facts: Trial court limited both sides to 30 minutes before voir dire began. Defense counsel was given a warning with two minutes left and was allowed to continue eight additional minutes. After he was cut off, he objected and perfected a bill introducing two questions that he was not allowed to ask.
2. Holding: Trial court's rulings were reversed. Appellate court found that the trial court's arbitrary limitation was unreasonable, that counsel's questions were relevant, and that the court's ruling prevented him from intelligently exercising his peremptory strikes. Interestingly, there was no evidence in the record as to whether counsel was able to speak to all of the juror's who actually served. The court found harm, however, because the court prevented counsel from knowing how to use his peremptory strikes.

K. **DeLaRosa v. State**, 414 S.W.2d 668 (Tex. Crim App. 1967).

1. Facts: Trial court limited both sides to 30 minutes before voir dire began. Defense counsel objected and stated a number of questions that he wanted to ask the panel but would not have time. Defense counsel finished his 30 minutes, requested more time, and was denied. He requested to perfect a bill and he was denied.

2. Holding: Trial courts rulings were reversed. Appellate court found that trial court's arbitrary limitation before voir dire began was unreasonable. Defense counsel attempted to show that he was forced to accept an objectionable juror, however, the trial court denied him the ability to perfect his bill. Defense counsel was forced to use four of his peremptory strikes against jurors with whom he never spoke. The questions defense counsel asked the venire were not designed to prolong voir dire and did not solicit objection.

IV. PRESERVING ERROR

If counsel's voir dire is restricted by the court, counsel should:

- A. Object
- B. Request more time
- C. Place on the record the questions that he or she was precluded from asking.

Diaz v. State, 2002 WL 31398949 (Tex. App. – Houston [14th Dist.] Oct. 24, 2002, no pet.) (not designated for publication) (counsel failed to properly preserve error when she did not object or request additional time and did not notify court of questions she wanted to ask until after she exercised causal challenges).

Taylor v. State, 939 S.W.2d 148 (Tex. Crim. App. 1996) (counsel properly preserved error by objecting, asking for more time and placing proposed questions on the record).

Singer v. Kan-Do Maintenance Co., 1996 Tex. App. LEXIS 1201 (Tex. App. – Houston [14th Dist.] 1996) (unpublished opinion) (counsel merely informed court of four areas about which he wanted to inquire, however, did not submit a list of questions, therefore, the issue was not properly preserved).

Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989) (stating that there is no requirement that counsel place specific questions on the record as long as the nature of the questions is apparent from the context).

Centamore v. State, 632 S.W.2d 778 (Tex. App. – Houston [14th Dist.] 1982) (counsel did not preserve error when he failed to provide a list of questions that he was denied and failed to file a bill detailing out how his client was prejudiced).

Barrett v. State, 516 S.W.2d 181 (Tex. Crim. App. 1974). Counsel objected to the 30-minute time limit, however, did not state why he required additional time. He proffered 26 pages of generic criminal voir dire questions as questions that he could have asked but was denied. This was held not to properly preserve any error.

TAB H

TAB H

SCOPE OF VOIR DIRE EXAMINATION

I. Trial court's discretion.

The trial court has discretion to limit the scope of counsel's voir dire examination (just as it has discretion to limit the time of the examination, the number of peremptory strikes allowed per side, and whether to grant excusals or challenges). This discretion, however, is limited by the party's constitutional right to a fair trial. TEX. CONST. art. I, §15; Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989); Haryanto v. Saeed, 860 S.W.2d 913 (Tex. App. – Houston [14th Dist.] 1993, writ den'd).

II. Broad scope encouraged.

- A. “[A] broad latitude should be allowed to a litigant during voir dire examination...to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised.” Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989).
- B. Denying counsel the ability to ask questions directed at exposing bias or prejudice, or any of the other statutory bases for disqualification, denies a party the right to trial by a fair and impartial jury. Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989).

III. Preserving error when court limits scope of counsel's examination.

If counsel's voir dire is restricted by the court, counsel should:

- A. Object
- B. Request more time
- C. Place on the record the questions that he or she was precluded from asking.

Diaz v. State, 2002 WL 31398949 (Tex. App. – Houston [14th Dist.] Oct. 24, 2002, no pet.) (not designated for publication) (counsel failed to properly preserve error when she did not object or request additional time and did not notify court of questions she wanted to ask until after she exercised causal challenges).

Taylor v. State, 939 S.W.2d 148 (Tex. Crim. App. 1996) (counsel properly preserved error by objecting, asking for more time and placing proposed questions on the record).

Singer v. Kan-Do Maintenance Co., 1996 Tex. App. LEXIS 1201 (Tex. App. – Houston [14th Dist.] 1996) (unpublished opinion) (counsel merely informed court of four areas about which he wanted to inquire, however, did not submit a list of questions, therefore, the issue was not properly preserved).

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IV. Review of court's limitations.

Most of the court's discretionary decisions regarding voir dire are reviewed for an abuse of discretion and subject to a harmless error analysis. Under Babcock, however, the court's decision to limit the scope of counsel's voir dire examination appears to not be subject to the traditional harmless error analysis. Instead, if the court improperly prevents counsel from asking questions designed to expose bias or prejudice, harm is presumed. Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989).

TAB I

TAB I

ASKING ABOUT INSURANCE & “TORT REFORM”

I. Evidence of Liability Insurance Generally Inadmissible

A. Texas Rule of Evidence 411

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness.

B. Scope of Rule 411.

1. Only applies to “liability” insurance. Evidence of other types of insurance may be admissible depending upon the facts of the case. See, Brownsville Pediatric Ass’n v. Reyes, 68 S.W.3d 184 (Tex. App. – Corpus Christi 2002); Thornhill v. Ronnie’s I-45 Truck Stop, Inc., 944 S.W.2d 780 (Tex. App. – Beaumont 1997).
2. Only inadmissible “upon the issue whether the person acted negligently or otherwise wrongfully.” The Rule goes on to give examples of instances in which evidence of liability insurance may be admissible, such as to prove “agency, ownership or control, if disputed, or bias or prejudice of a witness.”
3. Even though counsel’s voir dire examination is not “evidence,” courts have still used the logic supporting Rule 411 to preclude inquiry into matters related to insurance during voir dire. Brockett v. Tice, 445 S.W.2d 20 (Tex. Civ. App. – Houston [1st Dist.] 1969).

II. Standard of Review if Evidence of Insurance is Injected into Trial

- A. If evidence of insurance is injected into the trial, the proper action for the court is to either (1) grant a mistrial or (2) give a curative instruction and then await verdict before determining whether to grant a new trial. Bennis v. Hulse, 362 S.W.2d 308 (Tex. 1962). The court should not, however, specifically advise the jury whether or not there is insurance. *Id.*
- B. To obtain relief on appeal for the improper introduction of insurance during trial, the appellant must show “(1) that the reference to insurance probably caused the rendition of an improper judgment in the case; and (2) that the probability that the mention of insurance caused harm exceeds the probability that the verdict was

grounded on proper proceedings and evidence.” University of Texas at Austin v. Hinton, 822 S.W.2d 197 (Tex. App. – Austin 1991).

III. Asking about connection with insurance industry or company.

- A. While the cases are split, in general, counsel would be wise to limit their inquiry to asking whether jurors or their close friends or family members adjust, value or investigate claims.
1. Hemminway v. Skibo, 498 S.W.2d 9 (Tex. Civ. App. – Beaumont 1973) Court recognized split in authority over propriety of asking whether “anyone ever worked for an insurance company, insurance adjusting company, investigated automobile accidents or any kind of personal injury accidents.” Court was not impressed with question and found that, when combined with other improper arguments by counsel, it warranted reversal.
 2. A.J. Miller Trucking Co., Inc. v. Wood, 474 S.W.2d 763 (Tex. Civ. App. – Tyler 1971) (court agreed with Brockett that inquiry as to juror’s connection with the insurance industry is reversible error)
 3. McDonough Brothers, Inc. v. Lewis, 464 S.W.2d 457 (Tex. Civ. App. – San Antonio 1971) (court upheld counsel’s inquiry about whether jurors or their family members were connected with the insurance industry).
 4. Johnson v. Reed, 464 S.W.2d 689 (Tex. Civ. App. – Dallas 1971) (court found that preventing counsel from asking questions about whether jurors are connected with insurance industry is not error).
 5. Kollmorgan v. Scott, 447 S.W.2d 236 (Tex. Civ. App. – Houston [14th Dist.] 1969) (court found that counsel’s discussion with jurors about their and their family’s connection with the insurance business was in good faith and not in error).
 6. Brockett v. Tice, 445 S.W.2d 20 (Tex. Civ. App. – Houston [1st Dist.] 1969) (it was error for counsel to ask potential jurors whether they had any connection with insurance company).
 7. Kingham Messenger & Delivery Service, Inc. v. Daniels, 435 S.W.2d 270 (Tex. Civ. App. – Houston [14th Dist.] 1968) (court upheld counsel’s question about whether anyone adjusts claims as part of their jobs).
 8. South Austin Drive-In Theatre, et al. v. Thomison, 421 S.W.2d 933 (Tex. Civ. App. – Austin 1967) (court found that counsel’s inquiry about whether anyone had any connection, either directly or indirectly, through

family or close friends or neighbors, with the insurance industry was not error).

9. Texas Employers' Ins. Ass'n v. Lane, 251 S.W.2d 181 (Tex. Civ. App. – Ft. Worth 1952) (insured's of defendant insurance company were properly disqualified as interested persons).
10. Houston Transit Co. v. Goldston, 217 S.W.2d 435 (Tex. Civ. App. – Galveston 1949) (court upheld trial court's refusal to permit counsel to inquire as to potential juror's connection with insurance company).
11. Green v. Ligon, 190 S.W.2d 742 (Tex. Civ. App. – Ft. Worth 1945) (court found counsel's question about juror's connection with a specific insurance company improper).
12. Lange v. Lawrence, 259 S.W. 261 (Tex. Civ. App. – San Antonio 1924) (court found counsel's question about whether jurors or their family were connected to the insurance industry improper).
13. Tarbutton v. Ambriz, 259 S.W. 259 (Tex. Civ. App. – San Antonio 1924) (it was error to ask jurors if they or any member of their families were employed by or had any interest in any liability or casualty insurance company).

IV. Asking about “tort reform” or “insurance or liability crisis.”

- A. Babcock v. Northwest Mem. Hosp., 767 S.W.2d 705 (Tex. 1989).
 1. Facts: The trial court in this case precluded plaintiff's counsel from asking questions about jurors' knowledge of and opinions about any perceived “insurance crisis” or “lawsuit crisis.” Even after a juror brought the subject up and was struck for cause, the trial court continued to deny questioning on the subject. Counsel objected, asked to put questions on the record and was denied. Counsel then included, via affidavit, a list of questions in their motion for new trial.
 2. Holding: Trial court's ruling was reversed. Appellate court found such questions may have been proper, however, plaintiff's counsel failed to properly preserve error. Supreme Court reversed, holding that error was properly preserved in light of the fact the trial court prevented counsel from making a bill.

B. Nat'l County Mut. Fire Ins. Co. v. Howard, 749 S.W.2d 618 (Tex. App. – Ft. Worth 1988, writ denied).

1. Facts: Trial court allowed counsel to inquire of potential jurors whether they had seen recent advertisements regarding any sort of “crisis” or talking about our jury system. Opposing counsel objected and was overruled.
2. Holding: Trial court’s ruling was affirmed. Appellate court found the questions were proper and did not inject insurance into the lawsuit. The court found it important that the trial took place at a time when tort reform and cost of liability insurance was prominently in the news.

C. Other jurisdictions:

1. Tighe v. Crosthwait, 665 So.2d 1337 (Miss. 1995). Trial court erred by refusing to allow medical malpractice plaintiff to ask questions during voir dire to determine if prospective jurors had been exposed to and/or affected by media campaign on tort reform. Such error, however, was harmless, as advertisements in question were geared towards reducing amount of damages and did not suggest that jurors should find defendants not liable. Also, plaintiff was allowed to ask jurors whether they belonged to any tort reform group, whether they had personal feelings that there were too many lawsuits, whether they felt medical doctors should not be sued, and whether they should give large damages if they were justified by proof. Finally, the jury never got to the question of damages, therefore, any bias that they may have had from the propaganda regarding excessive damage awards did not affect the outcome of the trial.
2. Barrett v. Peterson, 868 P.2d 96 (Utah App. 1993). Trial court's failure to ask prospective jurors threshold questions sufficient to elicit information on jurors' possible exposure to tort-reform and medical negligence information was reversible error and prevented plaintiff from detecting possible bias and from intelligently exercising his peremptory challenges, thus impairing his right to informed exercise of challenges.
3. Kozlowski v. Rush, 828 P.2d 854 (Ida. 1992). Plaintiff could have properly made good faith inquiry on voir dire into issue of whether potential jurors were biased against plaintiffs in general by exposure to media accounts of "medical malpractice crisis" or "insurance crisis" subject to appropriate limitations imposed by trial court, if they had made a sufficient showing that members of prospective jury panel had been exposed to such media accounts. Plaintiff failed in making such a showing, however, so inquiry was properly denied.

4. Borkkoski v. Yost, 594 P.2d 688 (Mont. 1979). Plaintiff's attorney should have been permitted to pursue a line of inquiry during voir dire to determine whether any prospective jurors were biased against plaintiff as the direct result of a national advertising campaign by leading insurance companies to the effect that large jury awards are in fact paid by the general public and result in higher insurance premiums for everyone. Because the jury found the defendant physicians not liable, however, any error was harmless and did not provide a basis for reversal.

V. **Other questions or comments regarding insurance.**

- A. Conn v. H.E. Butt Grocery Co., 1997 Tex. App. LEXIS 6416 (Tex. App. – Corpus Christi 1997) (unpublished opinion) (defense counsel's comment informing potential jurors that Defendant did not have insurance was error, but harmless).

TAB J

TAB J

ASKING JURORS TO “COMMIT”

I. What is a “commitment question?”

- A. **“The impropriety of a commitment question is found in its design to determine a potential juror’s view of certain evidence; it does not seek to expose the existence of bias. And although the existence of bias will axiomatically always influence a juror’s view of the case, the converse is not true. That is, a potential juror’s view of the case as influenced by certain evidence does not necessarily mean the juror is biased and cannot be fair. Indeed, every trial lawyer hopes jurors are influenced by the evidence; otherwise, what is the point of a jury trial? But a party is not permitted to “pre-test” juror views on the weight they would give certain evidence for the purpose of exercising peremptory challenges.”**

Vasquez v. Hyundai Motor Co., 119 S.W.3d 848 (Tex. App. – San Antonio 2003, pet. granted) (reversed trial court’s refusal to allow counsel to ask jurors whether, knowing that the deceased was not wearing a seat belt, their views on seat belt use would prevent them from objectively evaluating all the evidence).

- B. Whether a question is a commitment question resolves only half the problem. Not all commitment questions are improper. **A question is not an improper “commitment question” if:**

- (1) **one or more of the possible answers does not require the prospective juror to resolve or refrain from resolving an issue in case on the basis of one or more facts contained in the question,**
- (2) **an answer to the question would possibly lead to a challenge for cause, and**
- (3) **the question contains only those facts necessary to test whether the prospective juror is challengeable for cause.**

Standefer v. State, 59 S.W.3d 177 (Tex. Crim. App. 2001) (asking “If someone refused to take a breath test, would you presume such a person in your mind to be intoxicated by virtue of refusing a breath test alone?” was improper).

II. Asking about juror attitudes regarding damages.

- A. General rule: while counsel is permitted to ask about juror attitudes regarding damage awards (see above) or whether a juror is willing to fully and fairly compensate plaintiff according to the evidence shown at trial, counsel may not inquire whether a juror could award a specific dollar amount assuming certain facts are shown.

B. Permissible inquiries:

1. "If under all the evidence when it is in, the greater weight and greater degree of believable evidence shows [plaintiff] is entitled to the \$115,000.00," (for which amount suit was brought) "is there any reason why anyone of you could not and would not be able to write such a verdict?" Brown v. Poff, 387 S.W.2d 101 (Tex. Civ. App. – El Paso 1965) (trial court properly allowed above question). But, see Greenman v. City of Fort Worth, 308 S.W.2d 553 (Tex. Civ. App. – Fort Worth 1957, writ ref'd n.r.e.) (court affirmed trial court's ruling preventing a question very similar to the question in Poff). Conclusion – these questions fall within the court's discretion.
2. Counsel allowed to ask jurors if they were convinced plaintiff was injured through the negligence of defendant and they thought plaintiff was entitled to \$20,000, would they put in that amount just as quick as they would \$.25. Dodd v. Burkett, 160 S.W.2d 1016 (Tex. Civ. App. – Beaumont 1942) (trial court correctly permitted the above question but only because counsel followed it up by asking whether jurors would put in an amount that was fair and supported by the law and evidence at trial).
3. Counsel allowed to ask "if for any reason they would be unwilling to render a verdict for full and fair compensation if they found for [the plaintiff], and, ...would there be any disposition to give him less than full compensation, under the evidence." Rice v. Ragan, 129 S.W. 1148 (Tex. Civ. App. 1910, writ ref'd) (trial court properly permitted counsel to ask the above question).

C. Impermissible inquiries:

1. "If the evidence is that the land taken has a fair market value of approximately \$87,000, and that the damage to the property not taken is \$230,000, will you have any objection to render a verdict for those amounts merely because of the large amounts of money involved?" Greenman v. City of Fort Worth, 308 S.W.2d 553 (Tex. Civ. App. – Fort Worth 1957, writ ref'd n.r.e.) (court affirmed trial court's ruling preventing the above question). This question is very similar to the question in Poff which was allowed. The two cases illustrate the fact that the propriety of committal questions fall squarely within the court's discretion.

III. Asking about the effect of certain evidence.

- A. General rule: counsel can ask potential jurors whether they would consider or be "prejudiced by" certain pieces of evidence, but they may not ask whether they would be "influenced by" certain evidence, what effect a certain piece of evidence

would have on them, or whether they would find a certain piece of evidence significant.

B. Permissible inquires:

1. Counsel may ask whether, given a set of undisputed facts, any of the jurors could not consider the rest of the evidence that would be presented regarding a specific issue. Grey Wolf Drilling Co. v. Boutte, 2004 WL 1784 (Tex. App. – Houston [14th Dist.] Dec. 14, 2004) (trial court properly allowed above question).
2. Counsel may inquire as to whether, knowing that the deceased was not wearing a seat belt, their views on seat belt use would prevent them from objectively evaluating all the evidence. Vasquez v. Hyundai Motor Co., 119 S.W.3d 848 (Tex. App. – San Antonio 2003, pet. granted).
3. Counsel may voir dire the panel on whether any of the potential jurors would be biased against the plaintiff “if during the trial evidence of [plaintiff’s] use of narcotics in prior years or of any narcotic convictions in the past would be introduced.” City Transp. Co. v. Sisson, 365 S.W.2d 216 (Tex. Civ. App. – Dallas 1963, no writ).
4. Counsel may ask whether jurors would take into consideration the fact that the witnesses to the disputed will were, at the time of its execution, employed by appellant. Rothermel v. Duncan, 365 S.W.2d 398 (Tex. Civ. App. – Beaumont), rev’d on other grounds, 369 S.W.2d 917 (Tex. 1963).
5. Counsel may inquire as to whether “the mere presence of a quart of rum and a piece of a bottle or rum or liquor in our car prejudice you at all in this case?” Airline Motor Coaches, Inc. v. Bennett, 184 S.W.2d 524 (Tex. Civ. App. – Beaumont 1944), rev’d on other grounds, 187 S.W.2d 982 (Tex. 1945).

C. Impermissible inquiries:

1. Counsel may not ask potential jurors “whether any of the jurors would be prejudiced if the Plaintiff did not call doctors to testify as to the nature of her injury and the extent of her disability, if it appeared that those doctors had examined the Plaintiff at Plaintiff’s request.” Tex. Gen. Indemn. Co. v. Mannhalter, 290 S.W.2d 360 (Tex. Civ. App. – Galveston 1956, no writ) (question was improper and error, however, court’s curative instruction made error harmless).
2. Counsel may not inquire “if it developed upon the trial that the work was in accord with the plans and specifications, but that there was an error in said plans and specifications, this fact would influence [the jurors] in their

deliberations.” Metropolitan cas. Co. v. Medina Rural High School Dist., 53 S.W.2d 1026 (Tex. Civ. App. – San Antonio 1932, writ dismiss’d w.o.j.) (trial court properly refused above question).

3. Counsel may not ask, “Would the fact that the testator, in making his will, left out and did not mention and did not give anything to one or more members of his family, influence you in finding a verdict in this case?” Campbell v. Campbell, 215 S.W. 134 (Tex. Civ. App. – Dallas 1919, writ refused) (trial court properly refused the above question).
4. Counsel may not inquire, “Would you let the fact that Schrimsher executed the mortgage or mortgages to the bank influence you in determining whether or not the property in controversy was a homestead of himself and family at the time he executed the mortgage?” Parker v. Schrimsher, 172 S.W. 165 (Tex. Civ. App. – Amarillo 1914, writ refused) (allowing question was reversible error).

IV. Asking “which party is ahead.”

“Asking a veniremember which party is starting out ‘ahead’ is often an attempt to elicit a comment on the evidence. (citation omitted). Such attempts to preview a veniremember’s likely vote are not permitted. (citing Lassiter and Campbell cases). Asking which party is ‘ahead’ may be appropriate before any evidence or information about the case has been disclosed, but here the plaintiff’s attorney gave an extended and emotional opening statement summarizing the facts of the case to the venire. (footnote omitted). A statement that one party is ahead cannot disqualify if the veniremember’s answer merely indicates an opinion about the evidence.” (citation omitted). Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).

TAB K

TAB K

CHALLENGES FOR CAUSE DUE TO BIAS OR PREJUDICE

For challenges based on statutory grounds other than bias or prejudice, see *supra* TAB A regarding Juror Qualifications.

I. Definition of bias.

“[A]n inclination toward one side of an issue rather than to the other.” Compton v. Henrie, 364 S.W.2d 179 (Tex. 1963).

II. Bias warranting disqualification.

- A. To warrant disqualification, “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.” Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005), relying on Compton v. Henrie, 364 S.W.2d 179 (Tex. 1963).
- B. A juror who equivocates, admitting bias but also pledging to approach the evidence with an impartial and open mind, is not subject to disqualification. Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).
- C. Even if juror admits that one side “would be starting out ahead” of another before presentation of the evidence, they are not necessarily disqualified. “An initial ‘leaning’ is not disqualifying if it represents skepticism rather than an unshakeable conviction.” Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005); see also, Goode v. Shoukfeh, 943 S.W.2d 441 (Tex. 1997) (affirming trial court’s denial of causal challenge of juror who admitted he had a “slight bias,” was “leaning a little” toward the defendant, and believed the plaintiff was “starting out a little bit behind.”); Excell Corp. v. Apodaca, 51 S.W.3d 686 (Tex. App. – Amarillo 2001), *rev’d on other grounds*, 81 S.W.3d 817 (Tex. 2002) (juror’s statement that he “might tend to lean towards plaintiff” if the evidence was “dead even” between the parties was insufficient to conclusively establish bias). [Note: Cortez disapproved Apodaca just to the extent that Apodaca found harmless error when a juror failed to sign the verdict form. Cortez found that when a party properly preserves error and is forced to accept an objectionable juror, harm is presumed].

III. Rehabilitation.

- A. Even if a juror admits bias, such juror may be rehabilitated. Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).
- B. The Court in Cortez alleged that it was unaware of any authority to the contrary, but if there was, such authority is disapproved. Before Cortez, it was commonly

believed that once a juror admitted bias, such juror could not be rehabilitated. Sullemon v. U.S. Fidelity & Guaranty Co., 734 S.W.2d 10 (Tex. App. – Dallas 1987) (“Once prejudice in the mind of a member of the jury panel is established, that member is automatically disqualified from serving on the jury as a matter of law. All discretion is removed from the trial court, and it must dismiss the venireman. Once a prospective juror admits bias or prejudice, he or she cannot be “rehabilitated,” and affirmations that bias or prejudice can be set aside and the case decided on the law and evidence must be entirely disregarded.” (citations omitted)).

- C. If, however, the record “clearly shows that a veniremember was materially biased, his or her ultimate recantation of that bias at the prodding of counsel will normally be insufficient to prevent the veniremember’s disqualification.” Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).
- D. “[T]he length and effect of efforts to rehabilitate veniremembers are governed by the same rules that apply to all of voir dire.” Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).
- E. Just because a potential juror utters “magic words” claiming that they can be “fair and impartial,” such juror will not avoid disqualification if the rest of the record indicates they are biased. Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).
- F. If a juror claims that he is “willing to try” to decide the case on the facts and the law, he can avoid disqualification. Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).

IV. Rule favoring liberal granting of challenges.

“In this country, where fair and impartial jurors can be had so readily, there is really no reason why questions of this character should arise, and in all cases where there is a possibility for serious doubt as to the impartiality of a juror, from whatever cause, the trial court, in the exercise of the discretion conferred upon it, should properly discharge the juror.” Baker v. Salah, 2004 WL 1921232 (Tex. App. – Corpus Christi 2004, pet. for review filed) citing Lumberman’s Ins. Corp. v. Goodman, 304 S.W.2d 139 (Tex. App. – Beaumont 1957, writ ref’d n.r.e.) (recently disapproved by Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005) on the issue of juror rehabilitation).

V. **Examples of bias warranting disqualification.**

A juror is disqualified as a matter of law when he states:

- A. that he does not believe in personal injury lawsuits. Compton v. Henrie, 364 S.W.2d 179 (1963).
- B. he believes that insurance companies get off lightly. Lumberman's Ins. Corp. v. Goodman, 304 S.W.2d 139 (Tex. Civ. App. – Beaumont 1957, writ ref'd n.r.e.) (disapproved by Cortez on the issue of juror rehabilitation).
- C. he was a client of one of the defense attorneys and that this relationship would bias him toward one side. Gum v. Schaeffer, 683 S.W.2d 803 (Tex. App. – Corpus Christi 1984, no writ) (disapproved by Cortez on the issue of juror rehabilitation).
- D. he believes people sue too quickly. Knop v. McCain, 561 So.2d 229 (Ala. 1989).
- E. the evidence must be overwhelming to award damages. Knop v. McCain, 561 So.2d 229 (Ala. 1989).
- F. he is against drinking of any kind (in a case where a party was a social drinker). Flowers v. Flowers, 397 S.W.2d 121 (Tex. Civ. App. – Amarillo 1965, no writ).
- G. he suffered from same ailment as plaintiff. Williams v. Texas City Refining, Inc., 617 S.W.2d 823 (Tex. App. – Houston [14th Dist.] 1981).
- H. was a previous defendant and had strong tort reform opinions. Lewis v. Voss, 770 A.2d 996 (D.C. 2001).
- I. was a current patient of defendant doctor. McGarry v. Horlacher, 775 N.E.2d 865 (2d Dist. Montgomery County 2002).
- J. he feels that persons bringing claims in minor automobile collisions are dishonest. Goldenberg v. Regional Import & Export Trucking Co., 674 So.2d 761 (Fla App. D4 1996).
- K. knows defendant doctor and sees him in a social context weekly. Davis v. Powell, 781 So.2d 912 (Miss Ct. App. 2000) cert denied.
- L. he had been represented by attorney, had a family member who had been represented by attorney and considered attorney to be his attorney. Toyota Motor Corp. v. McLaurin, 642 So.2d 351 (Miss 1994) reh den.

- M. bias against awarding nonpecuniary damages supported by the evidence. Cavnar v. Quality Control Parking, Inc., 678 S.W.2d 548 (Tex. App. – Houston [14th Dist.] 1984, rev'd in part on other grounds, 696 S.W.2d 549 (Tex. 1985).

VI. Preserving error when challenge is denied.

- A. Object immediately upon denial.
- B. Advise court, before exercising peremptory challenges, that you will exhaust peremptory challenges and that after exhausting such challenges, a specific objectionable juror will remain on the jury. Hallett v. Houston Northwest Med. Ctr., 689 S.W.2d 888 (Tex. 1985). You must identify the objectionable juror, but you do not have to explain why they are objectionable. Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005)
- C. Request that the court reconsider its ruling on your previous challenge for cause.
- D. Request the court grant you an additional peremptory strike. Whether this is required or not is not clear, so do it out of an abundance of caution. See, Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005) (no indication that counsel did it, but court found no waiver); Burton v. R.E. Hable Co., 852 S.W.2d 745 (Tex. App. – Tyler 1993, no writ) (requiring litigant to request additional strikes before giving peremptory challenges to court); Sullemon v. United States Fidelity & Guar. Co., 734 S.W.2d 10 (Tex. App. – Dallas 1987, no writ) (finding that Hallett does not require litigant to request additional peremptory strikes).
- E. Then, and only then, hand your peremptory strikes to the court or clerk. Make sure you have used all of your strikes.
- D. Cases:
1. Baker v. Salah, 2004 WL 1921232 (Tex. App. – Corpus Christi 2004, pet. for review filed) (In order to preserve error for appellate review in the denial of a challenge for cause, an appellant must (1) advise the trial court (2) before exercising his peremptory challenges (3) that the court's denial of the challenge for cause would force the party to exhaust his peremptory challenges and (4) that, after exercising these peremptory challenges, a specific objectionable juror will remain on the panel. Citing Hallett v. Houston Northwest Med. Ctr., 689 S.W.2d 888 (Tex. 1985).
 2. There is no requirement that counsel state the reason why the objectionable juror remaining on the panel is objectionable. Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005) citing Wolfe v. State, 178 S.W.2d 274 (Tex. Crim App. 1944).

3. “While an ‘objectionable’ veniremember could be picked at random, the objecting party must do so before knowing who the opposing party will strike or who the actual jurors will be. If it ‘guesses’ wrong, any error is harmless....” Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).

VII. Standard of Review.

- A. Whether a juror is biased is a factual determination for the court, however, if evidence conclusively establishes that a jury panelist would not act with impartiality, an appellate court must hold that the panelist was disqualified as a matter of law. The trial court has no discretion to overrule a challenge for cause when the challenged juror is disqualified as a matter of law. Baker v. Salah, 2004 WL 1921232 (Tex. App. – Corpus Christi 2004, pet. for review filed) (citations omitted).
- C. Harm is presumed when the party uses all of his peremptory challenges and is thus prevented from striking other objectionable jurors from the list because he has no additional peremptory challenges. Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005) citing Hallett v. Houston Northwest Medical Center, 689 S.W.2d 888 (Tex. 1985).

TAB L

TAB L

PEREMPTORY CHALLENGES AND *BATSON*

I. Number of peremptory challenges.

- A. Six per party in district court and three per party in county court. TEX. R. CIV. PROC. 233.
- B. The court may “equalize” the number of peremptory challenges in multi-party cases by reducing the number of challenges allowed for parties on the same side of the docket who are not adverse to one another. See above TAB E.
- C. When the court impanels alternate jurors, each party is entitled to one additional peremptory strike if one or two alternates are used, and two additional peremptory strikes if three or four alternates are used. The additional strike(s) may only be used against alternate jurors. TEX. GOV’T CODE §62.0202(e).

II. Making a *BATSON* challenge.

NOTE: While the majority of opinions regarding discriminatory use of peremptory strikes are criminal cases, Batson also applies to civil cases. Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991).

- A. Object before jury is sworn and the remainder of the panel is discharged. Parra v. State, 935 S.W.2d 862 (Tex. App. – Texarkana 1995, pet. ref’d).
- B. Make a prima facie showing of discriminatory motives. Batson v. Kentucky, 476 U.S. 79 (1986); Goode v. Shoukfeh, 943 S.W.2d 441 (Tex. 1997). Certain conditions must be satisfied in order for the moving party to make a prima facie case:
 - 1. the movant must raise it in a timely manner and ensure the record reflects how the peremptory strikes were made.
 - 2. the moving party must have standing to raise question, usually by being a member of a cognizable racial group. The moving party does not, however, have to be in the same cognizable racial group as the challenged jurors. Powers v. Ohio, 499 U.S. 400 (1991). A corporation cannot, however, claim membership in any constitutionally protected class, therefore, it may not make a Batson challenge. Dias v. Sky-Chefs, Inc., 948 F.2d 532 (9th Cir. 1992).
 - 3. the manner in which the strikes were made must create an inference that the striking party had an improper discriminatory purpose. Creating an inference can be done by showing any or all of the following:
 - a. a pattern of strikes against group members.
 - b. the struck jurors share only the characteristic of race.
 - c. the struck jurors’ responses during voir dire did not demonstrate any bias against the party striking them.
 - d. the struck jurors are of the same group as the movant party.

- e. the questions to the struck jurors were non-probing, leading, or conclusory questions not designed to elicit the juror's views.
- C. Once prima facie showing of discriminatory motives is made, the burden shifts to the party who exercised the strike to come forward with a race neutral explanation. Batson v. Kentucky, 476 U.S. 79 (1986). The court does not analyze whether the explanation is plausible, but rather, only looks at the facial validity of the explanation. Goode v. Shoukfeh, 943 S.W.2d 441 (Tex. 1997).
- D. Once the party who exercised the strike offers a race-neutral explanation, the burden shifts back the opponent of the strike to show the explanation is only a pretext for race-motivated strikes. Herron v. State, 86 S.W.3d 621 (Tex. Crim. App. 2002).
1. The court will evaluate the legitimacy of the strike in this stage of the process. Gibson v. State, 117 S.W.3d 567 (Tex. App. – Corpus Christi 2003, no pet.) (finding State's explanation was a pre-text for race-motivated strikes).
 2. The burden of persuading the court that the peremptory strike is race-based is on the party opposing the strike. Guzman v. State, 85 S.W.3d 242 (Tex. Crim. App. 2002).
 3. The moving party need only show that race was a "but for" cause for the strike, and not that it was the "sole cause." McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976). When the motives behind a peremptory strike are 'mixed,' i.e., both impermissible (race or gender-based) and permissible (race and gender-neutral), if the striking party shows that he would have struck the juror based solely on the neutral reasons, then the strike does not violate the juror's Fourteenth Amendment right to equal protection of the law. Guzman v. State, 85 S.W.3d 242 (Tex. Crim. App. 2002).
 4. This determination is a question of fact for the trial court. Goode v. Shoukfeh, 943 S.W.2d 441 (Tex. 1997).
- E. Gender: Gender is not a race neutral reason for exercising a peremptory strike. J.E.B. v. Alabama, 511 U.S. 127 (1994); Guzman v. State, 20 S.W.3d 237 (Tex. App. – Dallas 2000, pet. granted).
- F. Examples of race-neutral explanations.
1. Intelligence is a race neutral reason for a challenge. Satterwhite v. State, 858 S.W.2d 412 (Tex. Crim. App. 1993); Johnson v. State, 740 S.W.2d 868 (Tex. App. – Houston [14th Dist.] 1987, pet. ref'd).
 2. Youth and employment (or lack thereof) are acceptable race-neutral explanations for striking a prospective juror. Partida v. State, 133 S.W.3d 738 (Tex. App. – Corpus Christi 2003).

3. The appearance of a juror is a race neutral reason for a peremptory challenge. Partida v. State, 133 S.W.3d 738 (Tex. App. – Corpus Christi 2003) citing Ealoms v. State, 983 S.W.2d 853 (Tex. App. – Waco 1998, pet. ref'd).
4. Criminal history is a race neutral reason for striking a prospective juror. Chambers v. State, 866 S.W.2d 9 (Tex. Crim. App. 1993).
5. Age is a race neutral reason to strike a juror. Ealoms v. State, 983 S.W.2d 853 (Tex. App. – Waco 1998, pet. ref'd).
6. National origin is a race neutral reason. Wamget v. State, 67 S.W.3d 851 (Tex. Crim. App. 2001) (strike based on juror being born in a certain country is race-neutral).

G. Review of trial court's rulings.

When reviewing a *Batson* challenge, the appellate court examines the record in the light most favorable to the trial judge's ruling. It will reverse the trial judge's ruling only when it is clearly erroneous. A ruling is clearly erroneous when, after searching the record, the appellate court is left with the "definite and firm conviction that a mistake has been committed." If the trial judge's ruling is supported by the record, including the voir dire, the party's explanation of its peremptory challenges, any rebuttal, and any impeaching evidence, then the trial judge's ruling is not clearly erroneous. Guzman v. State, 2003 Tex. App. LEXIS 2760 (Tex. App. – Dallas 2003).

TAB M

TAB M

PRESERVING ERROR

I. Get a record.

- A. To preserve error for appeal, a party must object and insure that the record contains all relevant information. TEX. R. APP. PROC. 52. So, regardless of how it makes the court reporter feel, get a record of voir dire.
- B. Make sure during voir dire, you are properly identifying the jurors when they speak.
- C. Make sure all discussions at the bench are on the record.
- D. Make sure that you obtain a ruling on all issues and that all the court's rulings are on the record.

II. Preserving error when court limits scope or time of counsel's examination.

- A. Object before or during voir dire. Roberts v. State, 667 S.W.2d 184 (Tex. App. – Texarkana 1983, no pet.).
- B. Request more time if being cut off. Kendall v. Whataburger, 759 S.W.2d 751 (Tex. App. – Houston [1st Dist.] 1988, no writ).
- C. Place on the record the questions that the court precluded counsel from asking.
- D. Cases:
 - 1. Diaz v. State, 2002 WL 31398949 (Tex. App. – Houston [14th Dist.] Oct. 24, 2002, no pet.) (not designated for publication) (counsel failed to properly preserve error when she did not object or request additional time and did not notify court of questions she wanted to ask until after she exercised causal challenges).
 - 2. Taylor v. State, 939 S.W.2d 148 (Tex. Crim. App. 1996) (counsel properly preserved error by objecting, asking for more time and placing proposed questions on the record).
 - 3. Singer v. Kan-Do Maintenance Co., 1996 Tex. App. LEXIS 1201 (Tex. App. – Houston [14th Dist.] 1996) (unpublished opinion) (counsel merely informed court of four areas about which he wanted to inquire, however, did not submit a list of questions, therefore, the issue was not properly preserved).
 - 4. Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989) (stating that there is no requirement that counsel place specific questions on the record as long as the nature of the questions is apparent from the context).

5. Centamore v. State, 632 S.W.2d 778 (Tex. App. – Houston [14th Dist.] 1982) (counsel did not preserve error when he failed to provide a list of questions that he was denied and failed to file a bill detailing out how his client was prejudiced).
6. Barrett v. State, 516 S.W.2d 181 (Tex. Crim. App. 1974). Counsel objected to the 30-minute time limit, however, did not state why he required additional time. He proffered 26 pages of generic criminal voir dire questions as questions that he could have asked but was denied. This was held not to properly preserve any error.

III. Preserving error when causal challenge is denied.

- A. Object immediately upon denial.
- B. Advise court, before exercising peremptory challenges, that you will exhaust peremptory challenges and that after exhausting such challenges, a specific objectionable juror will remain on the jury. Hallett v. Houston Northwest Med. Ctr., 689 S.W.2d 888 (Tex. 1985).
- C. Request that the court reconsider its ruling on your previous challenge for cause.
- D. Request the court grant you an additional peremptory strike. Whether this is required or not is not clear, so do it out of an abundance of caution. See, Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005) (no indication that counsel did it, but court found no waiver); Burton v. R.E. Hable Co., 852 S.W.2d 745 (Tex. App. – Tyler 1993, no writ) (requiring litigant to request additional strikes before giving peremptory challenges to court); Sullemon v. United States Fidelity & Guar. Co., 734 S.W.2d 10 (Tex. App. – Dallas 1987, no writ) (finding that Hallett does not require litigant to request additional peremptory strikes).
- E. Then, and only then, hand your peremptory strikes to the court or clerk.

D. Cases:

1. Baker v. Salah, 2004 WL 1921232 (Tex. App. – Corpus Christi 2004, pet. for review filed) (In order to preserve error for appellate review in the denial of a challenge for cause, an appellant must (1) advise the trial court (2) before exercising his peremptory challenges (3) that the court's denial of the challenge for cause would force the party to exhaust his peremptory challenges and (4) that, after exercising these peremptory challenges, a specific objectionable juror will remain on the panel. Citing Hallett v. Houston Northwest Med. Ctr., 689 S.W.2d 888 (Tex. 1985).
2. There is no requirement that counsel state the reason why the objectionable juror remaining on the panel is objectionable. Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005) citing Wolfe v. State, 178 S.W.2d 274 (Tex. Crim App. 1944).

3. “While an ‘objectionable’ veniremember could be picked at random, the objecting party must do so before knowing who the opposing party will strike or who the actual jurors will be. If it ‘guesses’ wrong, any error is harmless....” Cortez v. HCCI-San Antonio, Inc., 2005 Tex. LEXIS 206 (Tex. 2005).

IV. Preserving error when court allows improper questions.

- A. Object immediately.
- B. Ask for curative instruction.
- C. Ask that counsel not be permitted to continue with that line of questioning.
- D. Get ruling.
- E. Ask for running objection to that line of questioning.
- F. Cases:
 1. A prompt objection and request for the court to instruct the panel to disregard the improper conduct of the opposing counsel is generally necessary to avoid waiving the objection. Tex. Employer’s Ins. Ass’n v. Loesch, 538 S.W.2d 435 (Tex. Civ. App. – Waco 1976).
 2. When trial court permits improper questions, the harmless error analysis applies and the complaining party must show probable harm. This is in contrast to when the court limits counsel from asking proper questions, which, under Babcock, doesn’t appear to be subject to the harmless error analysis, but rather, harm is presumed.

TAB N

TAB N

“BUSTING THE PANEL”

I. When is a panel “busted”?

The venire must at least have enough people to allow for each side to exercise its peremptory strikes and still leave enough left to sit a full jury, and any alternates. Assuming no alternates, a district court venire cannot get below 24 and a county court venire cannot be reduced to less than 12. TEX. R. CIV. PROC. 231.

II. What happens when a panel is “busted”?

The court must draw additional names from the wheel or the central jury panel depending upon how the panels are selected in that county.

- A. McRae v. Echols, 8 S.W.3d 797 (Tex. App. – Waco 2000, pet. denied) (trial court erred in proceeding with only 23 of 24 required venirepersons prior to exercise of peremptory challenges in personal injury action).
- B. Williams v. State 631 S.W.2d 955 (Tex. App. – Austin 1982) (where one of 12 potential jurors became ill and thus disqualified before trial judge administered juror's oath but after members of the jury panel who were not selected to serve on jury were excused, trial judge had authority to complete the jury by requiring additional individuals to be furnished from the central panel and in a number sufficient to complete a fair and impartial jury, and was not required to discharge the first panel and delay the trial by starting anew the selection of a jury from an altogether different panel).

III. Review of court’s action.

Trial court's error in proceeding with only 23 of required 24 venirepersons prior to exercise of peremptory challenges did not warrant reversal in personal injury action, where trial court empaneled 12-member jury, appellant lodged no objection to empaneled jury, and nothing in record showed that such error caused rendition of improper judgment or prevented proper appeal. McRae v. Echols, 8 S.W.3d 797 (Tex. App. – Waco 2000, pet. denied).

TAB O

TAB P