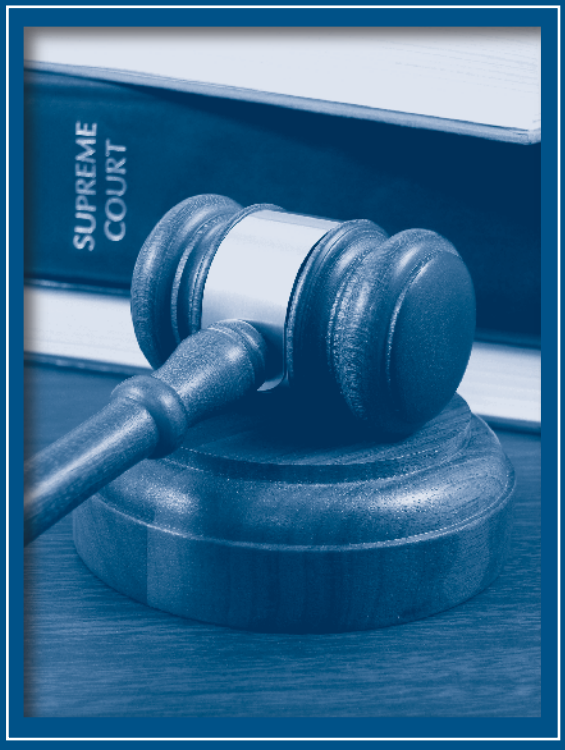
RECOMMENDATIONS FOR REFORM

The Civil Jury In Texas



TEXANS FOR LAWSUIT REFORM FOUNDATION

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EXECUTIVE SUMMARY

The primary goal of any jury selection system is to impanel a fair and impartial jury in every case. Selection procedures should promote the selection of juries that truly represent the community, encourage citizens to serve on juries, discourage avoidance of service, and prohibit invasion of jurors' privacy. Once a jury is impaneled, trial procedures should be respectful of jurors, use their time efficiently, and facilitate their comprehension of the evidence so that they can render an informed and fair verdict.

In recent years, Texas has improved its jury selection system in many respects, but some problems remain. Defendants continue to express the view that juries in many Texas courts are biased, a belief reflected in at least one widely-publicized study sponsored by business and reform groups. Plaintiff groups express dismay that the number of jury trials continues to decline. Bar groups such as the American Bar Association have sponsored broad studies of ways to improve the jury system, focusing on methods of improving the experiences and satisfaction of jurors. Various state judiciaries have also studied methods of improving jury systems in their respective jurisdictions. Following this trend, the Texas Supreme Court has focused considerable attention on the subject through a series of recent decisions and the appointment of special committees that continue to examine aspects of the system.

The purpose of this paper is to identify problems in the civil jury system and offer solutions to help Texas achieve the goal of impaneling a fair and impartial jury in every civil case. Our recommended starting point is adoption of a clear procedural rule governing a crucial aspect of the jury selection process—voir dire. In addition, we propose ways to facilitate jurors' understanding of the evidence during trial, encourage broad representation of the community on juries, and ensure that Texans more fairly share both the right and the burden of jury service.

Improving Voir Dire

The process of questioning potential jurors to determine who will actually serve on the jury is the most important step in determining whether a fair and impartial jury will be selected. In a typical civil case, a trial court may call for as many as three or four times as many potential jurors as will ultimately serve on the jury because the questioning process and related selection procedures eliminate many of those called. This pool of prospective jurors is called the "venire," and the people in the venire are called venire members. The process of questioning the venire members to determine who will actually serve on the jury is called "voir dire." No statute or rule in Texas provides any guidance on the appropriate method for conducting voir dire. Courts have provided some guidance by case law, but ambiguity remains.

Texas is one of only a few states that customarily allows the parties' attorneys to conduct voir dire without much active participation from the trial judge. Typically, the plaintiff's lawyer opens voir dire with a statement of the case, which that lawyer may use as an opportunity to begin to influence the jury. As zealous advocates for their clients in an adversarial system, lawyers may spend hours questioning potential jurors about the facts of the case with the ultimate goal of impaneling a jury favorable to their client rather than a fair and impartial one. After all, the advocates' duty is to represent their clients, not the public inter-

est of seating a fair and impartial jury. As former Supreme Court Justice Craig Enoch recently said, "[t]he legal purpose of voir dire is to seat a fair and impartial jury. The real purpose is to keep jurors off the panel who will not vote for your client." Because lawyers ethically must represent only their clients, the system necessarily relies on the trial judge to represent the public interest. Improving the fairness and impartiality of juries therefore depends on Texas judges taking a more active role in conducting voir dire.

This paper recommends that the Texas Supreme Court promulgate a rule refining and clarifying the procedure for voir dire. The rule should provide that trial judges, rather than lawyers, make a neutral opening statement about the case to the venire members and that the judge conduct the initial questioning of the venire members to determine whether they are statutorily qualified to serve or have a disqualifying bias or prejudice. The Court should also develop standard opening statements and questions and promulgate appropriate guidelines to assist trial courts in conducting the initial phase of voir dire. The Court should emphasize to trial judges that their opening statements must be impeccably impartial to the litigants.

The proposed rule should also make clear that trial courts have the power to limit the amount of time lawyers can use in voir dire and to limit or prohibit case-specific or fact-specific questions by lawyers. The Texas Supreme Court addressed this latter problematic area in three recent landmark decisions, which should be incorporated into the rule to give clear guidance to judges and lawyers on the kinds of questions that are appropriate in the jury selection process. Additionally, the rule should prescribe the appropriate scope of voir dire questioning by prohibiting examination that is repetitive, leading, suggestive, or argumentative, or that inquires into a prospective juror's religious, moral, social, philosophical or political beliefs and associations, voting record, personal income or financial status, medical history or condition, preferences and habits as to reading, television and other media, or other matters of a personal and private nature, except for the rare case where such questions are sufficiently relevant to overcome a juror's privacy and free speech rights. Citizens should not be summoned to respond to this kind of inquisition.

Furthermore, the rule should encourage the use of limited supplemental written questionnaires in appropriate cases to reduce the time needed for voir dire. Attorneys in complex litigation could conduct a more effective and efficient voir dire with increased use of such questionnaires. As with oral questioning of jurors, however, the rule should prohibit invasive questions to protect the privacy and free speech rights of citizens called to jury duty. The Supreme Court should constitute a Pattern Voir Dire Question Committee, similar to the Pattern Jury Charge Committee, to assist it in instructing trial courts on pattern questionnaires.

Finally, this paper encourages Texas judges, attorneys, and legal scholars to study additional methods of improving voir dire. These areas of further study may address the definition of "bias and prejudice" as a basis for challenges for cause, the scope of proper questioning during voir dire, and the standard for appellate review of trial court rulings on voir dire.

Facilitating Juror Consideration of Evidence

Jurors in most civil cases play a passive role. They sit quietly, listen to the evidence, and are not permitted to talk about the case among themselves until all evidence is presented. Typically, they do not take notes and do not ask questions of the witnesses. Studies have shown that this passive role is not helpful in keeping jurors focused on the trial or assisting jurors to retain information.

To improve juror participation and performance, this paper makes three recommendations. First, courts should encourage and facilitate juror note-taking during trial. Second, jurors should be allowed to submit written questions for the court to ask witnesses. Third, trial courts should have discretion to allow attorneys to make interim statements during trial to review the evidence. These changes, which are recommended by the American Bar Association, have been made in Arizona, California and other states and have proven successful at improving juror comprehension and satisfaction. Improving juror comprehension increases the likelihood of a just verdict and encourages participation in the civil justice system. These results are highly desirable.

Improving Selection Methods & Equalizing the Burden of Jury Service

The right to trial by an impartial jury is guaranteed by both the United States and Texas Constitutions. It is a basic and fundamental feature of our system of jurisprudence and one of our most precious rights. The promise of an impartial jury can be fulfilled, and the protection of one of our most precious rights maintained, only if citizens answer the call and exercise their right to serve on a jury. The recommendations discussed above are intended, in part, to encourage citizen participation through increased juror satisfaction. In addition to those reforms, the following changes would improve the juror selection process by increasing citizen participation in the judicial system and equalizing the burden of jury service among a representative cross-section of Texans.

First, in situations where randomness of the panel is assured, the "jury shuffle" should be eliminated to avoid discrimination, and the appearance of discrimination, in the jury selection system. Texas, which is the only state with such a procedure, currently gives lawyers the right, after seeing the order in which the venire is seated, to request the trial court to put the names of prospective jurors into a hat and to "shuffle" and redraw those names before voir dire. This shuffle changes the order of the jurors after they have initially taken their seats for voir dire. At the time a shuffle is requested, litigants typically have relatively little information about the prospective jurors, leading many to view the procedure as open to discriminatory or manipulative use.

Second, the paper recommends that exemptions for jury service be applied uniformly. Members of the Legislature and legislative employees who currently receive a blanket exemption from jury service should be excused only when the Legislature is actually in session. Furthermore, jurors who do not meet the statutory bases for exemption but present reasonable excuses as to why they cannot serve should be required to reschedule their jury service for a specific future date. The judge should also follow procedures to ensure that rulings on these excuses do not inspire other venire members to make similar claims to avoid jury duty.

Finally, the Texas Supreme Court and the Texas Legislature should study which source—driver's license, voter registration, or another list—is best for summoning citizens for jury service. For many reasons, the driver's license list is unreliable and increases the number of no-shows for jury service. Many argue, however, that the driver's license list increases diversity among the jury pool. The Texas Jury Task Force concluded in 1997 that the voter registration list was the most reliable source. However, before it would recommend changing from the driver's license list to the voter registration list, the Task Force recommended that a study be done to determine the best source for increasing participation of Texas citizens in jury service. This study should be completed to ensure that Texas uses the best method of summoning individuals to serve.

Momentum for Reform

Texas judges and lawmakers have identified jury reform as an important topic for review. During the summer of 2006, the Texas Supreme Court appointed a task force for jury assembly and administration and charged it with studying many of the issues outlined above and making recommendations for change. Additionally, the Senate Jurisprudence Committee has identified jury reform as an important topic for legislative action.

Hopefully, the issues identified in this paper will be considered by lawyers, academics, judges, and lawmakers as meaningful areas for reform. States such as Arizona, California, and New York have found many of the procedures discussed in this paper successful at improving jury participation, satisfaction and selection. The American Bar Association and a previous Texas jury task force have already recommended many of these proposals. Sufficient work is under way or already completed to allow the Texas bar, judiciary, and elected officials to make significant improvements in the Texas jury system.

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INTRODUCTION

The right to trial by an impartial jury is guaranteed by both the United States and Texas Constitutions. Courts have long held it to be a "basic and fundamental feature" of our system of jurisprudence[1] and "one of our most precious rights."[2] As Thomas Jefferson noted in 1789, it is "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[3] The promise of an impartial jury can be fulfilled, and the protection of one of our most precious rights maintained, only if all citizens answer the call and serve on juries.

Unfortunately, Texas' current civil jury selection process is primarily conducted by advocates whose ethical duty requires them to select a jury that is favorable to their side rather than a jury that is fair and impartial. The structure and operation of the civil jury selection system discourages citizen participation and encourages the rejection of jurors who, arguably, are the most fair and impartial. These problems result from the lack of procedural guidelines and the trial judge's relative lack of control over the jury selection process.

This paper examines Texas jury reform and reform efforts in other states to determine the areas most in need of reform and the most effective ways to institute reform. Ultimately, the paper proposes a number of changes to the Texas jury selection and service system, a detailed outline of which is provided in the Appendix. The recommendations made in this paper include, among others:

- requiring the trial judge, rather than the lawyers, to make brief and neutral opening statements to potential jurors concerning the facts and the law applicable to the case;
- requiring the trial judge to conduct the initial examination of potential jurors during voir dire to determine whether any of them are statutorily disqualified to serve on the jury;
- making clear that the trial judge can and should impose reasonable time limits on lawyers' questioning of venire members in voir dire;
- clarifying the scope of permissible voir dire questioning, including limiting or prohibiting repetitive, leading, suggestive, argumentative, and intrusive questions, and prohibiting questions inquiring as to a juror's probable vote intended to commit jurors to a particular outcome;
- suggesting additional study for improving voir dire;
- improving the use of reasonable, supplemental written jury questionnaires in complex cases;
- eliminating the jury shuffle;
- studying whether to change the source of the jury pool;
- allowing jurors to take notes during trial for use during deliberations;

- allowing jurors to submit questions to the judge to be asked of witnesses during trial; and
- allowing attorneys to make "mini-statements" to the jury during trial at appropriate intervals.

In sum, while this paper does not address every possible reform to the Texas jury system, these recommended changes would improve the jury selection process and voir dire by increasing judicial oversight and providing better guidance regarding the scope of permissible questions during voir dire. This, in turn, would increase efficiency and promote citizen participation in the civil justice system. Most importantly, the advocated changes would enhance justice by reducing the inevitable abuses that result from a process dominated by advocates who are seeking a jury favorable to one side. Texas' advocate-driven process should be changed to one that requires the trial judge to control jury selection to ensure that the jury eventually selected is fair, impartial, and representative of the community.

JURY REFORM IN TEXAS

In recent years, Texas has recognized and studied the need to reform its jury system. This section summarizes recommendations for reform made by the Texas Jury Task Force in 1997, legislative changes made since 1997, and recent judicial opinions affecting jurors and the jury selection process.

For additional information on Texas' process of summoning and selecting juries, refer to the Appendix, which provides a detailed outline of the Texas jury system.

Supreme Court of Texas Jury Task Force

In September 1996, the Supreme Court of Texas appointed a Jury Task Force ("Texas Jury Task Force") to study the Texas jury system and make recommendations to the Court and the Texas Legislature on necessary reforms.[4] The Texas Jury Task Force divided into four committees: Jury Composition and Juror Satisfaction; Jury Compensation; Jury Size and Non-Unanimous Verdicts; and Trial Procedures.[5] Each committee prepared a written report recommending changes to the jury system.[6] Those reports were accepted by the Texas Jury Task Force and submitted in a final report to the Texas Supreme Court and the Texas Court of Criminal Appeals in 1997.[7] A supplemental report concerning accommodations for jurors with disabilities was submitted in September 1998.[8]

Some of the Texas Jury Task Force's "principal recommendations" were to:

- Study the effect of the relatively new law providing that driver's license lists are included with voter registrations to form the jury pool list;
- Increase the number of counties using the one day, one trial system of excusing jurors;
- Encourage individual counties' attention to the human factors of jury service, such as minimizing waiting times and providing comfortable waiting areas;
- Suspend the payment of jurors for the first calendar day of service and use the money saved to increase the compensation for jurors serving two days or more to $40 per day;
- Tax jury payments as costs;
- Increase jury fees;
- Allow jurors to take notes under carefully controlled conditions;
- Allow judges in long civil trials to allow interim summations by the attorneys;
- Adopt a proposed rule to recognize the inherent power of a judge to set time limits on trials;
- Allow limited judicial control of voir dire;
- Eliminate the shuffle of jurors when the panel is still random as seated in the assigned court; and

- Adopt uniform statewide juror summons forms.[9]
- In addition to these principal recommendations, each committee made specific studies and recommendations on a variety of other issues.[10]

Since the Texas Jury Task Force made its recommendations in 1997, Texas lawmakers have increased jury compensation and have mandated the development of a uniform jury summons.[11] The Texas Supreme Court has also issued three opinions that provide guidance on conducting voir dire.[12]

Jury Composition & Juror Satisfaction. The Jury Composition and Juror Satisfaction Committee studied jury pool sources, qualifications for and exemptions from jury service, length and frequency of jury duty, jury management, jury orientation, and the possibility of creating a juror bill of rights.[13]

Concerning jury pool sources, the committee identified several arguments in favor of using the driver's license list.[14] First, "use of the drivers license list makes the jury pool more inclusive of the whole population and results in more complete representation of all groups."[15] Second, "use of the drivers license list enlarges the pool and thereby spreads the burden of jury duty more widely."[16] Third, "use of the drivers license list thwarts those who try to avoid jury duty by not registering to vote."[17]

Several arguments were made for returning to the use of voter registration lists.[18] First, the use of the driver's license list increased the number of no-shows for jury service.[19] This increases costs as counties must increase the number of summons to account for no-shows.[20] It also may increase the perception that citizens may "beat the system" and avoid jury service.[21] Voter registration lists are updated more frequently than driver's license lists and may produce fewer no-shows.[22] Second, the driver's license list is not screened for ineligible jurors such as non-citizens or felons, whereas the voter registration list excludes such groups.[23] Third, persons registering to vote have shown themselves to be civic-minded, which is a desirable quality for jury service.[24] Fourth, continued use of the driver's license list would require the costly updating of addresses.[25] The voter registration system already updates addresses.[26] Fifth, multiple driver's licenses may be issued to a person using an alias, giving them an increased chance over a law-abiding citizen to be selected for jury duty.[27]

In the end, a majority of the committee was persuaded by the arguments for returning to using only the voter list and supported giving counties a local option to decide for themselves which source to use.[28] However, the committee wanted more research on the characteristics of voter-list jurors and driver's license-list jurors and recommended that a study on this issue be completed.[29] And, if counties ultimately continued to use the driver's license list, the committee recommended that the State review the list to remove felons, non-citizens, and multiple entries for the same person.[30]

On the subject of juror qualifications and exemptions from jury service, the committee recommended that the Government Code be amended to raise the age exemption from sixty-five to seventy because of longer life expectancies, because jury service is a lesser burden to senior citizens as they ordinarily have more free time than younger jurors and are less likely to be working and supporting a family, and because their additional life experience enriches the jury.[31] The committee also recommended that the Government

Code be amended to permit trial judges to excuse jurors for "undue hardship," which may include economic hardship.[32] Finally, the committee recommended that the Government Code be amended to provide certain literacy requirements, including the ability to read, speak, and understand English.[33]

On the subject of length and frequency of jury duty, the committee recommended the "one day, one trial" policy for the twenty-five most populous counties, or counties with a population over 100,000.[34] It further recommended that jurors not be summoned more frequently than once every two years to minimize the burden on those called for jury service.[35]

Regarding jury management and juror orientation, it was recommended that each county review local practices for summoning and supervising juries with the goals to respect juror privacy, minimize waiting time, provide a comfortable waiting area, use fresh jurors before reusing jurors who have already returned to the jury pool after going through voir dire in another case, consider presenting a juror information program periodically on television in larger counties, send a second notice to a random group of jurors when summons are returned, and encourage jurors to make suggestions about improving the experience of jury duty.[36] The committee also recommended that each county discuss with jurors the selection process, length and frequency of jury service, the juror's role in the judicial system, the statutory qualifications for jury duty, and exemptions from jury duty.[37]

Finally, the committee decided against creating a juror bill of rights.[38] It concluded that such a document "would raise expectations more than it would produce results. The cause of reform would be better served by identifying problems and solving them, by changing practices and policies, than by making pronouncements about rights."[39]

Jury Compensation. The committee on jury compensation made six recommendations.[40] First, it recommended suspending payment for the first day of jury service to allow for an increase in funding for longer jury service.[41] Second, the committee recommended paying jurors $40 per day beginning on the second day of service.[42] Third, it recommended that all jury payments be taxed as costs, forcing litigants to consider the merits of their case before trying it to a jury.[43] Fourth, the committee recommended increasing the jury fees for county and district courts to help offset the additional expenses of a jury trial.[44] Fifth, it recommended allowing counties to offer incentives to increase the number of persons responding to jury service, such as free movie passes, reduced airline fares, food certificates, and, possibly, lottery tickets.[45] Sixth, the committee recommended establishing a jury commission to review fees and rules every biennium.[46]

Jury Size & Unanimous Verdicts. The committee considered reducing the size of juries in both civil and criminal trials and requiring less than unanimous verdicts in certain circumstances in criminal trials.[47] With respect to the proposed reduction in the number of jurors, the committee "found no practical impediments to jury accuracy, reliability of verdict or jury satisfaction that warranted a reduction [in the number of jurors]."[48] Because this paper focuses on the Texas jury system in civil cases, the committee's other findings will not be discussed in this paper.

Trial Procedures. The Trial Procedures Committee divided into several subcommittees to address juror note-taking, questions by jurors, interim arguments and deliberations by counsel, time limits on trials, limitations on voir dire, jury questionnaires, and the best number of peremptory challenges.[49] Each subcommittee issued a report and made recommendations, which are discussed below.[50] The recommendations of the subcommittees were adopted by the Trial Procedures Committee and the Texas Jury Task Force.[51]

Juror Note-Taking. The subcommittee recommended that the rules of civil procedure be amended to allow jurors to take notes for use during deliberations.[52] It also provided several model rules and model jury instructions to achieve this recommendation.[53] To address the perceived problems with juror note-taking, the subcommittee suggested the court provide instructions to guide jurors in taking notes.[54]

In support of this proposal, the subcommittee discussed the pros and cons of jury note-taking.[55] They found that note-taking may encourage more active participation in jury deliberations, help the jury reconstruct evidence more efficiently and decrease deliberation time, help jurors stay alert and interested in the trial, increase jurors' confidence that their deliberations correctly apply jury instructions, decrease requests for court reporter read-back, and increase jurors' morale and satisfaction.[56]

On the other hand, the subcommittee found that jurors who take notes may dominate deliberations in comparison to those who do not, may be less attentive to witnesses' behavior, may take notes of inadmissible evidence and accentuate irrelevant things, and may attach undue significance to their notes because they are in writing.[57] The subcommittee also was concerned that dishonest jurors could sway the jury with false notes, that jurors may be more attentive during deliberations to those who have taken notes, and that notes may be made public or may encourage jurors to write books regarding their deliberations.[58]

The subcommittee noted that the Texas Court of Criminal Appeals has ruled favorably on juror note-taking, that jurisdictions like Arizona allow civil juror note-taking, and that California provides trial courts with discretion to allow note-taking in civil actions.[59] It also observed that many academic studies and surveys support juror note-taking.[60]

Juror Questioning of Witnesses During Trial. Proponents of allowing jurors to ask questions during trial believe that it improves the accuracy of the jury's decisions because it helps jurors be more attentive during trial, allows jurors to elicit helpful information that the attorneys fail to mention, helps jurors feel like true trial participants and, thus, more responsible for their decisions, provides jurors with a two-way communication with the witnesses, clarifies any juror misconceptions, and shortens deliberation time, as there is less need to reread testimony.[61] Opponents believe that jurors' questions will be improper rather than helpful or relevant and that jurors will be distracted by thinking of questions rather than concentrating on the trial.[62] They also believe other detrimental effects may include: transforming jurors into advocates, improperly allowing

jurors to aid attorneys in presenting evidence, consuming too much time, alienating jurors from attorneys who object to their questions and offending jurors when the court determines that their questions should not be asked.[63]

The Texas Court of Criminal Appeals has held that jurors may not question witnesses during trial.[64] The court found that "juror questioning would cause, and the adversarial system could not tolerate, a change in the juror's role from neutral and passive fact finder to participating advocate."[65] Texas civil courts, however, have permitted juror questioning in limited circumstances.[66]

Other states, such as Arizona, allow jurors to ask questions of witnesses during trials.[67] The rules of evidence apply to the jurors' questions, attorneys are given an opportunity to object to the questions, and jurors are instructed that their questions may not be proper under the rules and, thus, not asked.[68] For good cause, Arizona courts may limit or prohibit the submission of juror questions to witnesses.[69]

Ultimately, the subcommittee determined that the risks associated with juror questioning were too great and did not recommend that Texas allow juror questioning.[70] However, the subcommittee wrote that if juror questioning was allowed, certain procedural safeguards should be created to eliminate some of its negative effects.[71] The recommended safeguards included admonishing jurors to ask questions sparingly, explaining reasons why some questions may not be allowed, requiring jurors to submit written questions, and excusing the jury from the courtroom while attorneys review and make objections to jurors' questions.[72]

Interim Summations. The term "interim summations" is defined as "any direct communication in the courtroom between a lawyer and the jury following opening statements and preceding closing arguments. It encompasses the concept of a neutral statement (such as an opening statement is supposed to be) or true interim argument (such as the purpose of closing argument)."[73] Judges could provide each party with time for interim summations that could be used at any point during trial or could allow for interim summations at various intervals during trial.[74]

The subcommittee expressed no opinion as to whether interim summations should be allowed in criminal trials, but, for longer civil cases, it recommended that the judge should have discretion to allow them.[75] The benefits of interim statements during a long trial are that they help the jury focus on significant evidence and place evidence in context, make the jury feel more informed, parallel a school experience where review was common, help lawyers get their thoughts together providing jurors cohesion as the trial moves forward, and refresh jurors' memories.[76] On the other hand, interim summations could waste time, become too repetitive, become prejudicial because not all of the evidence will have been introduced, and interrupt the presentation of evidence.[77] The subcommittee felt that these problems could be overcome with heightened judicial control.[78] Accordingly, it recommended a change to Texas Rule of Civil Procedure 265, which addresses the order of trial, to allow for interim summations.[79]

Interim Deliberations. The subcommittee recommended that the current rule of procedure barring discussions between jurors about a case prior to deliberations remain in place.[80] Proponents of interim deliberations argue that the passive juror model is unwarranted and that interim deliberations can lead to enhanced understanding, more thoughtful consideration of the case, and can reduce juror stress and result in greater efficiency.[81] Others argue that interim deliberations cause jurors to make premature determinations about a case, jeopardize the jury's impartiality, cause extra-legal factors to cloud decision-making, and are generally not favored in Texas.[82]

According to the subcommittee, at least one other jurisdiction has allowed jurors to conduct interim deliberations.[83] Arizona allows jurors to discuss evidence during recess from trial when all members of the panel are present in the jury room, but the jurors are admonished to reserve judgment about the case until deliberations begin.[84] In addition, California has recommended that trial judges, with agreement of counsel, experiment in long civil trials with scheduled pre-deliberation discussions.[85]

The subcommittee, however, concluded that the benefits of early discussions were substantially outweighed by the danger of jurors unfairly reaching decisions about the case before the close of evidence.[86] Therefore, it did not recommend changing Texas rules to allow pre-deliberation discussions.[87]

Limitations on Voir Dire. The subcommittee on limitations on voir dire proposed the adoption of the following rule of civil procedure giving trial judges limited discretion to control the form and scope of the voir dire examination.[88]

Rule __. Voir Dire of Prospective Jurors; Scope and Form of Examination.

1. By the Court. After giving the admonitory instructions in Rule 226a, the court shall examine the prospective jurors as to their general qualifications for jury service. The court in its discretion may make a brief statement of the case, and may examine the prospective jurors as to disqualifications for the particular case. However, no examination by the court shall preclude the parties from making their own statements or examination.

2. By Counsel. Each party shall have the right to make a brief statement of the case and conduct a reasonable examination of the prospective jurors. In appropriate cases, the court may allow all or part of such examination to be conducted outside the hearing of the other panel members or by written questionnaire. The court may place reasonable time limits upon such statement of the case and examination in accordance with the provisions of Rule __.

3. Scope. Each party may examine any prospective juror concerning matters reasonably related to the exercise of challenges for cause or peremptory challenges. The court may, in its discretion, limit any examination that is unreasonable because it is unduly invasive, repetitive, **[leading and suggestive]** or argumentative. Questions concerning a prospective juror's opinion of applicable law must be prefaced by a

proper statement thereof. A party may not inquire as to a prospective juror's probable vote, or attempt to commit a prospective juror to a particular verdict or finding as to any issue or evidence.

4. Rehabilitation. The court may examine, or **[shall]** allow any party to examine, a prospective juror for the purpose of clarification or reconsideration of a previous answer given by that prospective juror.[89]

In reaching this proposed rule, the subcommittee considered three proposals for changing voir dire in Texas: (1) prohibit leading questions during voir dire; (2) prohibit questions which ask whether a potential juror is "leaning" toward one side and what weight jurors will give to certain evidence; and (3) permit rehabilitation questions to panel members.[90]

As the subcommittee considered these proposals, two principles continued to emerge in their discussions. First, "blanket restrictions on voir dire questions will ultimately unduly interfere with the right to a fair trial."[91] Second, "broad scope in questioning is more likely to elicit bias from potential jurors and is important in exercising peremptory challenges wisely."[92] Following these principles, the subcommittee settled on a rule providing trial courts with broad discretion in directing voir dire while limiting voir dire questions to matters reasonably related to determining bias.[93] Since this proposed rule was first published, the Texas Supreme Court has handed down three significant decisions on voir dire that must be taken into account when considering rules affecting voir dire.[94]

The Jury Shuffle. The subcommittee studying the jury shuffle noted that the practice was originally developed to protect against juror stacking by "unscrupulous local officials."[95] The subcommittee recommended that "the jury shuffle be eliminated in those cases in which the panel of prospective jurors is still random when seated in the assigned court. However, the [sub]committee recommends that the shuffle be retained in those cases in which the panel is no longer random because prospective jurors have been 'recycled' after voir dire examination in another case."[96]

The subcommittee noted that the primary arguments against the jury shuffle are that it has outlived its purpose, is used to discriminate against panel members based on appearance, and eliminates the randomness of jury selection.[97] The primary arguments in favor of the jury shuffle are that it protects litigants against unrepresentative panels and does not discriminate against any particular juror because no one is excluded from jury service by the shuffle.[98] The subcommittee reported that no other jurisdiction permits jury shuffle.[99]

Jury Questionnaires. The subcommittee recommended amendments to the Texas Rules of Civil Procedure to allow trial judges to develop jury questionnaires during pretrial conferences and use them in appropriate cases.[100] The questionnaire would be completed by prospective jurors prior to voir dire and would be in addition to information given by the jurors on any forms accompanying their jury summons.[101]

According to the subcommittee, the benefits of using jury questionnaires include promoting more candid and honest answers than those given in oral examination, decreasing the time of the voir dire process, and decreasing challenges for cause.[102] The negatives associated with the use of jury questionnaires include encouraging attorneys to pose more extensive and invasive questions, raising privacy concerns, and requiring two-day voir dire so that responses may be copied, collated, and reviewed before voir dire begins.[103]

The subcommittee reported that most other jurisdictions use some type of personal history questionnaire that accompanies the jury summons and that the amount of detailed information requested by these questionnaires varies.[104]

The subcommittee recommended that the Texas Legislature develop a model jury summons for use in all Texas counties.[105] This would ensure uniformity throughout the State with respect to basic juror information.[106] The subcommittee could not identify any problem with having a uniform summons and reported that most other jurisdictions require it.[107]

Number of Peremptory Challenges. The subcommittee did not recommend any change in the number of peremptory challenges.[108] The proposal to change the number of peremptory challenges was generally favored by the judges on the subcommittee and opposed by trial lawyers and lay members.[109] Most trial lawyers reported needing all of their strikes in all of their cases.[110] The subcommittee also feared that voir dire would be prolonged if peremptories were reduced or eliminated.[111]

In analyzing this issue, the subcommittee identified the following benefits of reducing the number of peremptory challenges: (1) peremptory challenges open the door to discrimination in the jury selection process; (2) peremptory challenges decrease representativeness; (3) peremptory challenges decrease system-wide impartiality; (4) peremptory challenges deny a juror's right to serve; (5) peremptory challenges accomplish nothing because attorneys cannot predict a juror's verdict; (6) peremptory challenges make jury selection appear unfair; and (7) peremptory challenges waste time and money.[112]

The subcommittee also identified negative aspects of reducing the number of peremptory challenges: (1) some jurors will not admit bias; (2) fewer peremptory challenges will leave unfit jurors on the jury; (3) fewer peremptory challenges decrease the appearance of fairness; (4) fewer peremptory challenges will limit vigorous voir dire; (5) fewer peremptory challenges will make verdicts more unpredictable; (6) extra peremptory challenges save time and money; and (7) the "it ain't broke" argument, inferring that the Texas voir dire process already runs smoothly enough with the current number of challenges.[113]

The subcommittee noted that no other jurisdiction has completely eliminated peremptory challenges, but the number of challenges allowed in each jurisdiction varies widely.[114] A 1998 report from the United States Department of Justice charted the differences among the states in the allocation of peremptory challenges in each state's highest civil trial courts: Florida, Michigan, New

York, Ohio, Virginia and Washington allowed three; Arizona and Pennsylvania allowed four; Illinois allowed five; and California allowed six.[115]

Reforms to the Texas Jury System Since 1997

Legislative Reforms. Since the Texas Supreme Court's Jury Task Force made its recommendations in 1997, the Texas Legislature has made several changes to the Texas jury system, including increasing juror reimbursement, reducing the burden of jury service, raising the age exemption for jury service, improving the source list for the jury pool, creating a uniform jury summons, protecting the privacy of juror deliberations, and protecting juror rights.

Juror Reimbursement. Perhaps the most significant change to the Texas jury system in recent years has been the increase in the reimbursement paid to jurors for jury service-related expenses. Following the recommendations of the Texas Supreme Court Jury Task Force[116] and the Texas Judicial Council,[117] legislation passed in 2005 and effective on January 1, 2006 increased juror reimbursement from $6 per day to not less than $6 for the first day or fraction of the first day served and not less than $40 for each additional day or fraction of a day served thereafter.[118] Before this change, the last time the state increased juror reimbursement was in 1954, when it was raised from $4 to $6 per day.[119]

Reducing the Burden of Jury Service. Legislation passed in 1999 allows counties with populations greater than 250,000 to remove the names of persons who are summoned and appear for jury service from the jury wheel for three years.[120] It also provides an exemption for anyone who served on a jury in the past three years.[121] Additional legislation passed in 2003 provides exemptions for active military duty[122] and prohibits prospective jurors from being summoned to appear for jury service on the date of the general election for state and county officers.[123]

Finally, in an effort to make jury service more convenient, legislation passed in 2003 allows individuals who have received a jury summons to respond by telephone or computer.[124] This legislation encourages more Texas counties to implement the I-Jury program that originated in Travis County in March 2002.[125] I-Jury allows summoned jurors to use a secure web site to complete a form that captures all of the information necessary to qualify a juror, screen for excuses, request scheduling accommodations, and complete the standard juror questionnaire.[126] Those using I-Jury are contacted by email with a specific reporting date and court in which to appear, and in the event a trial is cancelled, the jurors are released from service without having to appear in person and waste a day at the courthouse.[127]

Age Exemption. Coinciding with the recommendation of the Texas Supreme Court Jury Task Force, legislation passed in 1997 raised the age exemption for jury service from sixty-five to seventy years of age.[128]

Improving the Driver's License List. The Texas Legislature also has enacted measures aimed at more efficiently summoning jurors via the driver's license list. Legislation enacted in 1997 requires the Department of Public Safety to exclude convicted felons and persons residing outside of the county from the driver's license list pro-

vided to the Texas Secretary of State.[129] Legislation enacted in 1999 further requires the Department of Public Safety to exclude persons from the driver's license list who are not citizens of the United States and delete duplicate names.[130]

Uniform Summons. Following the recommendation of the Texas Supreme Court Jury Task Force, legislation passed in 1999 requires the Texas Office of Court Administration to develop and maintain a model for a uniform jury summons and questionnaire.[131] It requires summoned individuals to provide certain biographical and demographic information that the Legislature deemed relevant to jury service.[132] It does not require prospective jurors to provide private information such as political affiliation, religion, or medical history.[133]

Privacy of Jury Deliberations. Legislation passed in 2003 prohibits the recording or televising of jury deliberations in civil and criminal cases.[134]

Protecting Juror Rights. Legislation passed in 1999 creates a criminal offense for employers who terminate an employee who misses work for jury duty.[135]

Texas Supreme Court Guidelines on Voir Dire. The Texas Supreme Court recently handed down three opinions clarifying the permissible scope of questioning to determine juror bias: *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.,*[136] *Hafi v. Baker,*[137] and *Hyundai Motor Co. v. Vasquez.*[138]

Cortez. The issue in *Cortez* was "whether the trial court abused its discretion in denying a challenge to an equivocating veniremember for cause…"[139] The juror in question had handled automobile claims as an insurance adjuster.[140] He admitted that he would "feel bias" and that the defendant in a negligence suit against a nursing home would be "starting out ahead" because he had seen "lawsuit abuse… so many times."[141] The Texas Supreme Court rejected the notion that once a juror had admitted bias, further questioning should not be permitted.[142] Rather, "the length and effect of efforts to rehabilitate veniremembers [who have expressed an apparent bias] are governed by the same rules that apply to all of voir dire."[143] Thus, "the proper stopping point in efforts to rehabilitate a veniremember must be left to the sound discretion of the trial court."[144]

Cortez recognizes that "[m]any potential jurors have some sort of life experience that might impact their view of a case; we do not ask them to leave their knowledge and experience behind, but only to approach the evidence with an impartial and open mind."[145] Thus, "the relevant inquiry is not where the jurors *start* but where they are likely to *end*."[146] Because the juror in question expressed a willingness to approach the evidence with an impartial and open mind, the court held that he was not biased as a matter of law – even though he admitted that, because of his knowledge and life experience, the defendant started out a little ahead.[147] In so holding, the Court provided additional guidance as to the proper scope of voir dire questioning: "Asking a veniremember which party is starting out 'ahead' is often an attempt to elicit a comment on the evidence. Such attempts to preview a veniremember's likely vote are not permitted."[148]

However, the Court also recognized that "[a]sking which party is 'ahead' may be appropriate before any evidence or information about the case has been disclosed."[149] Presumably, if a party starts out ahead before a juror has heard any evidence, the juror must hold some sort of "external" bias or prejudice against the party (i.e., a bias or prejudice the juror held before coming into the courtroom).[150] If a juror is asked which party is "ahead" after hearing some information about the case, his answer is "more a preview of [his] likely vote than an expression of an actual bias [and] is no basis for disqualification."[151] Thus, questions about which party is "ahead" are improper if they are asked after providing some information about the case (because they are questions that attempt to preview a juror's vote).[152] If a lawyer does ask such a question, he cannot then have the juror struck for cause based on the juror's answer.[153] In other words, a juror's opinions about the facts of a case should not be solicited, but if asked, do not show a bias that would merit dismissal of that juror for cause.[154]

Hafi. In *Hafi,* a medical liability case, the Texas Supreme Court considered whether a venire member should have been disqualified for having a better understanding of the defendant's side, even though he stated he could be fair and objective.[155] During voir dire, the venire member informed the plaintiff's counsel that he was a defense lawyer who had defended health care operations.[156] When asked by the plaintiff's counsel if the plaintiff would "start[ ] a little bit behind in [his] eyes," the venire member responded "I mean – I'm not saying that – I would do my best to be objective."[157] Following this exchange, the trial court denied the plaintiff's challenge for cause.[158]

The Texas Supreme Court reiterated the rule from *Cortez* that "having a perspective based on 'knowledge and experience' did not make a veniremember biased as a matter of law."[159] Instead of acknowledging bias, the juror's statements were offered so that counsel could use its peremptory strikes and not make a challenge for cause.[160] The court held, "[h]ere, the veniremember *disagreed* with every suggestion that he could not be fair and objective. His answers [did] not reflect a disqualifying bias."[161]

Hyundai. The issue in *Hyundai* was "whether a trial court abuses its discretion in refusing to allow a voir dire question from counsel that previews relevant evidence and inquires of prospective jurors whether such evidence is outcome determinative."[162] The Court reiterated the "general rule" adopted in *Cortez,* "that it is improper to ask prospective jurors what their verdict would be if certain facts were proved."[163] Thus, it held that the trial court did not abuse its discretion in refusing to allow the question at issue—whether the fact that a child not wearing her seat belt would determine a juror's verdict in a wrongful death suit arising from an accident in which the child was killed when the front airbag deployed.[164]

Even though the Court made it clear that such a question is improper, it did not curtail trial courts' discretion to allow the question: "If the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not disqualifying, because while such responses reveal

a fact-specific opinion, one cannot conclude they reveal an improper subject-matter bias."[165] The trial court retains discretion to allow or refuse such a question, because it has discretion to determine whether the question "pries into potential prejudices or potential verdicts."[166] *Hyundai* also appears to affirm the longstanding idea that a trial court *must* allow questions that could uncover a basis for juror disqualification.[167] Such questions would include questions aimed at "cull[ing] out any external bias or prejudice."[168] However, as long as a trial court could reasonably conclude that a question seeks to preview the jurors' verdicts rather than expose external bias or prejudice, it does not abuse its discretion in refusing to allow the question.[169]

Principles from Cortez, Hafi, & Hyundai. *Cortez, Hafi,* and *Hyundai* establish principles to be applied to voir dire questioning.

- Voir dire inquiry into "external" bias and prejudice (i.e., biases and prejudices the juror had before entering the courtroom and learning about the case) is proper to determine whether jurors are disqualified and to allow counsel to intelligently exercise peremptory strikes.[170]
- Trial judges must allow questions that would identify a basis for juror disqualification.[171] Thus, a trial court abuses its discretion if it refuses to allow a question that would present a basis for disqualifying a juror for cause.[172]
- Trial judges *may* refuse to allow a question that seeks to determine the weight to be given, or not given, a particular relevant fact or set of facts.[173] If a trial judge allows such a question, however, the juror's responses cannot be used to disqualify him because answers to those questions do not reveal a disqualifying bias or prejudice.[174] Therefore, an attorney desiring to remove such a juror from the panel must use one of his or her peremptory challenges.
- Trial judges must not allow questions that attempt to preview a juror's likely vote on the verdict.[175] The determination of whether a question attempts to preview the verdict is within the trial court's discretion.[176]
- Trial judges may allow further questioning of a juror who has expressed apparent bias.[177] Texas has no rule regarding "rehabilitation."[178] If a venire member expresses apparent bias, a court may allow further questioning to "show just the opposite or at least clarify the statement."[179] As with most of voir dire, the extent to which counsel may attempt to rehabilitate a venire member is left to the trial court's sound discretion.[180]
- Trial judges "may place reasonable limits on questioning that is duplicative or a waste of time."[181] They also may prohibit confusing or misleading questions.[182]
- The opinions, however, "left the door open…to trial courts allowing some evidence-type questions" because *Hyundai* leaves trial courts with discretion to allow voir dire questioning that delves into how the jurors may weigh evidence at trial.[183]

JURY REFORM IN ARIZONA, CALIFORNIA, AND NEW YORK

Texas is not the only state studying jury reform. States like Arizona, California and New York have made significant improvements in the quality of jurors' experiences and in the selection of juries. A brief summary of these states' efforts follows in order to place Texas reform efforts in a broader context and suggest directions for additional reforms to the Texas jury system.

Arizona

Arizona's jury reform occurred in two phases. The first phase began in 1993 when the Arizona Supreme Court called for a comprehensive review of juries in Arizona with a special focus on trial aspects of jury service.[184] The second phase was targeted toward improving jurors' overall experiences and resulted in the adoption in 2003 of the Jury Patriotism Act.[185]

Jurors: The Power of 12. The Arizona Supreme Court's goal in the first phase of Arizona's jury reform was to "increase juror effectiveness by placing a more active jury in Arizona's courtrooms."[186] The court established the Arizona Supreme Court Committee on More Effective Use of Juries (the "Arizona Committee") to study jury service, consult published studies, recommend specific changes to be made to the Arizona system, and monitor implementation and utilization of the new procedures and policies.[187] The principal concerns of the Arizona Committee were: (1) the lack of representativeness of jury panels; (2) the passivity imposed upon jurors during trials; (3) the low level of juror comprehension of the evidence and legal instructions; and (4) the generally low esteem accorded jury service by the public.[188]

In 1993 and 1994, the Arizona Committee examined the policies, procedures and practices of the jury system.[189] The Arizona Committee's final report, Jurors: The Power of 12, led to the sweeping Arizona Jury Reform Rules of 1995 ("Arizona Reform Rules").[190] The Arizona Reform Rules were aimed at making trials an educational process for jurors and giving jurors a voice.[191] The reforms included: (1) allowing attorneys the opportunity to conduct voir dire in all cases, as opposed to solely in civil cases;[192] (2) providing jurors with preliminary instructions that explain elementary legal principles involved in the case and informing the jury of the trial proceedings and procedures and of their role and duties as jurors;[193] (3) providing written copies of the court's preliminary and final instructions to jurors before the court reads the instructions;[194] (4) providing jurors with notebooks containing exhibits, photographs of testifying witnesses, jury instructions, and paper for each juror's notes;[195] (5) instructing jurors that they can submit written questions for witnesses to the judge;[196] (6) allowing jurors in civil cases to deliberate and discuss the evidence during recesses in the jury room;[197] and (7) allowing the court and counsel to assist a jury that is in danger of being deadlocked.[198]

Mini-Opening Statements Before Voir Dire. Historically, judges in Arizona wrote a short summary of the case that was read to the potential jurors before voir dire.[199] Currently, the Arizona Rules of Civil Procedure allow the parties, with the court's consent, to present brief opening statements to the entire jury panel prior to voir dire.[200] The extent to which this practice is used is unclear. It has been reported that some judges allow parties to present these "mini-opening statements" in lengthy or complex cases only.[201]

Juror Note-Taking. There was little opposition to amending the Arizona Rules of Civil Procedure to expressly allow juror note-taking in civil cases because trial judges often permitted note-taking in civil cases prior to the amendment, and jurors in criminal cases already had the right to take notes.[202] Now, jurors are expressly allowed to take notes in both civil and criminal cases.[203]

Pre-deliberation Discussions During Civil Trials. In considering whether to allow jurors to discuss the evidence while trial is on-going, rather than prohibiting jurors from discussing the evidence until after all evidence is admitted, the Arizona Committee identified the following possible benefits of allowing pre-deliberation discussions: (1) improving jury comprehension; (2) allowing jurors to ask questions and share impressions on a timely basis; (3) testing individual juror's tentative and preliminary judgments against the group's knowledge; and (4) reducing the formation of divisive cliques or forbidden conversations among jurors.[204]

Because of the controversial nature of this reform, the Arizona Supreme Court permitted a group to study the reform by videotaping the discussions and deliberations of juries in nearly fifty civil trials.[205] This study, known as the Arizona Filming Project, concluded that the benefits of the reform in shorter trials were modest.[206] However, in long and complex cases, jurors may "substantially benefit from the opportunity for discussion."[207] Researchers also found that jurors themselves were "quite enthusiastic about the reform and claim that it has positive effects."[208] Judges were also "relatively positive" about the reform.[209] Attorneys and litigants, on the other hand, were more negative, with about half opposing the reform.[210] Ultimately, however, many felt that the rule was simply permitting what was already taking place in trials.[211]

In the end, the Arizona Committee recommended, and the Arizona Supreme Court adopted, a rule allowing jurors to discuss the case during trial.[212] Jurors in civil trials in Arizona now are instructed that they may discuss the evidence amongst themselves during breaks in the trial, provided that all jurors are present and that the jurors do not form any conclusions until the time to deliberate.[213] Arizona was the first state in the nation to allow jurors to do so.[214]

Jurors' Questions During Trials. The Arizona Rules of Civil Procedure allow jurors to ask questions of witnesses during trial.[215] Questions must be submitted in writing and delivered to the bailiff or clerk.[216] The rules of evidence apply to the jurors' questions, and attorneys are given the opportunity to object to the questions.[217] For good cause, the court may limit or prohibit the submission of questions to witnesses.[218]

Other Issues. The Arizona Committee made over fifty recommendations regarding all aspects of jury service.[219] For example, the Arizona Committee addressed how to improve and expand the current source lists used to compile the lists of potential jurors, encouraged judges to receive training in conducting voir dire, encouraged the use of technology during trial to help juror comprehension, encouraged that jurors be allowed to ask questions about the final instructions, and addressed juror stress after

trial.[220] The Arizona Committee also addressed peremptory challenges and concluded that there should not be a change in the number of peremptory strikes—four—allotted to each party[221] because "they are necessary for the selection of a fair jury."[222]

Jurors: The Power of 12, Part 2. In late 1996, almost two years after the publication of its original report on jury reform, the Arizona Supreme Court Committee on More Effective Use of Juries was reconvened to address additional issues, including improving compliance with jury summons, jury facilities standards, use of jury consultants, changing the number of peremptory challenges, use of anonymous juries, jury size, and guidelines for sequestration of jurors.[223]

The Committee suggested a reduction in the number of peremptory strikes allotted to each side in all cases, including civil trials. "Despite concerns that peremptory challenges may be used to manipulate the composition of the trial jury and often deny prospective jurors their rights to serve free from discriminatory jury selection practices, the [C]ommittee rejected a proposal to ban peremptory challenges outright and opted to recommend, by an almost 3 to 1 margin, that the number of peremptory challenges available to the parties be reduced by one-half."[224] However, the Committee's recommendation has not been implemented, and each side in a civil trial still is entitled to four peremptory challenges.[225]

The Arizona Jury Patriotism Act. In a second phase of reform, beginning in 2001, Arizona addressed issues related to jury management, summonses, and compensation.[226] The Arizona Supreme Court formed the Ad Hoc Committee to Study Jury Practices and Procedures (the "Ad Hoc Committee"), which studied: (1) the quality of source lists used for summoning jurors statewide; (2) centralized jury list preparation; (3) summons enforcement, excuses and postponement; (4) jury compensation; and (5) the feasibility of implementing "one day/one trial" reforms statewide.[227] The Ad Hoc Committee did not address, however, the issue of peremptory challenges despite the failed attempt to change the number of such challenges as recommended in *Jurors: The Power of 12: Part 2*.[228]

In August 2002, the Ad Hoc Committee published its final report and recommendations.[229] In response to this report, the Legislature in 2003 enacted the Jury Patriotism Act (the "Act"), which is based on model legislation prepared by the American Legislative Exchange Council.[230] Some of the major changes implemented by the Act include: (1) establishing a lengthy-trial fund, funded by a small additional filing fee to be determined by the Arizona Supreme Court, to compensate those who serve on long trials for their lost wages; (2) increasing the level of scrutiny for the granting of hardship excuses; (3) creating harsher penalties for ignoring a jury summons; (4) allowing two voluntary postponements for jurors to re-schedule jury service; and (5) ensuring that if a person serves on a jury he or she will not be called again for two years.[231]

California

In the mid-1990s, California had several high-profile jury trials (e.g., the O.J. Simpson and Rodney King trials) that led the public and government leaders to call for improvements in the jury system.[232] In 1995, the Chief Justice of the California Supreme Court and the California Judicial Council created the Blue Ribbon Commission on Jury System Improvement (the "Blue Ribbon Commission"),[233] which conducted a comprehensive evaluation of all aspects of the jury system in California and reported its findings and recommendations for action in a report entitled *Final Report of the Blue Ribbon Commission on Jury System Improvement* ("Blue Ribbon Report").[234] The Blue Ribbon Report made recommendations in three areas: (1) jury administration and management; (2) jury selection and structure of the trial jury; and (3) trial procedures.[235]

One of the biggest problems facing the California court system in 1995 was the low number of jurors appearing for jury service.[236] The Blue Ribbon Commission made many recommendations related to this issue,[237] and the following changes[238] were made to the California jury system:

- Implement the "one-day/one-trial" system of jury service;[239]
- Increase juror pay;
- Require jury commissioners to apply standards for hardship excuses;
- Develop a model juror summons and a statewide juror handbook explaining the trial process and jurors' rights and responsibilities;
- Encourage implementation of a mechanism to respond to juror complaints;
- Encourage the use of the national change of address system to update jury lists and reduce undeliverable summons;
- Develop the Failure to Appear Kit to assist courts in implementing effective programs to address summoned eligible jurors who fail to appear for jury service;
- Promote court staff education on juror treatment through Center for Judicial Education and Research materials and programs;
- Perform public outreach to actively promote the importance of jury service (such as public service announcements by celebrities); and
- Provide reimbursement for childcare costs incurred as a result of jury service.[240]

The Blue Ribbon Commission also made several recommendations regarding voir dire and jury questionnaires that have been implemented. They include:

- Counsel may participate in voir dire in both criminal and civil trials (previously it was not common in criminal cases); and
- Use of juror questionnaires is recommended in both criminal and civil trials (previously it was not recommended in criminal cases).[241]

The issue of the number of peremptory challenges[242] to allot each side in a case was debated at length by the Blue Ribbon Commission.[243] The Commission reached a consensus that a reasonable number of peremptory challenges must be allowed, but the Commission could not reach an agreement on what the number should be.[244] The California Task Force on Jury System Improvements, which was charged with studying the issue further,[245] identified the following arguments justifying more rather than fewer peremptory challenges:

- Peremptory challenges allow parties to retain jurors they want and to eliminate jurors deemed to be unfair;
- The purpose of trial is to provide justice for the parties, not to create juror satisfaction, so the judicial system should not be concerned that the use of peremptory challenges may upset potential jurors;
- Peremptory challenges are time-tested;
- Peremptory challenges provide protection against undisclosed bias and are a necessary back-up to challenges for cause;
- Peremptory challenges recognize that group affinities exist and must be addressed;
- Peremptory challenges compensate for inadequate voir dire;
- Peremptory challenges allow attorneys to take advantage of their experience; and
- The United States Supreme Court's holding in *Batson v. Kentucky*[246] is a buffer against the charge that peremptory challenges are used to remove jurors on account of race or gender.[247]

The California Task Force identified the following reasons to limit or eliminate peremptory challenges.

- The use of peremptory challenges undermines citizen confidence in the fairness and impartiality of the jury system;
- The use of peremptory challenges is disrespectful to jurors;
- Peremptory challenges cause judicial atrophy of the challenge for cause;
- Peremptory challenges are wasteful;
- Peremptory challenges may be used to remove jurors on account of race or gender, which is contrary to the belief that equal protection rights of jurors should be enforced;
- Peremptory challenges perpetuate bias and stereotyping;
- It is difficult to prevail on *Batson* challenges, which means they are not an effective check against the discriminatory use of peremptory challenges;
- The use of peremptory challenges appears capricious; and
- The better course would be to improve voir dire practices instead of compensating for inadequate voir dire with peremptory challenges.[248]

Despite this debate, California has not reduced the number of peremptory challenges. It continues to provide six peremptory challenges to each party, or eight to each side, in a civil action.[249]

New York

New York's jury reform efforts have been aimed at minimizing the burden of jury duty, using jurors' time more effectively, reforming voir dire and increasing juror compensation.[250] Of these, reforms to voir dire are most relevant to recent changes in Texas case law.

Prior to jury reform, New York had a "bizarre system of unsupervised civil voir dire that allowed lawyers to spend days—days—grilling panels of innocent people before selecting six to hear a simple tort case that then settled before the first witness was even sworn."[251] The New York voir dire reforms require a judge to preside at the commencement of voir dire and to open voir dire proceedings.[252] A trial judge also must establish time limitations for questioning prospective jurors during voir dire.[253] While the specific time limits are left to the discretion of the judge, "the limits…may consist of a general period for the completion of the questioning, a period after which attorneys shall report back to the judge on the progress of the voir dire, and/or specific time periods for the questioning of panels of jurors or individual jurors."[254]

In an effort to expedite voir dire, "[c]ounsel may consent to the use of 'nondesignated' alternate jurors, in which event no distinction shall be made during jury selection between jurors and alternates, but the number of peremptory challenges in such cases shall consist of the sum of the peremptory challenges that would have been available to challenge both jurors and designated alternates."[255] As part of the reforms, the New York Legislature changed the number of peremptory challenges in civil cases from three per party to three per side and from one per alternate to one per two alternates.[256]

All prospective jurors are also now required to fill out a basic background questionnaire supplied by the court in a form approved by the chief administrator.[257] Completed questionnaires are made available to counsel prior to voir dire.[258] "With Court approval, which shall take into consideration concern for juror privacy, the parties may supplement the questionnaire to address concerns unique to a specific case."[259]

The reforms to voir dire have helped reduce the time of voir dire by half.[260] By 2000, "the average time for civil voir dire in New York City was 4.9 hours per case compared with 11.9 hours in 1995. Similarly, the average time for civil voir dire conducted throughout New York State was 4.4 hours per case compared with 9.3 hours in 1995."[261]

TEXANS FOR LAWSUIT REFORM FOUNDATION'S PROPOSALS FOR REFORMING THE TEXAS JURY SYSTEM

In the following pages, this paper proposes changes to Texas' jury selection process, changes regarding exemptions from jury service, and changes to jury service that are intended to help jurors understand the evidence and reach just decisions in civil cases.

Require Judges To Make an Opening Statement in Voir Dire and To Conduct the Initial Questioning.

The Rules of Civil Procedure should be amended to require trial judges to take greater control over the voir dire process.[262] First, trial judges should be required to give a brief and impeccably impartial opening statement about the case at the beginning of voir dire. The judge's statement should include an explanation of the trial process and the jury's role in the trial and a brief, neutral statement of the nature of the case and the claims at issue. The judge's statement also should include a discussion of the available exemptions from jury service if jurors have not been previously informed of those exemptions.

In preparing case-specific aspects of the opening statement, the judge should be assisted by the attorneys, as is common in many federal courts. In the same way that the attorneys provide the judge with recommended jury charges, attorneys could provide the judge with suggested opening statements. The judge would have the discretion to craft his or her opening statement with or without reference to the statements suggested by the lawyers.

Second, the Rules of Civil Procedure should be amended to require trial judges to conduct the initial examination of jurors during voir dire. Both the Texas Jury Task Force[263] and the American Bar Association ("ABA")[264] have recommended that trial judges be required to conduct the initial questioning in voir dire because it expedites the process and reduces the opportunity for attorneys to ask improper questions.[265] At least two states have statutes prescribing questions for the court to ask the panel.[266]

The Texas Supreme Court should create a list of questions to be asked by the trial judge in each case to determine if any juror is statutorily disqualified. The Court should specify other types or categories of questions trial judges should ask to elicit useful and relevant case-specific information in an efficient manner. To aid the Court in developing these voir dire questions, the court should create a Pattern Voir Dire Question Committee, similar to the Pattern Jury Charge Committee, to report directly to the Court.

These reforms would make the voir dire process more efficient and balanced among litigants. With the trial judge making a neutral opening statement and conducting the initial questioning, attorneys will no longer have to take time to educate the venire about the case or to cover the basic questions for disqualification. Instead, the parties can concentrate on effectively using their peremptory challenges. Most importantly, the principal factor in jury selection—voir dire—will be the judge's responsibility. This will serve the public interest by allowing the judge to select a fair and impartial jury rather than allowing the advocacy of counsel to remain the principal determinant of jury composition.

Limit Time Spent in Voir Dire

The Texas Rules of Civil Procedure should be amended to provide, as suggested by the Texas Jury Task Force,[267] that each party be given an opportunity—subject to reasonable time limits—to examine the jurors after the court concludes its initial questioning. The use of time limits is particularly appropriate if this paper's other recommendations—requiring the trial court to make an impartial opening statement and conduct the initial questioning in voir dire and allowing the use of appropriate case-specific questionnaires—are adopted because those recommendations should lead to a decreased need for extended voir dire. Customarily, the plaintiff is given more time, usually on the basis that the plaintiff's attorney will ask several questions regarding the basic grounds for disqualification that the defendant's attorney will not need to duplicate. If, however, the trial judge is charged with the task of making a brief neutral statement of the case and asking the initial questions, the time required by each side will be reduced and should be equalized.

Neither the Texas Rules of Civil Procedure nor any statute specifically provides that a trial court has the authority to limit the time attorneys are given to conduct voir dire. The Texas Supreme Court has held that a trial court in a civil case "may place reasonable limits on questioning that is duplicative or a waste of time."[268] But whether further questioning would be a waste of time depends on factors that may not appear in the record.[269] Consequently, the reasonableness of voir dire limits "must be left to the sound discretion of the trial court."[270]

The Texas Court of Criminal Appeals has provided more guidance to trial courts regarding the imposition of voir dire time limits in criminal cases than has the Texas Supreme Court in civil cases. The Court of Criminal Appeals has held that trial courts have broad discretion over the jury selection process, including discretion to set reasonable time limits on voir dire.[271] It is improper, however, for a trial court to limit voir dire based on the mere possibility that an otherwise proper question might lengthen the jury selection process.[272] Each case must be examined on its own facts; a reasonable time limit for one case may not be reasonable for another.[273] In reviewing whether the trial court abused its discretion in refusing to allow additional time for questioning, an appellate court must determine: (1) whether a party's voir dire examination reveals an attempt to prolong the voir dire; (2) whether the questions the party was not permitted to ask were proper voir dire questions; and (3) whether the party was precluded from examining specific venire members who served on the jury.[274]

Place Limits on the Questioning of Venire Members

Voir Dire Before Cortez, Hafi, and Hyundai. Texas law provides that a potential juror is disqualified from service if he has a "bias or prejudice in favor of or against a party in the case."[275] Texas courts historically have given this statute a broad meaning, allowing the for-cause dismissal of jurors who express bias or prejudice concerning the "type of case" or the "subject matter of the litigation."[276] The wording of the appellate court opinions interpreting "bias or prejudice" have encouraged litigants to ask fact-based questions to try to show that a prospective juror has "prejudged" the case, is "leaning" toward one side or the other, or has a "state of mind" favoring one side or the other.[277]

Because of the broad interpretation of "bias or prejudice," attorneys often take hours asking leading questions in voir dire "as a tool to convert a peremptory challenge into a challenge for cause."[278] "In its most aggressive form, lawyers identify an unfavorable juror and then try to stuff the most appalling mischaracterizations into her mouth. Others use a more subtle approach: 'Juror X, don't you think because of your background that you might possibly be leaning…toward my opponent.'"[279] Moreover, the system seems to eliminate outspoken, knowledgeable individuals who expressed opinions in response to questioning, and select meek, docile and uninformed jurors in their place.[280]

The three recent Texas Supreme Court opinions – *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc., Hafi v. Baker,* and *Hyundai Motor Co. v. Vasquez*[281] – discussed at Pages 12-14, clarify and limit the concept of disqualifying bias.[282] In these opinions, the Court recognizes that "[m]any potential jurors have some sort of life experience that might impact their view of a case." According to the Court, "we do not ask [potential jurors] to leave their knowledge and experience behind, but only to approach the evidence with an impartial and open mind."[283] Based on these considerations and others, the Court concludes that a juror's response to a fact-based question cannot provide a basis for a for-cause challenge.[284] But the Court also holds that a trial judge must allow questions that present a basis for juror disqualification[285] and that litigants have a right to question jurors to facilitate the intelligent use of peremptory challenges.[286] The Court left the decision about whether to allow particular fact-based questions to the trial court's discretion.[287] Consequently, because the Court has not prohibited fact-based questioning during voir dire, it is unclear whether the Court's opinions will result in trial judges substantially limiting lawyer questioning in voir dire in the future. Even if the opinions reduce the number of questions, the opinions do not adequately outline a procedure for voir dire and do not define the scope of voir dire. Neither do the Texas Rules of Civil Procedure.

The Supreme Court Should Promulgate a Rule Governing Voir Dire. The Texas Jury Task Force proposed a voir dire rule to help guide trial judges in exercising their oversight of voir dire questioning by attorneys.[288] The Texas Jury Task Force's proposed rule allows each party to "examine any prospective juror concerning matters reasonably related to the exercise of challenges for cause or peremptory challenges."[289] However, the rule also provides that the court has discretion to "limit any examination that is unreasonable because it is unduly invasive, repetitive, [leading and suggestive], or argumentative."[290] The proposed rule also contains more specific provisions requiring that questions concerning a prospective juror's opinion of applicable law must be prefaced by a proper statement of the law, prohibiting a party from inquiring as to a prospective juror's probable vote or attempting to commit a prospective juror to a particular verdict or finding, and allowing prospective jurors to be rehabilitated.[291]

Along the lines proposed by the Texas Jury Task Force, the Texas Supreme Court should adopt a rule for voir dire to provide a voir dire procedure and define the scope of voir dire. The rule should incorporate the holdings of *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc., Hafi v. Baker,* and *Hyundai Motor Co. v. Vasquez*.[292] At a minimum, the new rule should:

- Require that the trial judge make the initial statement of the case and that the statement be entirely neutral and impartial to the litigants;

- Provide that the trial judge may limit or prohibit statements of fact by the litigants;
- Require that the trial judge question the venire about matters that would result in the dismissal of venire members for cause;
- Require the trial judge to limit the time given litigants to question the venire;
- Provide that the trial judge must prohibit examination that is repetitive, leading, suggestive, or argumentative or that inquires into a prospective juror's religious moral, social, philosophical, or political beliefs or affiliations,[293] voting record, personal income or financial condition, medical history or condition, preferences and habits as to reading, television and other media, or other matters of a personal and private nature, except when directly relevant to the law or facts of the case;
- Prohibit a party from inquiring as to a prospective juror's probable vote on the verdict or attempting to commit a prospective juror to a particular finding as to any issue or evidence;[294]
- Require that questions concerning a prospective juror's opinion about applicable law, if permitted to be asked, be prefaced by a proper statement of the law;[295] and
- Allow prospective jurors to be rehabilitated.[296]

Further Limitations on Voir Dire Questioning May Be Required. The *Hyundai, Hafi,* and *Cortez* decisions are relatively new. Consequently, insufficient time has passed to determine the impact of those decisions on the conduct of voir dire in Texas trial courts. Because very few appellate court opinions on voir dire have been handed down since the Texas Supreme Court's decision in *Hyundai,* we do not know how trial courts are following the Court's decisions and whether trial courts are having difficulty applying the decisions. To assist trial judges in implementing the Court's new opinions and the other recommendations in this paper, policy makers might well conclude that additional measures are required.

For example, former Texas Supreme Court Justice Craig Enoch recently noted that *Hyundai* addresses a trial court's *refusal* to dismiss jurors for cause, but does not address the opposite situation – a trial court's *dismissal* of jurors for cause.[297] Striking qualified jurors for cause, more than refusing to strike jurors for cause, is what allows a jury to be "filled with venire members who favor one side's evidence over the other" because it gives the party seeking the strike more opportunities to remove unfavorable, but qualified, jurors.[298]

In any appeal, the appealing party must show that the alleged error was "reversible error" in that it probably caused the rendition of an improper judgment.[299] It is exceedingly difficult to obtain a reversal of a trial court's judgment on the ground that the trial judge erred in striking or refusing to strike a juror for cause because it is difficult to preserve error,[300] difficult to show that the trial court committed error (which requires that the appellant show that the trial court "abused its discretion"[301]), and almost impossible to show that the error probably caused the rendition of an improper judgment.[302] Justice Enoch argued that "improperly granting for-cause strikes for evidence-weighing responses," under some circumstances, should amount to reversible error.[303]

The Texas Supreme Court should consider Justice Enoch's approach. If attorneys are concerned that having jurors dismissed for cause might introduce reversible error into an otherwise favorable judgment, it seems likely that lawyers will be less inclined to seek questionable for-cause strikes. That, in turn, could result in fewer fact-based questions aimed at creating bias or prejudice. Additionally, it could aid the selection of fair and impartial jurors because it will impede the ability of litigants to fill a jury with jurors who favor one party's evidence. On the other hand, creating grounds for reversal of judgments may discourage trial judges from granting for-cause challenges, which could result in biased jurors remaining on some juries – although attorneys, armed with six peremptory strikes, should be able to prevent this from happening.

Alternatively, the Texas Supreme Court might consider addressing the problem of "bias or prejudice" more directly. The expansive meaning given "bias or prejudice" by Texas' appellate courts gives litigants the opportunity and incentive to create, through skillful questioning, a basis for having prospective jurors dismissed for cause. The Legislature or the Court could wipe away all or part of the judicial gloss that has built up on "bias or prejudice" over the years. That phrase could be narrowed to mean, for example, bias or prejudice for or against the actual party or for or against a party's race or gender, but not any other kind of bias or prejudice. Under this definition, a for-cause strike would not be available to obtain the dismissal of a venire member for perceived bias for or against the type of case, the subject matter of the litigation, the occupation or industry of a party, the kinds or amounts of damages sought, or any other aspect of the case. For those kinds of perceived bias, peremptory strikes would have to be used – which is the purpose of giving lawyers the generous number of peremptory strikes that Texas law allows. Of course, there are numerous other ways the Legislature or Court might shape the definition of "bias or prejudice" by including or excluding types of bias. For example, disqualifying bias or prejudice might include bias or prejudice for or against a party, a party's race or gender, or a party's occupation or industry.

There are several benefits to narrowing the definition of "bias or prejudice." First, if the definition is narrowed such that the grounds for disqualification are relatively objective, all grounds for the for-cause dismissal of venire members could be easily ascertained by having the trial judge ask a few simple questions at the beginning of voir dire. For example, jurors who do not know anything about a party probably cannot be biased or prejudiced against that party. Attorney questioning to identify for-cause strikes would be unnecessary in most cases. Second, having objective, easily ascertained grounds for disqualification would lessen the ability of litigants to influence trial results through the skillful use of voir dire to shape a jury. Consequently, it would lessen the incentive to ask case-specific questions. Third, questioning for the purpose of rehabilitating venire members would be unnecessary except in unusual circumstances. Fourth, limiting the ability of litigants to achieve the for-cause dismissal of venire members gives greater respect to our citizens' right to serve on a jury.[304]

Allow Appropriate Case-Specific Written Supplemental Questionnaires

The Texas Jury Task Force recommended promulgation of a uniform jury summons and basic questionnaire for use in all Texas counties.[305] The Task Force also recommended amending Texas Rule of Civil Procedure 166 to allow trial judges, in appropriate cases, to use supplemental written questionnaires in voir dire examination.[306]

Two years later, the Texas Legislature amended the Government Code to require the Office of Court Administration ("OCA") to develop and maintain a uniform written questionnaire to obtain basic "biographical and demographic information that is relevant to service as a jury member." The standard questionnaire must inquire about the prospective juror's: (1) name, sex, race,[307] and age; (2) residence and mailing addresses; (3) education level, occupation, and place of employment; (4) marital status and, if applicable, the name, occupation, and place of employment of the person's spouse; and (5) citizenship status and county of residence.[308] The OCA's uniform questionnaire requests that jurors provide the information required by statute, plus some additional information, like the range of ages of the prospective juror's children.[309] The Government Code provides that the summons "must include a copy of the questionnaire *developed under this section,*" suggesting that counties cannot use a unique questionnaire to obtain additional information.[310] At least one Texas county, however, uses a unique questionnaire that requires the prospective juror to provide additional information, including the person's religion and social security number.[311]

Texas has not adopted the Task Force's recommendation for the use of supplemental written questionnaires, but nothing prohibits use of supplemental questionnaires in Texas civil cases. According to proponents, there are a number of reasons to use supplemental questionnaires. First, supplemental questionnaires allow the court and counsel to obtain additional information about juror qualifications and about potential biases and prejudices that might affect a juror's ability to serve in a particular case.[312]

Second, using written questionnaires can save time by reducing the need for repetitive oral questioning during voir dire.[313] This allows the court and counsel to conduct a more efficient and focused voir dire and enables the attorneys to make better decisions about exercising challenges.[314]

Third, in responding to questionnaires, jurors typically reveal information that they may not disclose during oral voir dire. "[E]veryone 'talks.' No juror can hide behind speech fright or choose to remain silent. You will learn something about each juror."[315]

Fourth, because questionnaires give jurors more time to think and formulate their answers, jurors tend to provide more complete information than they do when spontaneously responding to oral questioning.[316] This is especially true in the rare cases where potential jurors will need to be asked questions about case-relevant private matters because jurors are more comfortable revealing sensitive information on a written questionnaire than in response to oral questioning.[317]

Fifth, psychological studies show that "jurors are influenced by hearing other jurors' voir dire responses, and tr[y] to alter their responses to conform…"[318] Thus, jurors are more likely to express their own, candid opinions about topics in responding to written questionnaires, rather than merely echoing the sentiments expressed by others in a group setting.[319]

This makes written questionnaires a particularly useful tool for discovering bias and prejudice.[320] Indeed, jurors may be more willing to express socially unacceptable attitudes and opinions (e.g., racial or ethnic prejudices) in responding to a written questionnaire.[321]

Sixth, a juror's response to a written questionnaire may indicate that the juror should be questioned individually rather than in a group setting. This private, individual questioning may prevent juror embarrassment or help counsel avoid having a juror express views that might prejudice the remainder of the panel and make it more difficult to seat a fair and impartial jury.[322]

Seventh, supplemental questionnaires also may allow jurors who cannot serve on a particular case to be immediately identified and promptly dismissed. This saves the jurors, parties and the court time and reduces juror frustration with the jury selection system.[323]

Eighth, because written questionnaires typically are submitted and approved in advance of voir dire, it is easier for courts to exercise oversight and refuse to allow inappropriate questions.[324]

Despite these benefits, use of supplemental written questionnaires raises significant concerns. First, including juror questionnaires in public records raises privacy issues.[325] At a minimum, jurors should be informed about the questionnaires' purpose, how the information will be used, and who will have access to the responses.[326] Responses to supplemental juror questionnaires should be afforded the same degree of confidentiality as responses to uniform jury summons questionnaires.[327] Furthermore, policymakers should consider whether a juror's personal information such as home address, telephone number, and other contact information should be provided special protection from disclosure.

Second, preparing, distributing, completing and collecting written questionnaires takes attorney, court, and juror time. In small or routine cases, it is probably not time well spent, making written questionnaires inappropriate for such cases. In complex litigation, however, the time used to prepare, distribute, complete and collect written questionnaires may be well spent, particularly if the questionnaire can be completed, returned to court, and furnished to counsel before voir dire.[328]

Finally, if not properly supervised by judges, questionnaires may invade the juror's rights to free speech and privacy,[329] prolong the time required for voir dire, and be used to obtain information that is not relevant to any aspect of the case, but instead intended to help a party select a favorable jury rather than an impartial one.[330] For example, a questionnaire recently used by a Houston probate court in a personal injury case asked, among other things:

- Politically, do you consider yourself to be: Liberal, Moderate, Conservative, Other.
- Have you formed an opinion about the ethics of people in business today? Is your opinion: Positive, Negative, or Neutral.
- Companies should be held to a Higher/Equal/Lower standard of legal responsibility than individuals.
- Have you or your spouse served in the military?
- Are you currently active in any community organizations or as a volunteer?
- Which comes closest to describing you? Warm-hearted or Clear-headed.

- Which is more important to you when making a difficult decision? How I feel or What I think.[331]

A jury questionnaire provided to those attending a recent continuing legal education course suggested asking venire members, among other things:

- List 3 people you admire *most*.
- What newspapers, magazines, or trade publications do you read?
- Please list all unions and civic, social, professional, and religious organizations to which you now belong or have belonged.
- Please list your 3 favorite television shows.
- What one person has most influenced your life and why?[332]

In a case of singular rarity, *Brandborg v. Lucas,* a Texas juror simply refused to answer questions of this kind, was held in contempt of court, fined, and sentenced to time in jail.[333] The questions the juror declined to answer include the following:

- What was your combined family income last year?
- Religious preference (please name denomination and specific church you attend):
- With which political party are you primarily associated?
- Do you consider yourself a liberal, a conservative or a moderate?
- What television shows do you watch regularly?
- Which magazines and newspapers do you subscribe to or read regularly?
- What type of vehicle(s) do you drive?
- To what clubs, unions, societies, fraternal or political organizations, professional associations or other organizations do you belong, and what offices held?
- If you do volunteer work, please indicate the organizations and your involvement.
- What reading material do you routinely read?
- Are you presently under the care of a physician or taking any medication? Yes No
- Have you or any member of your family been a member of the National Rifle Association or any local gun, pistol, or hunting club? Yes No[334]

After declining to answer these questions, which were only eleven of the more than hundred questions on the written questionnaire, the juror addressed a letter to the judge explaining that "I found some of the questions to be of a very private nature, and in my opinion, having no relevance to my qualifications as a potential fair and impartial juror…I respectfully request your consideration in this matter."[335] The court gave her no alternative but to answer the questions.[336] When she refused, the court held her in contempt, sentenced her to three days in jail, and levied a $200 fine against her.[337] The juror appealed, and the order was eventually overturned by the United States District Court for the Eastern District of Texas as a violation of her First and Fourteenth Amendment rights to privacy.[338]

As illustrated by *Brandborg,* jurors who object to intrusive jury questions run considerable risks.[339] In *Brandborg,* the juror incurred the expense and the aggravation of an extended legal appeal.[340] Her appeal lasted approximately eighteen months and included appeals to both the Texas Court of Criminal Appeals and the United States District Court for the Eastern District of Texas before her sentence was eventually overturned.[341] Had she been unable to bring the appeal or had her appeal been unsuccessful, she could have been forced to serve time in jail and pay a fine.[342]

Intrusive questions having no relevance to the case have no place in a society that places a value on privacy, free speech, and free association. The only reason questions like these are posed is to allow attorneys and their jury consultants to profile potential jurors to determine if they are likely to favor a particular litigant's position. This type of questioning should be regarded as abusive and disallowed. Prospective jurors should not be required to reveal private information or information that is irrelevant to the case to complete their civic duty. Neither should they be required to write an essay on their opinion about an abstract topic. General rules defining the scope of voir dire should apply to written questionnaires.[343] It is no more permissible to ask an improper question in writing than to ask one orally. And it is no more permissible to waste venire members' time in writing than it is to do so orally.

Based on the foregoing, the Texas Legislature should amend the Government Code to make absolutely clear that, except for complex cases, counties cannot use unique questionnaires to accompany the jury summons, but instead must use the OCA's standard questionnaire. Additionally, the Texas Supreme Court should adopt a rule allowing the use of supplemental written questionnaires in complex civil cases, but prohibiting their use in routine cases. The rule should require that trial courts exercise strict oversight to maximize logistical efficiency and protect juror privacy. Questions that delve unnecessarily into private matters, that are not directly relevant to the case, and that require an extended response about an abstract topic should not be allowed. Questions about political and religious affiliations, income, medical and family histories, and personal behaviors that are not directly relevant to the law or the facts of the case should be specifically prohibited. As with all other aspects of voir dire, trial courts must supervise the use of supplemental questionnaires to ensure they are used to achieve the goal of a fair and impartial jury no matter how determined the attorneys are to select only those venire members who are most partial to their respective clients.

Clarify the Procedure for Judicial Excuses from Jury Service

Under current Texas law, a court may hear a prospective juror's reasonable and sworn excuse for exemption.[344] If a prospective juror asserts that jury service will cause economic hardship, that juror may be dismissed from service only if all parties agree to the dismissal.[345] Otherwise, a juror may be dismissed any time the trial court finds the exemption sufficient.[346]

Texas law recognizes that trial courts need flexibility in excusing jurors who may not meet the statutory grounds for an exemption but otherwise demonstrate good reason why they cannot serve.[347] Granting these judicial excuses, however, can present problems during voir dire if not carefully executed by the trial court. If the trial court discusses a particular juror's excuse and request for dismissal in front of all prospective jurors, other prospective jurors may be encouraged to seek dismissal on the same grounds.

Additionally, if the trial court informs prospective jurors that requests for economic hardship require attorney approval, or the trial court seeks the attorneys' approval in the presence of prospective jurors, the attorneys may be placed in a prejudicial light with the jurors seeking to be relieved of service.

The Texas Supreme Court should promulgate a rule of procedure prohibiting trial courts from discussing a particular juror's judicial excuse for exemption in the presence of other jurors, from informing the venire that the attorneys must agree to a juror's request for an exemption, and from asking the attorneys whether they will agree to a request for an economic hardship exemption in the presence of any prospective juror. In addition, the Legislature should amend the Government Code to require jurors excused under Section 62.110 to reschedule their jury service for another date.

Eliminate the Jury Shuffle

The Texas Rules of Civil Procedure allow a trial judge, on the request of a party, to "shuffle" the names of prospective jurors before voir dire begins.[348] This practice is unique to Texas.[349] According to the Texas Jury Task Force, the shuffle was "[o]riginally conceived to protect against stacking of jurors by unscrupulous local officials" but is outdated due to "massive changes" in the way panel members are selected.[350] Additionally, in the absence of a written questionnaire, the only basis a party has for requesting a shuffle is information gained by a visual examination of the panel, which will reveal the prospective jurors' race, gender and general appearance.[351] Deciding to shuffle jurors based on race or gender encourages stereotyping and may be constitutionally suspect.[352] For these reasons, the Texas Jury Task Force recommended eliminating the jury shuffle where the jury panel was still random when seated in the assigned court.[353]

In addition to the concerns expressed by the Texas Jury Task Force, the expanded use of written questionnaires, which is recommended in this paper, could increase the use of the jury shuffle. Armed with more information about jurors than merely how they look, litigants could request a shuffle whenever the questionnaire responses indicate that the jurors near the top of the order might be unfavorable to a litigant's position. Used this way, the jury shuffle could become yet another tool to select a "favorable" jury rather than an impartial one. Litigants may eliminate "unsympathetic" jurors using their peremptory challenges,[354] but they should not be allowed to use the jury shuffle to gain greater advantage based on information gleaned from juror responses to written questionnaires.

In sum, where other means are in place to assure randomness, the jury shuffle should be eliminated in civil cases to avoid the appearance of discrimination and manipulation of the selection system.

Study the Best Source for the Jury Pool

A "substantial majority" of the Texas Jury Task Force's committee on juror compensation and juror satisfaction were in favor of returning to use of the voter registration list as the source for the jury pool, but they felt that the issue needed further study.[355] Despite this recommendation, no formal study has been conducted to determine the best source. The Legislature should require the OCA to study this issue further and report its findings to the new jury task force commissioned by the Texas Supreme Court in 2006.

Limit Jury Exemptions for the Legislative Branch

Currently, Texas law provides an exemption from jury service for an "officer or an employee of the senate, the house of representatives, or any department, commission, board, office, or other agency in the legislative branch of state government."[356] In the absence of special sessions, the Texas Legislature meets for only 140 days every other year.[357] During legislative sessions, legislative and executive branch employees are consumed with government affairs and exempting them from jury service is sensible. Exempting these individuals from service when the Legislature is not in session, however, is unnecessary to the operation of state government, unfair to other Texas citizens who report for jury duty regardless of their professional obligations, and removes a number of civic-minded jurors from the jury pool. Accordingly, the Legislature should amend the Government Code to provide this exemption from service only for periods when the Legislature is in session.

Permit Juror Note-Taking in Civil Trials

There is no statute or rule prohibiting or permitting juror note-taking during trial either in criminal or civil cases.[358] Several courts, including the Texas Court of Criminal Appeals and some civil courts, have affirmed or allowed juror note-taking in recognition of its benefits.[359]

The ABA recommends that jurors be permitted to take notes during trial,[360] and several states, like Arizona, have reformed their jury rules to permit note-taking and the use of notes during deliberations.[361] Other states, like California, have revised their rules to provide trial courts discretion to allow juror note-taking.[362]

Legal scholars have found that note-taking juries "were able to better organize and construct the evidence and, importantly, this in turn led to improved and more efficient (focused on the evidence) jury deliberations."[363] These scholars have found that note-taking can be especially helpful during long trials when jurors are required to recall weeks or months of testimony,[364] and jurors who were permitted to take notes expressed a greater satisfaction with the trial process as compared to jurors who did not take notes.[365]

Additionally, the Texas Jury Task Force recommended that Texas adopt a rule of civil procedure permitting juror note-taking and allowing those notes to be used by jurors in deliberations.[366] In support of this recommendation, the Task Force wrote that note-taking aided juror memory, encouraged more active participation, and helped to decrease deliberation time by assisting jurors to more efficiently consider evidence.[367] Despite this recommendation, Texas has not yet adopted such a rule.

Critics argue that jurors who take notes may participate more effectively than those who do not take notes, may be less attentive to witnesses' behavior if they concentrate on note-taking, and may take notes of inadmissible evidence or other non-relevant information.[368] Many of these concerns will exist regardless of whether jurors are permitted to take notes, and trial courts can alleviate these concerns through admonitory instruction to guide jurors in their note-taking.

Based on the substantial authority that juror note-taking during trial is beneficial, the Texas Supreme Court should promulgate a rule of procedure to make clear that jurors in civil cases may take notes during trial and use those notes in their deliberations. The Texas Supreme Court also should develop uniform instructions regarding juror note-taking for use by trial courts.

Permit Jurors to Pose Written Questions to Witnesses Through the Judge

The Texas Jury Task Force considered whether to allow juries in civil cases to submit written questions to witnesses during trial. Ultimately, the Task Force did not recommend allowing juror questioning, in large part because the Task Force did not want to change the jurors' role from neutral, passive fact finders to participating advocates.[369] However, studies show that jurors use questions to clarify testimony and put evidence in context, not to advocate for one side or another.[370] In other words, studies show that juror questioning does not change the role of the jury, but instead allows jurors to better evaluate the evidence. Furthermore, judges who allow juror questioning find the content and the number of jurors' questions to be reasonable and that jurors who were allowed to ask questions did not overwhelm the court with questions or slow the trial.[371] One study found that the median number of questions was only six per case.[372]

Many state and federal courts permit jurors to ask questions in civil trials. Arizona, for example, recently amended its rules to permit juror questions.[373] The American Judicature Society reports that one-third of states have a statute or rule allowing juror questions to witnesses, and most of the remaining states and all the federal circuits that have considered the issue permit such questions in the trial judge's discretion.[374] Moreover, the ABA recommends that jurors be permitted to submit written questions to witnesses during civil trials.[375]

Following the suggestion of the ABA and the lead of many other states, the Texas Supreme Court should develop a rule allowing jurors in civil cases to submit written questions to witnesses. This practice, along with juror note-taking, will help the jury be more attentive during trial, help jurors resolve questions they have regarding evidence by creating two-way communication with witnesses, and help attorneys identify and resolve issues troubling the jury.[376] Some proponents also believe that juror questioning will encourage a greater sense of responsibility among the jurors in the pursuit of justice and increase the public's perception of the credibility of the jury.[377]

The procedure for juror questions should be carefully outlined. Jurors should be permitted to submit questions in writing to the trial judge after all counsel have finished examining a witness. The trial judge and attorneys must be allowed to consider the questions outside the presence of the jury. After the attorneys have had an opportunity to object, the judge can decide whether the question should be permitted. If the judge finds the question appropriate, the judge should ask the witness the question and allow counsel an opportunity for follow-up examination. The judge should instruct the jury at the beginning of trial that questions should be asked sparingly, that some questions may not be asked, and that various sound reasons exist to disallow certain questions.

Permit Interim Statements to the Jury

The ABA and the Texas Jury Task Force support the use of interim statements to the jury to improve juror comprehension.[378] The Texas Jury Task Force recommended a rule to allow interim statements, finding that it is helpful to the jury to have a summary of the evidence in long, complex trials.[379] Interim statements "allow[ ] counsel to organize, clarify, emphasize, contextualize, and explain evidence, and aid[ ] jurors in remaining focused."[380] The Task Force recommended that Texas Rule of Civil Procedure 265 be amended to include the following:

> In cases where the Court believes that it would assist the jury because of the length or complexity of the trial, the Court may permit parties to make interim statements summarizing what the evidence has shown thus far and what the party believes the following evidence will show. [Such statements shall not be in the form of arguments.] The Court has discretion to determine the intervals and length of any such statements; however, in exercising its discretion, the Court should not permit interim statements that disrupt a witness' testimony (i.e., ordinarily it should be permitted only at the beginning or close of the day or at the conclusion of a witness' testimony) or that unnecessarily lengthen the trial.[381]

Despite the Task Force's recommendation, Texas has no rule permitting or prohibiting the practice of interim statements. To better aid the jury's retention and comprehension of evidence in lengthy trials, the Texas Supreme Court should develop a rule similar to the rule proposed by the Task Force giving trial courts discretion to allow interim statements during civil trials.

Summary of Proposed Changes and Proposed Voir Dire Rule

To achieve the recommendations made in this paper, the Texas Government Code should be amended as follows.

1. Amend § 62.110 to require jurors excused for "judicial excuses" to reschedule their jury service.
2. Amend § 62.0132 to provide that information disclosed on written jury summons questionnaires and any supplemental written questionnaires may not be disclosed to anyone other than the judge, court personnel, litigants, and attorneys in a case in which the respondent is a potential juror.
3. Amend § 62.106 to restrict the exemption for the legislative branch to apply only when the Texas Legislature is in session.

In addition, the following changes should be made to the Texas Rules of Civil Procedure.

1. Require judges to make decisions regarding judicial excuses for jury service exemptions outside the presence of the jury.
2. Require judges to make a neutral opening statement about the case during voir dire and to conduct the initial questioning in voir dire.
3. Define the scope and limits of permissible voir dire questioning.
4. Allow appropriate case-specific written supplemental questionnaires in complex cases and amend Texas Rule of Civil Procedure 166 to include proposed supplemental questionnaires as part of pretrial submissions or the pretrial conference, if requested in complex cases.
5. Eliminate the jury shuffle where means are in place to ensure randomness of the jury panel.
6. Allow juror questioning of witnesses through the judge.
7. Provide judges discretion in civil trials to allow interim statements to the jury.

The best way to implement the above-recommended changes is to add a rule to the Texas Rules of Civil Procedure specifying voir dire procedures and giving trial courts guidelines for conducting voir dire. The issues concerning voir dire are complex. We recognize that this paper's analysis of and recommendations concerning those issues will stimulate discussion and debate. Those discussions will inform the ultimate proposals that the Supreme Court will review when considering a rule that addresses voir dire. The new rule could read as follows:

> **Rule ___. Voir Dire of Prospective Jurors; Form and Scope of Examination.**[382]
>
> ***1. Written Questionnaires.*** Before voir dire begins, the court and the parties shall be provided with the prospective jurors' responses to written questionnaires provided with the uniform jury summons.[383] In complex cases, the court may use a supplemental questionnaire to obtain information relevant to ascertaining jurors' biases or prejudices in that case,[384] and may require the parties to submit a proposed supplemental questionnaire at an appropriate time.[385] The court shall ensure that all questions comply with the guidelines set forth in subsection (4) of this rule.[386]
>
> ***2. By the Court.*** After giving the admonitory instructions in Rule 226a, the court shall make a brief neutral statement of the case and shall conduct an initial examination of the prospective jurors.[387] The court's questioning should be sufficient, at a minimum, to determine the jurors' legal qualifications to serve under § 62.102 and § 62.105 of the Texas Government Code.[388]
>
> ***3. By Counsel.*** Following initial questioning by the court, each party shall have the opportunity, under the court's supervision and subject to reasonable time limits, to make a brief statement of the case and to conduct a reasonable examination of the jurors, both individually and as a panel.[389] The court shall ensure that all questions comply with the guidelines set forth in subsection (4) of this rule.[390]
>
> ***4. Scope of Questions.***[391] The court shall allow each party a reasonable opportunity to ask questions to determine whether any jurors should be disqualified for cause. Subject to reasonable time limits, the court also may allow each party time to ask questions. The court shall not allow a party to seek a prospective juror's opinion about the weight the juror might give certain evidence to be admitted at trial, to inquire about a prospective juror's probable vote on the verdict, or to attempt to commit a prospective juror to a particular verdict or finding. The court also shall not allow the parties to inquire into a prospective juror's religious, moral, social, philosophical, or political beliefs or associations, voting record, personal income or financial condition, medical history or condition, preferences and habits as to reading, television and other media, or other matters of a personal and private nature, except when such a question is directly relevant to the law or facts of the case. The court shall prohibit questions that are repetitive, invasive, or argumentative.[392]
>
> ***5. Rehabilitation.***[393] The court may conduct further questioning, or may allow any party to conduct further questioning, of a prospective juror who has expressed apparent bias.

CONCLUSION

The Texas Constitution guarantees litigants the right to trial by a "fair and impartial" jury, but it does not guarantee litigants the right to a jury that favors their side. The voir dire process is intended to protect this valuable constitutional right. Unfortunately, however, the voir dire process in Texas civil courts is often manipulated by litigants in an attempt to select a jury that will be favorable to their position, not to select a fair and impartial jury. As a result, the process often takes too long, intrudes on the legitimate privacy interests of potential jurors, and results in juries that are tailor-made to favor one side or the other.

The desire to use voir dire to create a favorable jury, rather than an impartial one, is exacerbated in Texas because Texas has no statutory provisions or procedural rules defining the form and scope of voir dire. Instead, voir dire is left almost entirely to each trial judge's discretion, and Texas trial judges customarily allow attorneys almost unfettered freedom to conduct voir dire. Thus, advocacy skills and the experience of the attorneys conducting voir dire dominate the selection process and frequently result in the selection of juries inclined from the outset to favor one side or another.

This paper recommends increased judicial involvement in voir dire and recommends that judges and attorneys be given clear guidance, in the form of a procedural rule, regarding the form and scope of permissible voir dire questioning. This paper also makes a number of suggestions intended to facilitate jurors' consideration of the evidence. The paper recommends that trial courts encourage and facilitate juror note-taking during trial, that trial courts allow jurors to submit written questions to witnesses, and that trial courts be given discretion to allow attorneys to make interim statements during trial to review the evidence. Improving juror comprehension will increase the likelihood of a just verdict and improve juror satisfaction.

Many Texas citizens do not appear for jury service because they have had bad experiences with jury duty in the past or have heard friends and family members complain of their experiences with jury service. They believe their time will be wasted in the jury selection process, that they will not be picked for service, that they may be subjected to intrusive or embarrassing examination by attorneys, and that they may have to spend days or weeks missing work to serve as a juror. Many of the proposals made in this paper – like limiting voir dire questioning and allowing jurors to take notes and ask questions – are intended to increase juror satisfaction in the hopes that increased satisfaction will encourage citizen participation.

Most importantly, the changes recommended in this paper are intended to help ensure that a fair and impartial jury is impaneled in every civil case. The foundation of a civil justice system in a free society is the trust of the citizenry in the effectiveness and fairness of trials. The linchpin of a fair trial is an impartial jury. Texas should constantly search for ways to assure that fair, attentive, and impartial citizens sit in the jury boxes of our courtrooms.

ENDNOTES

1 *Jacob v. City of New York,* 315 U.S. 752 (1942).
2 *Gen. Motors Corp. v. Gayle,* 951 S.W.2d 469, 476 (Tex. 1997).
3 Letter from Thomas Jefferson to Thomas Paine (1789), *available at* Thomas Jefferson on Politics and Government, http://etext.lib.virginia.edu/jefferson/quotations/jeff1520.htm#Trial (follow "Trial by Jury" hyperlink) (last visited Oct. 30, 2006).
4 SUPREME COURT OF TEXAS JURY TASK FORCE, FINAL REPORT 5, 55-64 (1997), http://www.courts.state.tx.us/commtask/ (follow "Supreme Court Jury Task Force [pdf]" hyperlink) [hereinafter Jury Task Force Final Report].
5 *See id.* at 82-84.
6 *See id.* at 2.
7 *Id.*
8 *See id.* at 43-52.
9 *Id.* at 5-6.
10 *See id.*
11 Pages 11-12.
12 Pages 12-14.
13 Jury Task Force Final Report, note 4 above, at 97-104.
14 *Id.* at 100.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at 100-01.
19 *Id.* at 100.
20 *Id.*
21 *Id.*
22 *Id.*
23 *See id.*
24 *Id.*
25 *Id.* at 101.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.* at 97, 101.
32 *Id.* at 97, 101.
33 *Id.* at 97, 102.
34 *Id.* at 98, 102.
35 *Id.* at 98, 102.
36 *Id.* at 98.
37 *Id.* at 98-99.
38 *Id.* at 99.
39 *Id.*
40 *Id.* at 103, 104.
41 *Id.* at 103
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.* at 103-04.
46 *Id.* at 104.
47 *Id.* at 105-06.
48 *Id.* at 105.
49 *Id.* at 108-215.
50 *See id.*
51 *Id.* at 5.
52 *Id.* at 113-20.
53 *Id.*
54 *Id.* at 114-15.
55 *Id.* at 109-10.
56 *Id.* at 109.
57 *Id.* at 110.

58 *Id.*
59 *Id.* at 109, 111.
60 *Id.* at 112-13.
61 *Id.* at 122.
62 *Id.* at 122-23.
63 *Id.*
64 *Morrison v. State*, 845 S.W.2d 882, 887-89 (Tex. Crim. App. 1992).
65 *Id.*
66 Some civil trial courts have permitted juror questioning. *See* Judge Ken Curry & M. Beth Krugler, *The Sound of Silence: Are Silent Juries the Best Juries?*, 62 TEX. B.J. 441, 442 (1999); *see, e.g., Hudson v. Markum*, 948 S.W.2d 1, 3 (Tex. App.—Dallas 1997, writ denied); *Fazzino v. Guido*, 836 S.W.2d 271, 275 (Tex. App.—Houston [1st Dist.] 1992, writ denied). It is generally within the trial court's discretion to allow the jurors in civil trials to take notes and ask questions during the trial because such actions will typically not be held harmful error by the appellate courts. *See Hudson*, 948 S.W.2d at 3; *Fazzino*, 836 S.W.2d at 276; *Manges v. Willoughby*, 505 S.W.2d 379, 384 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.)
67 *See* ARIZ. R. CIV. P. 39(b)(1), (10); *see also* Pages 15-17.
68 *See* ARIZ. R. CIV. P. 39(b)(1), (10); *see also* Pages 15-17.
69 *See* ARIZ. R. CIV. P. 39(b)(1), (10); *see also* Pages 15-17.
70 Jury Task Force Final Report, note 4 above, at 131.
71 *Id.*
72 *Id.* at 131-32.
73 *Id.* at 137.
74 *Id.*
75 *Id.* at 141.
76 *Id.* at 137.
77 *Id.*
78 *See id.* at 141-42.
79 *Id.* at 142.
80 *Id.* at 150.
81 *Id.* at 145-46.
82 *Id.* at 146-48.
83 *Id.* at 148.
84 *Id.*
85 *Id.* at 149.
86 *Id.* at 150.
87 *Id.*
88 *Id.* at 164-68.
89 *Id.* at 167-68.
90 *See id.* at 160-74, 180-82.
91 *See id.* at 161, 171.
92 *Id.* at 162, 171.
93 *See id.* at 167-68.
94 *See* Pages 12-14.
95 Jury Task Force Final Report, note 4 above, at 176.
96 *Id.* at 177.
97 *Id.* at 176.
98 *Id.* at 176-77.
99 *Id.* at 177.
100 *Id.* at 186.
101 *Id.* at 184.
102 *Id.*
103 *Id.* at 184-85.
104 *See id.*
105 *See id.* at 191.
106 *Id.*
107 *Id.*
108 *Id.* at 199.
109 *Id.*
110 *Id.*
111 *Id.*
112 *See id.* at 194-95.
113 *Id.* at 196-97.

114 *Id.* at 197-98.
115 *See* U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, Table 41: Who Conducts Voir Dire and the Allocation of Peremptory Challenges, at 273, http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf.
116 *See* Jury Task Force Final Report, note 4 above, at 103-04.
117 The 76th Texas Legislature requested the Texas Judicial Council examine jury service and issues relating to juror pay, juror participation, and incentives offered to jurors. SUBCOMMITTEE ON JURIES, TEXAS JUDICIAL COUNCIL, EXAMINING JUROR PAY AND OTHER WAYS TO ENCOURAGE JURY SERVICE IN TEXAS 5 (2001), http://www.courts.state.tx.us/oca/tjc/publications/ (follow "Examining Juror Pay" hyper link) (last visited October 29, 2006). The Texas Judicial Council recommended, in part, an increase in juror pay to help aid diversity among Texas juries. *See id.* at 18; COMMITTEE ON JURIES, TEXAS JUDICIAL COUNCIL, JURY SERVICE: PARTICIPATION AND PAY IN TEXAS 15-16 (2002), http://www.courts.state.tx.us/oca/tjc/publications/ (follow "Jury Service: Participation and Pay in Texas" hyperlink) (last visited Oct. 29, 2006).
118 Act of June 18, 2005, 79th Leg., R.S., ch. 1360, § 1, 2005 TEX. GEN. LAWS 4257 (codified as an amendment to TEX. GOV'T CODE § 61.001(a)).
119 V&E, Firm News: Texas Increases Juror Pay, http://www.velaw.com/resources/resource_detail_print.asp?rid=322713201&rtype=news (last visited Oct. 29, 2006).
120 Act of June 18, 1999, 76th Leg., R.S., ch. 640, § 1, 1999 TEX. GEN. LAWS 3210-11 (codified at TEX. GOV'T CODE § 62.001(j).
121 *Id.* § 2 (codified at TEX. GOV'T CODE § 62.106(a)(8)).
122 Act of May 27, 2003, 78th Leg., R.S., ch. 153, § 1, 2003 TEX. GEN. LAWS 228-29 (codified at TEX. GOV'T CODE § 62.106(a)(9)).
123 Act of June 20, 2003, 78th Leg., R.S., ch. 398, § 1, 2003 TEX. GEN. LAWS 1647 (codified at TEX. GOV'T CODE § 62.0125).
124 Act of June 18, 2003, 78th Leg., R.S., ch. 276, § 1, 2003 TEX. GEN. LAWS 1208-09 (codified at TEX. GOV'T CODE § 62.0111).
125 *See* Senate Comm. on Jurisprudence, Bill Analysis, Tex. H.B. 2188, 78th Leg., R.S. (2003) http://www.capitol.sate.tx.us/tlodocs/78R/analysis/pdf/HB02188S.pdf; *see also* Travis County, I-Jury Online Impaneling, http://www.co.travis.tx.us/district_clerk/jury/default.asp (last visited Oct. 29, 2006).
126 Bill Analysis, note 125 above.
127 *See id.*
128 Act of June 17, 1997, 75th Leg., R.S., ch. 686, § 1, 1997 TEX. GEN. LAWS 2307 (codified as an amendment to TEX. GOV'T CODE § 62.106(1)).
129 Act of May 29, 1997, 75th Leg., R.S., ch. 425, § 1, 1997 TEX. GEN. LAWS 1684 (codified as an amendment to TEX. GOV'T CODE § 62.001(f)).
130 Act of June 18, 1999, 76th Leg., R.S., ch. 640, § 1, 1999 TEX. GEN. LAWS 3210 (codified as an amendment to TEX. GOV'T CODE § 62.001(f)).
131 Act of June 18, 1999, 76th Leg., R.S., ch. 539, § 1, 1999 TEX. GEN. LAWS 3035-36 (codified at TEX. GOV'T CODE §§ 62.0131, 62.0132).
132 *Id.* (codified at TEX. GOV'T CODE § 62.0132(c)).
133 *Id.*
134 Act of May 15, 2003, 78th Leg., R.S., ch. 54, §§ 1, 2, 2003 TEX. GEN. LAWS 86-87 (codified at TEX. CIV. PRAC. & REM. CODE § 24.001 & TEX. CODE CRIM. PROC. art. 36.215).
135 Act of June 18, 1999, 76th Leg., R.S., ch. 770, § 2, 1999 TEX. GEN. LAWS 3389 (codified at TEX. CIV. PRAC. & REM. CODE §§ 122.0021, 122.0022).
136 *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005).
137 *Hafi v. Baker,* 164 S.W.3d 383 (Tex. 2005).
138 *Hyundai Motor Co. v. Vasquez,* 189 S.W.3d 743 (Tex. 2006).
139 159 S.W.3d at 89.
140 *Id.* at 90.
141 *Id.*
142 *Id.* at 92.
143 *Id.*
144 *Id.*
145 *Id.* at 93.
146 *Id.* at 94 (emphasis in original).
147 *See id.* at 94-95.
148 *Id.* at 94 (citations omitted).
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*
155 164 S.W.3d at 384-85.
156 *Id.* at 384.
157 *Id.*

158 *Id.* at 385.
159 *Id.*
160 *Id.*
161 *Id.* (emphasis in original).
162 189 S.W.3d at 747.
163 *Id.* at 751.
164 *Id.* at 757-58.
165 *Id.* at 753.
166 *Id.* at 755.
167 *See id.* at 756-57.
168 *See id.* at 755-56.
169 *See id.* at 758.
170 *See id.* at 750-52.
171 *See id.* at 756-57.
172 *See id.* at 758. The Supreme Court has previously held that a trial court also abuses its discretion by refusing to allow a "proper question" if it "denies intelligent use of peremptory challenges." *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). However, the oft-repeated idea that a court *must* allow proper questions relating to the intelligent use of peremptory challenges (which can be used for no reason, or to determine whether a juror is "unsympathetic") is problematic as it would open the door for extensive questioning about jurors' opinions as to issues in the case. As the Texas Supreme Court indicated in *Hyundai*, trial courts are *not* required to allow questions unless the answers would provide a basis for juror disqualification. *Hyundai*, 189 S.W.3d at 756-57. Thus, the idea that a trial court *must* allow questions related to "intelligent use of peremptories" may have been repudiated in Texas. *See id.*
173 *Id.* at 753.
174 *Id.*
175 *Cortez*, 159 S.W.3d at 94.
176 *Hyundai*, 189 S.W.3d at 758.
177 *Cortez*, 159 S.W.3d at 91-92.
178 *Id.* at 92.
179 *Id.* at 93.
180 *Id.* at 92.
181 *Id.*
182 *See id.* at 92, n.3.
183 Craig Enoch & David F. Johnson, *The Next Step After Cortez & Hyndai*, TEX. LAW., Aug. 28, 2006.
184 B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280 (1996).
185 American Legislative Exchange Council, Press Releases 2003, http://www.alec.org/news/press-releases/press-releases-2003 (follow "May 14, 2003: Arizona Governor Signs 'Jury Patriotism Act'" hyperlink) (last visited Oct. 30, 2006).
186 Janessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform with Its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1012 (1996).
187 Dann & Logan, note 184 above, at 280, 282.
188 Ariz. Supreme Court Comm. on More Effective Use of Juries, Jurors: The Power of 12, Executive Summary (1994), http://supreme.state.az.us/jury/execsumm.htm (last visited Oct. 27, 2006).
189 *Id.*
190 Robert D. Myers & Gordon M. Griller, *Educating Jurors Means Better Trials: Jury Reform in Arizona*, 36 JUDGES' J. 13, 14 (Fall 1997).
191 *Id.*
192 ARIZ. R. CRIM. P. 18.5(d).
193 ARIZ. R. CIV. P. 39(b)(1), 51(a); ARIZ. R. CRIM. P. 18.6(c).
194 ARIZ. R. CIV. P. 51(b)(3); ARIZ. R. CRIM. P. 21.3(d).
195 ARIZ. R. CIV. P. 39(d)(3), (p); ARIZ. R. CRIM. P. 18.6(d).
196 ARIZ. R. CIV. P. 39(b)(1), (10); ARIZ. R. CRIM. P. 18.6(e).
197 ARIZ. R. CIV. P. 39(f).
198 *Id.* 39(h); ARIZ. R. CRIM. P. 22.4.
199 Myers & Griller, note 190 above, at 14.
200 ARIZ. R. CIV. P. 47(b)(2).
201 Myers & Griller, note 190 above, at 14.
202 *Id.*; *see also* Judge Jacqueline A. Connor, *Jury Reform: Notes on the Arizona Seminar*, 1 J. LEGAL ADVOC. & PRAC. 25, 31 (1999).
203 ARIZ. R. CIV. P. 39(d)(3); ARIZ. R. CRIM. P. 18.6(d).
204 Arizona Supreme Court, Jurors: The Power of 12, at "37. Allow Jurors to Discuss the Evidence Among Themselves During the Trial," http://www.supreme.state.az.us/jury/Jury/jury.htm (follow "Report" hyperlink; then follow "D. Trial" hyperlink) (last visited Oct. 30, 2006).

205 Shari Seidman Diamond et al., *Inside the Jury Room: Evaluating Juror Discussions During Trial*, 87 JUDICATURE 54, 54-55 (Sept.-Oct. 2003) [hereinafter *Inside the Jury Room*]; *see also* Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003).

206 *Inside the Jury Room*, note 205 above, at 54, 58.

207 *Id.* at 58.

208 Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349, 375 (1999).

209 *Id.*

210 *Id.*

211 Natasha K. Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. REV. 845, 856-57 (1998) (quoting an Arizona attorney who stated "It's been my experience that jurors do discuss the case…If you offer no guidance for them, you have no control. It's going to go on whether you like it or not, so you'd better have some input in it.").

212 Connor, note 202 above, at 33.

213 ARIZ. R. CIV. P. 39(f).

214 *Inside the Jury Room*, note 205 above, at 54.

215 ARIZ. R. CIV. P. 39(b)(1), (10); ARIZ. R. CRIM. P. 18.6(e).

216 ARIZ. R. CIV. P. 39(b)(1), (10); ARIZ. R. CRIM. P. 18.6(e).

217 ARIZ. R. CIV. P. 39(b)(1), (10); ARIZ. R. CRIM. P. 18.6(e); *see also* Connor, note 202 above, at 31-32.

218 ARIZ. R. CIV. P. 39(b)(1), (10); ARIZ. R. CRIM. P. 18.6(e).

219 Jurors: The Power of 12, note 204 above, (follow "Recommendations" hyperlink).

220 *Id.* at Recommendations 2-3, 21, 36, 47, 51-54.

221 ARIZ. R. CIV. P. 47(e).

222 *See* Jurors: The Power of 12, note 204 above, at Recommendation 23.

223 Ariz. Supreme Court, Jurors: The Power of 12: Part 2, http://www.supreme.state.az.us/jury/Jury2/jury2.htm (last visited Oct. 27, 2006).

224 *Id.* (follow "D. Change Number of Peremptory Challenges" hyperlink) (footnotes omitted).

225 ARIZ. R. CIV. P. 47(e).

226 *See* ARIZ. SUPREME COURT AD HOC COMM. TO STUDY JURY PRACTICES AND PROCEDURES, FINAL REPORT AND RECOMMENDATIONS (2002), http://www.supreme.state.az.us/jury/juryrpt.pdf.

227 *Id.* at 1.

228 *See id.*

229 *Id.* at 1-2.

230 American Legislative Exchange Council, note 185 above.

231 *See* ARIZ. REV. STAT. §§ 21-202 (excuses from service, including hardship), 21-222 (lengthy trial fund), 21-236 (employment rights), 21-334 (fine for failure to appear), 21-335 (frequency of service), 21-336 (postponement of service).

232 *See, e.g.*, Reynolds Holding, *Unanimous Jury Rule is Unpopular*, S.F. CHRON., Sept. 12, 1995, at A13 ("Californians overwhelmingly favor allowing juries to convict accused criminals on less than a unanimous vote, reflecting deep frustration with the court system and hung juries in high-profile cases…"); Jury System Improvements in California, http://www.courtinfo.ca.gov/ jury/improvements.htm (last visited Oct. 27, 2006).

233 Jury System Improvements in California, note 232 above.

234 BLUE RIBBON COMM'N ON JURY SYSTEM IMPROVEMENT, FINAL REPORT (1996), http://www.courtinfo.ca.gov/reference/documents/BlueRibbonFullReport.pdf [hereinafter Blue Ribbon Report].

235 Jury System Improvements in California, note 232 above.

236 *See* Harriet Chiang, *Lousy Pay, Tedious Work*, S.F. CHRON., Nov. 14, 1995 at A1. ("The task of filling the jury waiting room has turned into a challenge for judges, lawyers and court administrators. Public reluctance to take part in trials has reached an all-time high, and the justice system is close to a breakdown…").

237 *See* Blue Ribbon Report, note 234 above, at 12, 18-48.

238 Upon the recommendation of the Blue Ribbon Commission, a Task Force on Jury System Improvements was created to provide continuing oversight and analysis of the implementation of the Blue Ribbon Commission's recommendations. *Id.* at 3; *see also* TASK FORCE ON JURY SYSTEM IMPROVEMENTS, JUDICIAL COUNCIL OF CALIFORNIA, FINAL REPORT 2 (2004), http://www.courtinfo.ca.gov/reference/documents/tfjsi_final.pdf [hereinafter California Task Force Final Report].

239 *See* Appendix X.D.

240 California Task Force Final Report, note 238 above, at 3-4, 17, 20-21.

241 *Id.* at 45-46.

242 In civil matters, California law allows six peremptory challenges per party or a total of eight per side. CAL. CIV. PROC. CODE § 231(c).

243 California Task Force Final Report, note 238 above, at 4-5, 47.

244 Blue Ribbon Report, note 234 above, at 59.

245 California Task Force Final Report, note 238 above, at 48.

246 The United States Supreme Court prohibited the use of peremptory challenges to strike jurors on the basis of race in *Batson v. Ky.,* 476 S. 79 (1986). A "*Batson* challenge" is an objection to the use of a peremptory strike because the objecting party believes the strike is motivated by race. *Id.* at 89.

247 California Task Force Final Report, note 238 above, at 49.
248 *Id.*
249 CAL. CIV. PROC. CODE § 231(c).
250 *See* Colleen McMahon & David L. Kornblau, *Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York,* 10 St. John's J. Legal Comment. 263, 263-64 (1995).
251 Honorable Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1495 (1999). The process could be summarized as follows: "Juries are empaneled wherever space can be found, which is seldom in a courtroom, except in smaller counties upstate. Rules for questioning vary from none (in most instances) to those imposed by particular judges in parts functioning as individual assignment parts. Challenges for cause are difficult to resolve, if only because the attorneys have to find a judge to hear them (none being present in the empaneling room). As a result, civil voir dire can take days or even weeks. Each party has three peremptory challenges, plus one for each alternate seat, but this number is effectively increased in many cases by the widespread practice of agreeing to excuse jurors neither side wishes to seat (sometimes referred to as "cause by consent")." McMahon & Kornblau, note 250 above, at 265-66 (footnote omitted).
252 N.Y. COMP. CODES R. & REGS. tit. 22, § 202.33(e); *see also* Julia Vitullo-Martin et al., *Five Years of Jury Reform: What Jurors are Saying: Final Report on Juror Concerns to the Unified Court System* (Vera Institute of Justice (August 2000)), at 3, 14, 22, http://www.vera.org/publication_pdf/juryfinal.pdf (discussing use of Judicial Hearing Officers during voir dire instead of full judicial supervision of impanelment process).
253 N.Y. COMP. CODES R. & REGS. tit. 22, § 202.33(d).
254 *Id.*
255 *Id.* § 202.33(g)(A)(2).
256 N.Y. C.P.L.R. 4109.
257 N.Y. COMP. CODES R. & REGS. tit. 22, § 202.33(g)(A)(3).
258 *Id.*
259 *Id.*
260 Rosalyn Richter, *Jury Reform Has Changed Voir Dire, but More Exploration Is Needed Into the Types of Questions Asked*, 73 N.Y. ST. B.J. 19, 20 (June 2001).
261 *Id.*
262 Jury Task Force Final Report, note 4 above, at 164-67 ("The committee [on jury procedures] recommends adoption of a rule of civil procedure giving the trial judge limited discretion to control the form and scope of the voir dire examination.").
263 *See id.* at 14.
264 AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES & JURY TRIALS, 65, 72-73 (2005) [hereinafter ABA Principles].
265 S*ee* Debora A. Cancado, Note, The Inadequacy of the Massachusetts Voir Dire, 5 Suffolk J. Trial & App. Advoc. 81, 83-84 (2000) (summarizing arguments in favor of judge-conducted voir dire).
266 *See*, *e.g.*, *id.* at 84-85 (describing Massachusetts practice by which the "judge asks general questions prescribed by statute to the entire jury pool collectively in order to identify jurors who have formed opinions about the case or have any bias or prejudice that will prevent them from rendering a verdict based on the evidence presented during the trial"); Lee Smith, Note, *Voir Dire in New Hampshire: A Flawed Process*, 25 VT. L. REV. 575, 577-78 (2001) (describing New Hampshire practice by which the judge asks a series of questions prescribed by statute but has discretion to ask additional questions proposed by counsel).
267 Jury Task Force Final Report, note 4 above, at 164, 167; see also ABA Principles, note 264 above, at 65.
268 *Cortez,* 159 S.W.3d at 92.
269 *Id.*
270 *Id.*
271 *Barajas v. State*, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002); *Boyd v. State*, 811 S.W.2d 105, 115 (Tex. Crim. App. 1991).
272 *Woolridge v. State*, 827 S.W.2d 900, 905-06 (Tex. Crim. App. 1992).
273 *Ratliff v. State*, 690 S.W.2d 597, 600 (Tex. Crim. App. 1985).
274 *McCarter v. State*, 837 S.W.2d 117, 120-22 (Tex. Crim. App. 1992); *see also McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793, 797 (Tex. App.—Texarkana 2001, no pet.).
275 TEX. GOV'T CODE § 62.105(4).
276 *Hyundai,* 189 S.W.3d at 751; *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963).
277 *See* Appendix VII.B.; *see also* Scott A. Brister, *Wanted: Docile, Uninformed Jurors? If We Want a Truly Representative Jury, There Are 10 Practices We Shouldn't Allow in Voir Dire,* Tex. Law., Jan. 27, 1997 ("many lawyers and judges apparently think it's proper to ask…jurors if they are 'leaning' toward or away from either side").
278 Brister, note 277 above.
279 *Id.*
280 *See id.*
281 *See* Pages 12-14.
282 *See Hyundai,* 189 S.W.3d at 758; *Hafi,* 164 S.W.3d at 385; *Cortez,* 159 S.W.3d at 94.
283 *Cortez,* 159 S.W.3d at 93.
284 *Hyundai,* 189 S.W.3d at 753.
285 *See id.* at 756-57.
286 *See id.* at 750-52.

287 *See id.* at 753.
288 *See* Jury Task Force Final Report, note 4 above, at 165-66.
289 *Id.* at 167.
290 *Id.*
291 *Id.* at 167-68.
292 *See* Pages 12-14.
283 *Cortez*, 159 S.W.3d at 92 (trial courts "may place reasonable limits on questioning that is duplicative or a waste of time" and may prohibit confusing or misleading questions).
294 *Id.* at 94.
295 *See Thompson v. State,* 95 S.W.3d 537, 541 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (party may use hypothetical questions in voir dire as long as the questions do not misstate the law).
296 *Cortez*, 159 S.W.3d at 91-92 (a trial court may allow further questioning of a prospective juror who has expressed apparent bias).
297 Enoch & Johnson, note 183 above.
298 *Id.*
299 Tex. R. App. P. 44.1(a).
300 Many litigants waive error by failing to timely and properly object. See, e.g., Malone v. Foster, 977 S.W.2d 562, 564 (Tex. 1998); *Hallett v. Houston Nw. Med. Ctr.,* 689 S.W.2d 888, 889-90 (Tex. 1985); *Born v. Va. City Dance Hall & Saloon,* 857 S.W.2d 951, 954-55 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *White v. Dennison,* 752 S.W.2d 714, 718-19 (Tex. App.—Dallas 1988, writ denied); *Carpenter v. Wyatt Constr. Co.,* 501 S.W.2d 748, 750-51 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Ratcliff v. Bruce*, 423 S.W.2d 614, 616 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e).
301 *See* Malone, 977 S.W.2d at 564; *Buls v. Fuselier,* 55 S.W.3d 204, 210 (Tex. App.—Texarkana 2001, no pet.); *Sosa v. Cardenas,* 20 S.W.3d 8, 11 (Tex. App—San Antonio 2000, no pet.).
302 Enoch & Johnson, note 183 above; *see also Galvan v. Aetna Cas. & Sur. Co.,* 831 S.W.2d 39, 40 (Tex. App.—El Paso 1992, writ denied).
303 Enoch & Johnson, note 183 above.
304 *See* Enoch & Johnson, note 183 above ("The real purpose [of voir dire] is to keep jurors off the panel who will not vote for your client."); Brister, note 277 above; Jury Task Force Final Report, note 4 above, at 55-64.
305 *See* Jury Task Force Final Report, note 4 above, at 191.
306 *See id.* at 186.
307 The United States Supreme Court, in *Batson v. Ky.,* 476 U.S. 79, 96 (1986), held that it is unconstitutional to use peremptory challenges to strike jurors on the basis of race in criminal cases. The Court extended that holding to civil cases in *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 628 (1986), and to gender-based peremptory strikes in J.E.B. v. Ala., 511 U.S. 127 (1994). *See also Powers v. Palacios,* 813 S.W.2d 489, 490-91 (Tex. 1991) (a race-based strike is a violation of the equal protection clause of the United States Constitution). The first step in asserting a claim that a peremptory strike was used in violation of *Batson* is to present a prima facie case of purposeful discrimination against a venire member of a protected class. *Goode v. Shoukfeh,* 943 S.W.2d 441, 444-46 (Tex. 1997). Thus, disclosure of race and gender on the standard questionnaire could facilitate appellate court review of a *Batson* claim if the questionnaires are included in the appellate record. See In re A.D.E., 880 S.W.2d 241, 245 (Tex. App.—Corpus Christi 1994, no writ)(noting that the party making a *Batson* claim failed to put juror information cards into evidence and otherwise failed to ensure that the record reflected the necessary facts, which may be accomplished through sworn testimony, exhibits, stipulations, admissions, or judicial notice), disapproved on other grounds, In re J.F.C., A.B.C., & M.B.C., 96 S.W.3d 256, 267 (Tex. 2002).
308 Tex. Gov't Code § 62.0132(a), (c).
309 *See* Office of Court Administration, Official Uniform Model Jury Summons & Questionnaire, http://www.courts.state.tx.us/oca/PublicInfo/jsummons.asp (last visited November 8, 2006).
310 Tex. Gov't Code § 62.0132(b) (emphasis added).
311 *See* Travis County standard jury questionnaire, available from the Travis County Clerk and on file with the author.
312 *See* ABA Principles, note 264 above, at 69; Jury Task Force Final Report, note 4 above, at 185; Sydney Gibbs Ballesteros, *Don't Mess With Texas Voir Dire,* 39 Hous. L. Rev. 201, 240 (2002); Lin S. Lilley, *Let Jurors Speak the Truth, in Writing,* 41 Trial 64, 64 (July 2005).
313 *See* ABA Principles, note 264 above, at 70; Jury Task Force Final Report, note 4 above, at 184; Ballesteros, note 312 above, at 240; Lilley, note 312 above, at 64.
314 *See* ABA Principles, note 264 above, at 69-70.
315 Lilley, note 312 above, at 64.
316 Jury Task Force Final Report, note 4 above, at 185; Lilley, note 312 above, at 64.
317 Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.-Kent L. Rev. 1179, 1198 (2003); Lilley, note 312 above, at 64.
318 Jury Task Force Final Report, note 4 above, at 187.
319 ABA Principles, note 264 above, at 70; Jury Task Force Final Report, note 4 above, at 185; Lilley, note 312 above, at 64.
320 *See* Ballesteros, note 312 above, at 240; Lilley, note 312 above, at 64.
321 Lilley, note 312 above, at 64.
322 *See id.*
323 ABA Principles, note 264 above, at 70-71.
324 *See* Ballesteros, note 312 above, at 236-37.

325 *See* Jury Task Force Final Report, note 4 above, at 184 (discussing need to file questionnaires and responses to preserve error regarding jury selection).
326 *See* ABA Principles, note 264 above, at 71.
327 *See* TEX. GOV'T CODE § 62.0132(f), (g) (providing that information disclosed on written jury summons questionnaires is confidential and may not be disclosed to anyone other than the judge assigned to the case, court personnel, and litigants and their attorneys in a case in which the respondent is a potential juror).
328 *See* Ballesteros, note 312 above, at 239.
329 Citizens called for jury duty are entitled to keep their views to themselves when not relevant to the case and to remain free of government-sponsored intrusions. *See, e.g., Brandborg v. Lucas,* 891 F.Supp. 352, 361 (E.D. Tex. 1995) (written juror questionnaire asking juror questions about personal matters impinged on her constitutional privacy rights and district court's order of contempt for juror's refusal to respond to the questionnaire violated the juror's First and Fourteenth Amendment Rights); *see also Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.,* 475 U.S. 1, 11 (1986) ("The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas…There is necessarily…a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.") (citations omitted); *Gibson v. Fla. Legislative Investigation Comm.,* 372 U.S. 539, 543 (1963) (rights of association are within ambit of constitutional protections afforded by the First and Fourteenth Amendments).
330 *See, e.g.,* Jury Task Force Final Report, note 4 above, at 184; Ballesteros, note 312 above, at 236-40 (responding to arguments against questionnaires); Brister, note 277 above (opposing questionnaires).
331 Document on file with author.
332 Robert B. Hirschhorn, Voir Dire—Jury Selection: Legal Issues and Practical Aspects, 93-110 (28th Annual Advanced Civil Trial Course, Austin, Texas (Texas Bar CLE, Sept. 2, 2005)) (on file with author).
333 Brandborg, 891 F.Supp. at 355.
334 *Id.* at 353-54.
335 *Id.* at 353.
336 *Id.* at 354-55.
337 *Id.* at 355.
338 *Id.*
339 *See id.* at 353-55.
340 *See id.* at 355.
341 *See id.*
342 *Id.*
343 *See* Ballesteros, note 312 above, at 236-37.
344 TEX. GOV'T CODE § 62.110(a).
345 *Id.* § 62.110(c).
346 *Id.* § 62.110(a).
347 *Id.* § 62.110.
348 *See* TEX. R. CIV. P. 223.
349 Jury Task Force Final Report, note 4 above, at 177.
350 *Id.* at 176.
351 *Id.*
352 *See* Brister, note 277 above.
353 Jury Task Force Final Report, note 4 above, at 18, 176.
354 *See Hyundai*, 189 S.W.3d at 750.
355 *See* Jury Task Force Final Report, note 4 above, at 101.
356 *See* TEX. GOV'T CODE § 62.106(5).
357 TEX. CONST. art. III, § 24(b).
358 *See* Appendix IX.B.
359 *See* Appendix IX.B., n. 140.
360 *See* ABA Principles, note 264 above, at 91.
361 *See* Page 16.
362 *See* Jury Task Force Final Report, note 4 above, at 111.
363 Lynne Forster Lee & Irwin A. Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184, 188 (2003).
364 *See* Ron Bailey, *Note-Taking By Jurors: Should It Be a Universal Practice?*, 46 FED. LAW. 3, 3 (Feb. 1999).
365 Lee & Horowitz, note 363 above, at 188-89.
366 *See* Page 6.
367 *See id.*
368 Jury Task Force Final Report, note 4 above, at 110.
369 *See id.* at 131.
370 Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That is the Question"*, 78 CHI.-KENT L. REV. 1099, 1119 (2003).
371 *Id.* at 1120.

372 *Id.*
373 *See* Page 16.
374 American Judicature Society, Juror Questions to Witnesses, http://www.ajs.org/jc/juries/jc_improvements_juror_questions.asp (last visited Oct. 30, 2006).
375 ABA Principles, note 264 above, at 91.
376 *See* Jury Task Force Final Report, note 4 above, at 122; Kirsten Debarba, Note, *Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial*, 55 VAND. L. REV. 1521, 1532 (2002).
377 *See* Debarba, note 376 above, at 1532.
378 ABA Principles, note 264 above, at 93; Jury Task Force Final Report , note 4 above, at 140-42.
379 *See* Jury Task Force Final Report, note 4 above, at 140-42.
380 *Id.* at 140.
381 *Id.* at 142.
382 The proposed Rule is based, in part, on language used by the ABA and the Texas Jury Task Force. See ABA Principles, note 264 above, at 65-66; Jury Task Force Final Report, note 4 above, at 167-68.
383 *See* ABA Principle 11(A), note 264 above, at 65 (modified to reflect uniform jury summons questionnaire requirement in TEX. GOV'T CODE § 62.0132).
384 *See id.*
385 *See* Jury Task Force Final Report, note 4 above, at 186.
386 ABA Principle 11(B)(5), note 264 above, at 66 (tied to more specific limitations on scope derived from Texas Supreme Court holdings in *Hyundai,* 189 S.W.3d at 743, *Hafi,* 164 S.W.3d at 383, and *Cortez,* 159 S.W.3d at 87).
387 *See* Jury Task Force Final Report, note 4 above, at 167; see also ABA Principle 11(B)(1), note 264 above, at 65-66.
388 ABA Principle 11(B)(1), note 264 above, at 65.
389 *See* Jury Task Force Final Report, note 4 above, at 167; see also ABA Principle 11(B)(2), note 264 above, at 65.
390 *See* ABA Principle 11(B)(5), note 264 above, at 66, (tied to more specific limitations on scope derived from Texas Supreme Court holdings in *Hyundai,* 189 S.W.3d at 743, *Hafi,* 164 S.W.3d at 383, and *Cortez,* 159 S.W.3d at 87).
391 *See Hyundai,* 189 S.W.3d at 743; *Hafi,* 164 S.W.3d at 383; *Cortez,* 159 S.W.3d at 87 (in lieu of more general provisions in ABA Principle 11(B)(3), note 264 above, at 66, and Jury Task Force Final Report, note 4 above, at 167).
392 *See* Jury Task Force Final Report, note 4 above, at 167 (to encourage trial courts to limit inquiries falling within permissible scope of inquiry).
393 *See id.* at 168 (revised to reflect Texas Supreme Court's holding in *Cortez,* 159 S.W.3d at 91-92).

APPENDIX

The Texas Jury System

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Seating a jury in a particular case and obtaining its verdict is the culmination of many steps taken by a number of state and county employees, judges, and attorneys. This appendix describes each of those steps to provide background and context for the recommendations made in this paper.

I. JUROR QUALIFICATIONS

Generally, in order to be qualified to serve as a juror in Texas, a person must be: (1) at least eighteen years of age; (2) a citizen of this state and of the county in which the person is to serve as a juror; (3) qualified to vote in the county in which he or she is to serve as a juror; (4) of sound mind and good moral character; (5) able to read and write; (6) not have been convicted of misdemeanor theft or a felony; (7) not under indictment or otherwise legally accused of misdemeanor theft or a felony; and (8) not have served as a juror for six or more days during the preceding three months in county court or during the preceding six months in district court.[1] A court may suspend the requirement that a juror be able to read and write if it appears to the court that the requisite number of jurors able to read and write cannot be found in the county.[2] Similarly, a court may suspend the requirement that a person not have recently served as a juror if it appears to the court that the county's sparse population makes the enforcement of the requirement seriously inconvenient.[3]

Even though a person may be generally qualified for jury service, he or she is disqualified to serve as a juror in a particular case if the person: (1) is a witness in the case; (2) is interested, directly or indirectly, in the subject matter of the case; (3) is related within the third degree to a party in the case; (4) has a bias or prejudice in favor of or against a party in the case; or (5) has served as a juror in a former trial of the same case or in another case involving the same questions of fact.[4] Additionally, a blind, deaf, or hard of hearing person may be disqualified to serve as a juror on the basis of his or her disability if, in the opinion of the court, the disability renders him or her unfit to serve as a juror in that particular case.[5]

II. COMPILING THE LIST OF POTENTIAL JURORS

The jury selection process begins by compiling a list of all potential jurors in a particular county.[6] Unless a county contracts with a different governmental entity or a private company to compile this list, the Texas Secretary of State is charged with compiling the list for each Texas county and must do so once every year.[7] The Secretary of State performs this service free of charge.[8]

To compile the list for each county, the Secretary of State receives voter registration records from the registrar in each county and a list of names from the Texas Department of Public Safety.[9] The Department of Public Safety includes on its list only those persons who have a valid driver's license or identification card and who: (1) are at least eighteen years of age; (2) are citizens of Texas and of the county in which they are to serve; and (3) have not been convicted of misdemeanor theft or a felony.[10] The Department of Public Safety excludes duplicate names from the list before it furnishes the list to the Secretary of State.[11]

The Department of Public Safety cannot ensure, however, that its list is an accurate list of qualified jurors. An individual may move and fail to change the address listed on his or her driver's license or state identification card. Additionally, the Department of Public Safety cannot determine if an individual satisfies all of the qualifications for serving as a juror by looking at its records. For example, it cannot determine if a person is able to read and write or whether the person has served as a juror for six or more days in the last six months.

Using the list received from the Secretary of State, each county updates its list of potential jurors. In counties with a population of 250,000 or more, the names of persons who are summoned for jury service and who appear for service must be removed from the list of potential jurors until the earlier of the third anniversary of the date the person appeared for service or the next date on which the list is reconstituted.[12] Counties also remove names of persons who have a permanent exemption from jury service, such as individuals over seventy years of age who have elected to be permanently exempt.[13]

III. SELECTING NAMES FOR JURY SERVICE

Once the county or district clerk for a county has completed the process of updating its list of potential jurors, the clerk can begin generating lists of prospective jurors to be summoned for jury service.[14] Unless the county has adopted a different method for generating lists of prospective jurors,[15] Texas statutes require that each potential juror's name be written on a card and placed into a device called a jury wheel.[16] After all potential jurors' names are placed in the jury wheel, the wheel is turned to mix the cards.[17] A court official then draws cards from the jury wheel and the names of the prospective jurors drawn from the jury wheel are recorded on a summons list.[18] The summons list is placed in an envelope and sealed.[19] The statute contemplates that a summons list will be drawn on a court-by-court basis for each week the court is scheduled to have a jury trial during the court's term.[20] For district courts, twenty-four prospective jurors' names are to be put on each list.[21] For county and justice courts, twelve prospective jurors' names are to be put on each list.[22] The summons list remains sealed and in the clerk's possession until opened prior to trial for the purpose of summoning jurors for service during the week and in the court specified.[23] If the number of prospective jurors is insufficient, additional names may be drawn from the jury wheel and summoned for service.[24]

Texas law also allows a county, on the recommendation of a majority of the district and criminal district judges in the county, to adopt a plan for the selection of persons for jury service with the aid of electronic or mechanical equipment instead of a jury wheel.[25] The list of potential jurors may be generated for each court as needed for trials, or, in counties with two or more district or criminal district courts, or with one district court and a county court at law with concurrent jurisdiction, one master list may be used for all courts in the county.[26] Counties that create a single list of potential jurors for all courts in the county are said to have "interchangeable juries."[27] The use of interchangeable juries is common in large Texas counties.[28]

IV. ISSUING THE SUMMONS AND PROVIDING THE BASIC JUROR QUESTIONNAIRE

The clerk provides the summons list to the sheriff or constable, who issues the summonses.[29] The sheriff or constable may serve the summonses on prospective jurors by an oral summons, or, if the judge ordering the summons so directs, by certified or first-class mail.[30] The summons – typically a double-sided postcard or printed form – commands the person to appear for jury service.[31] The summons provides the time and place for appearance, the purpose for which the person is to appear, and the penalty for failure to appear.[32] It also provides the general qualifications for jury service, the permitted exemptions from jury service, and information on the duties of an employer whose employees are summoned for jury service.[33]

Along with the summons, prospective jurors receive a questionnaire.[34] The questionnaire requires the potential juror to provide biographical and demographic information that the Legislature has deemed to be "relevant to service as a jury member," including the person's: (1) name, sex, race, and age; (2) residence and mailing addresses; (3) education level, occupation, and place of employment; (4) marital status and, if applicable, the name, occupation, and place of employment of the person's spouse; and (5) citizenship status and county of residence.[35]

Once a person receives a summons and a questionnaire, the potential juror must respond or be subject to penalties.[36] The individual must appear in person as commanded in the summons unless the county has adopted a plan allowing prospective jurors to "appear" by computer or automated telephone system.[37]

In most counties, the prospective juror submits the questionnaire when he or she reports for jury duty.[38] Counties may, however, allow the juror to submit the questionnaire electronically.[39] The information contained in the completed questionnaire may be disclosed only to court personnel and to the judge, the litigants, and the litigants' attorneys in the case in which the juror may serve.[40] Otherwise, the information is kept confidential.[41]

At least three Texas counties have implemented the I-Jury System to allow prospective jurors to respond to jury summons and questionnaires electronically.[42] The I-Jury System in Travis County begins with "an online questionnaire that indicates whether people are qualified to serve on a jury or not,"[43] i.e., whether the person is over the age of eighteen, a Texas resident, and has no felony convictions.[44] It then inquires into a prospective juror's desire to take an allowed exemption based upon age, status as a student or parent of young children, or other exemptions.[45] Lastly, it allows jurors to provide other excuses such as doctor's appointments or out-of-town trips.[46] After submitting this information, a prospective juror will receive an acknowledgement informing the prospective juror if he or she should expect a court assignment via email in the next few days.[47]

V. RESPONDING TO A JURY SUMMONS

A. Failure to Respond. Once a person receives a summons, the person must respond or be subject to penalties.[48] As a penalty for failing to respond, a person may be fined not less than $10 nor more than $100.[49] In addition, a person may be found in civil contempt of court and fined not less than $100 nor more than $1000.[50] The person also is subject to a criminal penalty for criminal contempt not to exceed a fine of $100.[51] Despite these penalties, many individuals do not respond to a jury summons. For example, in 2004, "about 30 percent, or about 56,000, of the 189,182 people summoned to jury duty [in Bexar County] appeared at the courthouse."[52] Of those who did not appear, "[a]bout 53,000 people contacted the county to explain why they couldn't make it," and about 40,000 summonses were returned because of wrong addresses.[53] "Research shows that a significant number of those who do not respond to a jury summons fail to do so because they have little fear of receiving a penalty, or believe that the penalty will be a mere 'slap on the wrist.'"[54]

Unfortunately, prospective jurors are justified in their conclusion that nothing is likely to happen to them for failure to obey a jury summons. A person who is subject to contempt for failing to obey a jury summons is constitutionally entitled to procedural due process.[55] Procedural due process requires that, prior to imposing a penalty, the court hold a "show cause" hearing at which the person may appear and explain why he or she should not be held in contempt,[56] and an order to appear at the show cause hearing must be personally served on the delinquent juror.[57] In other words, before a person may be held in contempt for failure to comply with a summons, a show cause order must be drafted by the judge or a prosecutor, signed by the judge, and personally served by a sheriff or constable. Then a hearing must be held. Consequently, contempt proceedings for failure to respond to a jury summons are rare.[58]

B. Exemptions from Service. The following individuals may request an exemption from jury service: (1) those who are seventy years of age or older; (2) those who have legal custody of a child younger than ten years of age and can establish that service on the jury would require leaving the child without adequate supervision; (3) students of public or private secondary schools; (4) persons enrolled and in actual attendance at institutions of higher education; (5) officers or employees of the senate, the house of representatives, or any department, commission, board, office, or other agency in the legislative branch of state government; (6) those who are the primary caretakers of people unable to care for themselves; (7) members of the United States military forces serving on active duty and deployed away from home; or (8) in larger counties, individuals summoned too soon after prior jury service.[59] The exemption may be permanent for anyone over seventy years of age, or for anyone who establishes a mental or physical impairment or an inability to comprehend or communicate in English such that it is very difficult or impossible for the person to serve on a jury.[60]

To claim an exemption, a person may file either a signed statement listing the grounds for exemption with the clerk or a sworn statement listing the grounds for exemption with the sheriff, tax assessor-collector, or district or county clerk of the county of his or her residence.[61] The Office of Court Administration's model summons allows a prospective juror to claim an exemption by checking a box on the summons itself, signing the form under penalty of perjury, and returning it to the clerk.[62]

C. Postponements & Excuses. A person who has been summoned for jury service may request a postponement of the person's initial appearance.[63] To request a postponement, the person must contact the clerk's office in person, in writing, or by telephone and make the request before the date on which the person has been summoned to appear.[64] The clerk of the county is required to grant the postponement request if the person has not asked for a postponement of service within the preceding one-year period and the person is given a substitute date not more than six months later than the date he or she was originally summoned to appear.[65] A potential juror may request a subsequent postponement in the same manner, but it is granted only in the event of an extreme emergency that could not have been anticipated, such as a death in the person's family, sudden serious illness, or a natural disaster or national emergency in which the person is personally involved.[66]

In addition, a potential juror may be released from jury duty or postpone his or her service if he or she would be required to appear at court on a religious holy day observed by the prospective juror.[67] To make such a request, the potential juror may be required to present a sworn statement to the court stating the grounds for the requested postponement or release and attesting to the fact that the prospective juror holds religious beliefs that prohibit him or her from taking part in a court proceeding on the day for which the release is sought.[68]

In addition to postponement and release for religious holidays, the court also may hear any other reasonable sworn excuse of a prospective juror—a "judicial excuse"—and release him or her from jury service entirely or until another day.[69] However, the court cannot release a person on economic grounds unless the attorneys for each party approve the exemption.[70]

VI. SELECTING THE JURY PANEL FOR A PARTICULAR CASE

A. Creating a Panel. Texas statutes direct a judge or court employee to assign a sufficient number of potential jurors to serve on the jury panel.[71] A "sufficient number" depends on the court and case. In district court, a jury is composed of twelve persons,[72] and up to four alternate jurors may be impaneled.[73] In county and justice courts, a jury is composed of six persons,[74] and up to two alternates may be impaneled.[75] Each party may strike up to six jurors in district court and up to three jurors in the lower courts.[76] Consequently, in a two-party case in which no alternate jurors will be selected, at least twenty-four prospective jurors who are not statutorily disqualified to serve in the case must be assigned to a district court, and at least twelve such jurors must be assigned to a county court. Additional prospective jurors are necessary in multi-party cases to allow for the selection of alternates and to account for statutory disqualifications.

If there are insufficient prospective jurors available for the panel, additional prospective jurors may be summoned to provide the requisite number for the panel.[77] The judge may order all or part of a panel to stand adjourned from jury service until a subsequent date when the additional jurors appear, but a juror cannot be paid for the time he stands adjourned.[78]

B. Challenging the Array. A party can challenge the pool of prospective jurors, known as challenging the array, if the summoned jurors have not been selected by the appointed jury commissioners, have not been properly selected by drawing names from the jury wheel, or if the party believes that the officer summoning the jury has acted corruptly and has willfully summoned jurors known to be prejudiced against the party or biased in favor of the adverse party.[79]

To challenge the array, the party must make the challenge in writing and attach a sworn statement of the party or the person who believes that there are grounds for challenging the array.[80] The challenge must be made before the jury is drawn from the general pool.[81] In counties with interchangeable juries, the challenge must be presented to the judge who will impanel the jurors for all courts for the week.[82] When a challenge to the array is made, the court will hold a hearing on the matter, and, if the court finds that misconduct occurred, the officer responsible for summoning the jurors must be discharged.[83] In addition, the array of jurors is relieved of service and a new pool of jurors is summoned.[84]

C. Shuffling the Jury. In counties with interchangeable juries, prior to voir dire,[85] and upon a party's demand, the court must "shuffle" the jury. This requires the names of the jury panel to be placed in a receptacle, shuffled, drawn, and transcribed in the order drawn.[86] Only one shuffle of the jury panel is allowed in a case.[87] This unique practice has been criticized as potentially discriminatory because little information is known about the jurors at the time of the shuffle.[88] Generally, before requesting a shuffle, litigants have only the information provided by juror questionnaires and other plainly observable attributes such as race, gender, and appearance.[89]

VII. CONDUCTING VOIR DIRE

A. Purpose of Voir Dire. Once the panel of prospective jurors or venire has been assembled in the courtroom, the court administers an oath to the venire.[90] After administering the oath, the procedure for selecting a jury from the venire is largely one of custom rather than one dictated by statute or rule.[91] Typically, the trial judge will welcome the jury, and either the court or the attorneys will give a brief description of the case. Then the trial judge will give each party the opportunity to "voir dire" or question the venire members.

The Texas Supreme Court has said that the appropriate purpose of voir dire is to protect the parties' constitutional right to a fair trial[92] through the exposure of improper juror biases that form the basis for statutory disqualification.[93] In a more specific sense, the purpose of voir dire is twofold: to gather information about the venire members so the judge can determine if any venire member must be dismissed "for cause" and to allow the parties to intelligently exercise their "peremptory challenges."[94]

B. Challenges for Cause. Texas law provides that a person is disqualified to serve as a juror in a particular case if the person: (1) is a witness in the case; (2) is interested, directly or indirectly, in the subject matter of the case; (3) is related by consanguinity or affinity within the third degree to a party in the case; (4) has a bias or prejudice in favor of or against a party in the case; or (5) has served as a juror in a former trial of the same case or in another case involving the same questions of fact.[95] A "challenge for cause" is an objection made to a potential juror alleging that one of these grounds disqualifies the person to serve as a juror in the case or renders the person unfit to sit on the jury.[96] Whether a potential juror is disqualified on grounds (1), (2), (3), and (5) can be determined by fairly objective criteria. However, whether a prospective juror should be disqualified under ground (4) for having a bias or prejudice in favor of or against a party in the case is inherently more difficult to determine by objective criteria—and has proven to be a potent advocacy tool by lawyers seeking to disqualify jurors seen as likely unfavorable votes.

C. Peremptory Challenges. A peremptory challenge, often referred to as a "strike," is a challenge made to a juror without assigning any reason therefor.[97] Peremptory challenges allow parties to strike jurors perceived to be unsympathetic to their positions.[98] However, peremptory challenges are not intended to allow a party to select a favorable jury[99] or to exclude jurors based on race or gender.[100]

Each party to a civil action in district court has six peremptory challenges, and each party to a civil action in a county or justice court has three peremptory challenges.[101] Each side is entitled to one additional peremptory challenge if one or two alternate jurors are to be impaneled and two additional peremptory challenges if three or four alternate jurors are to be impaneled.[102] For multi-party litigation, the trial court "shall" equalize the number of peremptory challenges "so that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side."[103]

D. Questioning the Venire Members. The Texas Rules of Civil Procedure do not contain any specific rules on the procedures to be used in voir dire or the scope of voir dire questioning.[104] Instead, the procedures and scope of voir dire are left to the discretion of the trial courts, subject to general guidelines established by case law.[105] In the absence of specific guidance, Texas allows the parties' attorneys to conduct voir dire in civil cases[106] and has allowed them "broad latitude" to do so.[107] Most Texas trial judges play a relatively passive role in voir dire in civil cases.

Attorneys use voir dire, in part, to discover whether a prospective juror "has a bias or prejudice in favor of or against a party in the case."[108] If an attorney elicits information indicating that the prospective juror is biased or prejudiced, the attorney will ask to have that juror dismissed "for cause."[109] At least two consequences flow from this method of selecting a jury. First, the meaning of the statutory phrase "has a bias or prejudice in favor of or against a party in the case" is important. Obviously, if the phrase is interpreted broadly, more prospective jurors will be subject to dismissal for cause. Conversely, if the phrase is interpreted narrowly, fewer prospective jurors will be subject to dismissal for cause. Second, this selection method encourages attorneys to attempt to persuade the trial judge to dismiss prospective jurors for cause. If an attorney can persuade the judge to dismiss a perceived unfavorable juror for cause, that attorney need not use one of his or her six peremptory

challenges on that juror, allowing the attorney to use the challenges on remaining venire members. Capable advocates can make effective use of this process to serve their client's interest by shaping the jury in their favor.

As to the first of these consequences, the Texas Supreme Court historically has interpreted the statutory phrase more broadly than the plain language suggests. In *Compton v. Henrie,* the Court noted that the usual meaning of "bias" "is an inclination toward one side of an issue rather than to the other," but that disqualifying bias requires that "the state of mind of the juror leads to the natural inference that he will not…act with impartiality."[110] "Prejudice," according to the Court, "is more easily defined for it means prejudgment, and consequently embraces bias."[111] Additionally, the Court held that "the statutory disqualification of bias or prejudice extends not only to the litigant personally, but to the subject matter of the litigation as well,"[112] a holding recently referenced as a form of party prejudice by the Court in *Hyundai Motor Co. v. Vasquez.*[113]

Compton introduced three concepts in determining whether a prospective juror is biased or prejudiced – "inclination", "state of mind", and "prejudgment".[114] Subsequent opinions equated "prejudice" and "prejudgment" as *Compton* did[115] and, at least in some courts, "inclination toward one side of an issue" seemed to become the starting point for determining "bias."[116] Several courts of appeals interpreting *Compton* also focused on the juror's "feelings" (i.e., state of mind), concluding that "the key response that supports a successful challenge for cause is that the veniremember cannot be fair and impartial because the veniremember's feelings are so strong in favor of or against a party or against the subject matter of the litigation that the veniremember's verdict will be based on those feelings and not on the evidence."[117]

Determining whether a prospective juror has prejudged a case, or is inclined toward or has a state of mind favoring one side or the other, arguably requires that the prospective juror know the facts of the case. Consequently, Texas civil trial attorneys have become accustomed to giving a factual recitation during voir dire, which they use both to persuade the jury and to set up case-specific questioning, and to asking fact-based questions about jurors' "leanings," state of mind, and prejudgments.[118] For example, in *Goode v. Shoukfeh,* the lawyers' recitation of the facts caused one prospective juror to state that he was "leaning" toward the defendant.[119] The plaintiff's lawyer then questioned the prospective juror in an apparent attempt to make clear that the prospective juror was biased.[120] Ultimately, the prospective juror agreed to a "small bias."[121] The defendant's attorney then attempted to "rehabilitate" the juror by asking questions to encourage the witness to state that he would decide the case on the facts and law.[122] At the conclusion of voir dire, the plaintiff's lawyer moved to disqualify the prospective juror on the grounds that he was biased.[123] The trial court refused and that decision was affirmed on appeal.[124]

As discussed at Pages 12-14 of the paper, the Texas Supreme Court in three recent opinions has clarified the permissible scope of questioning in voir dire and the consequences of a juror's answer to case-specific questioning.[125] The Court, however, has not yet sought to reexamine the appropriateness of its prior broad interpretation of the statutory phrase "bias or prejudice in favor of or against a party in the case." The Court's opinions establish that a trial court may (but need not) allow case-specific questions – including questions about the weight jurors would give particular facts – so long as the questions do not seek to gauge the

jurors' likely verdict.[126] Trial courts also may place reasonable limits on questioning that is duplicative or a waste of time, and may prohibit confusing or misleading questions.[127]

E. Striking Jurors. Typically, the parties will be provided an ordered list of the venire members before voir dire begins.[128] At the conclusion of voir dire questioning, the parties challenge specific jurors for cause and obtain the trial court's rulings on those challenges.[129] The parties strike from their lists the names of venire members who will be dismissed for cause.[130] Then the parties use their peremptory strikes to remove other venire members from the jury.[131] After all parties have marked their strikes, they give their lists to the trial court.[132] The trial court combines all parties' lists into a master list reflecting the for-cause strikes and all peremptory strikes by all parties.[133] The court then reads the first six (in county and justice court) or twelve (in district court) names that remain on the master list.[134] Those six or twelve venire members are impaneled as the jury.[135] The jurors then select a jury foreman, also known as the "presiding juror."[136]

VIII. SUMMARY

Figure 1 summarizes the narrowing of the jury pool from the general population of a county to a particular jury assigned to hear a specific case.

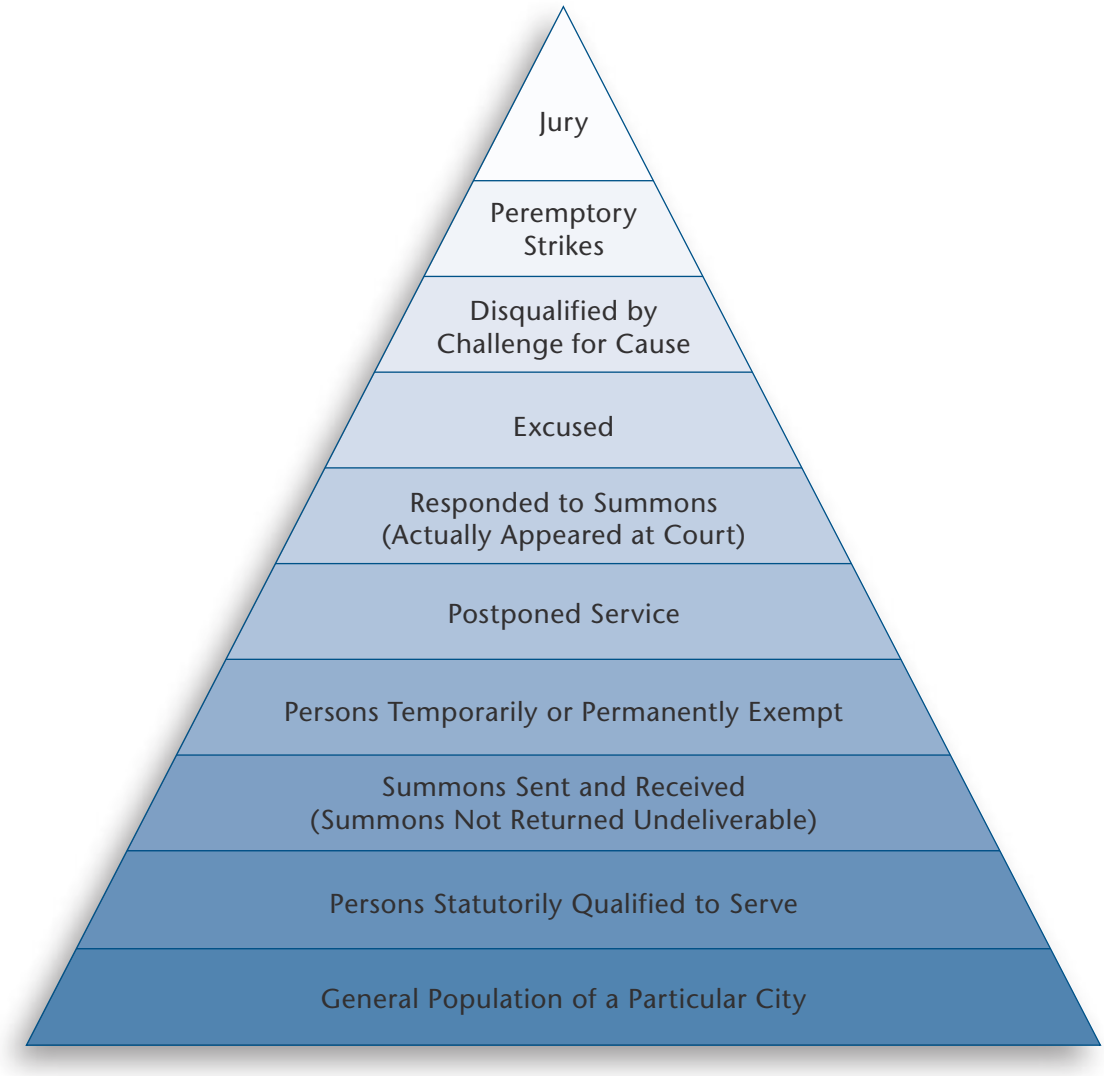

Figure 1: Summary of Narrowing the Jury Pool

IX. INSTRUCTING THE JURY AND RECEIVING ITS VERDICT

A. Preliminary Jury Instructions. Before trial begins, the court must instruct the jury about their duties as jurors.[137] The Texas Supreme Court has promulgated instructions that all courts must read to jurors in civil cases, which include the following rules:

1. Not to communicate with the attorneys, parties, or witnesses in the case.
2. Not to accept favors from or give favors to any of the above, such as rides, food, or refreshments.
3. Not to discuss the case with anyone, including the jurors' wives or husbands, until discharged from service.
4. Not to discuss the case among themselves until the jury is sent to deliberations at the conclusion of the case.
5. Not to make any independent investigation of the evidence.
6. Not to share personal experiences with other jurors. (A juror may have special knowledge of matters such as business, technical, or professional matters, have expert knowledge or opinions, or know what happened in this or some other lawsuit, but the juror is prohibited from sharing this information with the other jurors.)
7. Not to discuss or consider attorney's fees unless evidence about fees is admitted.
8. Not to speculate, consider, or discuss whether a party is protected by insurance.
9. Not to seek or review information in law books, dictionaries, public or private records, or elsewhere.[138]

B. Jury Participation During Trial. During trial, Texas jurors play a passive role. They may not discuss the case with each other,[139] they typically do not take notes,[140] and they typically do not ask questions during the trial (although there is no explicit prohibition in Texas law against juror note-taking or questioning in civil trials).[141] They simply observe the presentation of evidence and hear the arguments of the attorneys.

C. Jury Charge & Deliberations. After the evidence has been presented, the trial court prepares the jury charge containing written instructions and questions regarding the case.[142] Either party may request the inclusion of particular questions, definitions, or instructions in the jury charge.[143] Before the attorneys make their closing arguments, the judge reads the jury charge aloud to the jury in the precise words in which it was written, including all questions, definitions, and instructions.[144]

Once the attorneys have completed their closing arguments, the jury begins its deliberations. The jury may deliberate in open court or retire to the jury room.[145] A peace officer is assigned to protect and monitor the jury during its deliberations.[146] The officer may not interact with the jurors except to ask whether they have reached a verdict.[147] In addition, the officer is to prevent any outside parties from communicating with the jurors.[148]

The jury may request that a written copy of the jury charge be available to them in the jury room.[149] In addition, it may take any written evidence, except the depositions of witnesses, into its deliberations.[150] If there is a disagreement as to a witness' testimony, the court may ask that the testimony be read to the jury from the court reporter's notes.[151] If there is no court reporter or if there is some other reason the notes cannot be read to the jury, the judge may call the witness back to the stand, despite the fact that the trial is over, and instruct the witness to repeat his or her trial testimony.[152]

During deliberations, the jury may communicate with the judge either by giving a message to the officer assigned to the jury, who in turn will communicate it to the judge, or the entire jury may return to the courtroom and the presiding juror may communicate directly with the judge.[153] The jury may receive additional instructions regarding the law, either at the jury's request or if the judge decides additional instructions are necessary.[154] The additional instructions must be in writing.[155] If additional instructions are given, the court may allow the lawyers to make additional closing arguments.[156]

The jurors are supposed to be kept together until they reach a decision.[157] However, the court may permit the jurors to separate for the night, at their meals, and for other purposes the court deems proper.[158] If the jurors are allowed to separate during deliberations, the judge is to admonish the jurors that it is their duty not to converse with or permit themselves to be addressed by others regarding the trial.[159]

D. Rendering a Verdict & "Hung Juries". The jury's purpose is to render a verdict. A verdict is a written declaration of the jury's decision that is signed by the presiding juror.[160] Generally, a verdict in a civil case may be rendered when ten or more members of the original twelve-person jury agree or when five or more members of the original six-person jury agree.[161] The need for unanimity for civil cases arises only in connection with exemplary damages.[162] A verdict may be rendered awarding exemplary damages only if the jury was unanimous in finding liability for and the amount of exemplary damages.[163] If the verdict in a civil case is not unanimous, each individual juror who agrees with the verdict must sign it.[164]

As many as three jurors may die or become disabled while sitting on a twelve-person jury, and a verdict may be rendered so long as the nine remaining jurors are unanimous in the verdict.[165] The trial court makes the determination whether a particular juror is disabled from sitting on the jury.[166] Being disabled from sitting requires more than just an inconvenience or delay.[167] A constitutional disability must be in the nature of an actual physical or mental incapacity.[168] If there are alternate jurors, they may, in the order in which they are called, replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.[169] However, if the jurors become disabled during deliberations, the alternate jurors may not replace them.[170]

While deliberations are ongoing, the jurors should not reveal the state of deliberations to anyone.[171] However, the judge may have the attending officer inquire as to whether the jurors have agreed on a verdict.[172] The jurors also may be brought into the courtroom and the judge may inquire generally as to the jury's progress.[173]

Sometimes a jury has difficulty reaching the consensus necessary to render a verdict. In these circumstances, the jury may not be coerced to reach a verdict, but the trial judge may urge the jurors to come to an agreement.[174] The court may wish to avoid a "hung jury" by urging the jurors to reach a verdict through what is known as a "dynamite" or *"Allen"* charge.[175] An *"Allen"* charge is an instruction given by the court "to encourage a deadlocked jury, after prolonged deliberations, to reach a verdict."[176] There are no specific rules dictating what should be included in an "Allen" charge and generally the court has discretion so long as it does not coerce the jurors.[177] The judge may direct the jurors to continue deliberating, despite the fact that the jurors have reported themselves deadlocked, and may point to specific sections of the jury charge for the jurors to consider further.[178] However, the court may not suggest that the jurors compromise to reach a verdict or threaten the jurors with long confinement or other inconvenience unless they reach a verdict.[179]

Once the requisite number of jurors reaches a verdict, the jury returns to the courtroom and the verdict is read aloud by the clerk of the court.[180] At that time, a party may request that the jurors be polled.[181] "Polling the jury" occurs when the judge or another employee of the court reads the verdict to the jury, after which the name of each individual juror is called out and the juror is asked if he or she agreed to the verdict.[182] If any juror answers negatively when the verdict was presented as a unanimous verdict, or if the verdict was not unanimous but one of the jurors who signed the verdict answers negatively, then the jury must deliberate further until a proper verdict is reached.[183]

A "hung jury" occurs when the requisite number of jurors cannot reach a verdict.[184] In that event, a mistrial is declared, the jury is dismissed, and the jurors are released from service.[185]

E. Contact with Jurors After the Trial. The Texas Disciplinary Rules of Professional Conduct permit attorneys to contact jurors after the trial as long as an attorney does not ask questions or make comments calculated to harass or embarrass the jurors or to influence their actions in future jury service.[186]

X. JUROR EMPLOYMENT AND REIMBURSEMENT, JURY FINANCING, AND OTHER MATTERS

A. Jurors & Their Employers. Texas law does not require employers to compensate their employees for time spent in jury service, but an employer may not fire a permanent employee because the employee serves as a juror.[187] An employee who is fired for attending jury service is entitled to "return to the same employment that the employee held when summoned for jury service if the employee, as soon as practical after release from jury service, gives the employer actual notice that the employee intends to return."[188]

A wrongfully terminated juror may receive damages in an amount not less than one year's compensation or more than five years' compensation at the rate at which the person was compensated when summoned for jury service.[189] The injured person also is entitled to recover reasonable attorneys' fees in an amount approved by the court.[190]

Additionally, it is a Class B misdemeanor to terminate a permanent employee because he or she served as a juror.[191] And a court may hold an employer in contempt for terminating, threatening to terminate, penalizing, or threatening to penalize an employee because the employee performs jury duty.[192]

In either a civil or criminal action for the alleged termination or penalization of a person for attending jury service, the employer may claim as a defense that circumstances changed while the employee served as a juror so that reemployment was impossible or unreasonable.[193] To establish this defense, the employer must prove that the termination was due to circumstances other than the employee's jury service.[194]

B. Juror Reimbursement. Currently, jurors in a civil or criminal district court, county court, county court at law, or justice court are entitled to receive as reimbursement for travel and other expenses an amount not less than $6 for the first day or fraction of the first day served as a juror and not less than $40 for each day or fraction of each day served as a juror after the first day.[195] A person who responds to a summons and appears, but is excused from jury service after the person's voir dire examination, is entitled to receive as reimbursement for travel and other expenses an amount not less than $6 or more than $50 for each day or fraction of each day in attendance in court in response to the summons.[196] The commissioners court of a county can reduce or eliminate the daily reimbursement for persons who attend court for only one day, or fraction of a day, if the funds saved are used to increase the daily reimbursement for jurors who attend court for more than one day.[197]

Within these guidelines, a commissioners court can set different daily reimbursement for jurors based on the court in which the juror serves or any other reasonable criteria.[198] Additionally, in a specific case, the presiding judge, with the parties' agreement, may increase the daily reimbursement for jurors in that case to an amount not to exceed the maximum amount prescribed by statute.[199] In that circumstance, the parties share the cost of the additional reimbursement equally.[200]

Potential jurors receive compensation as reimbursement for travel and other expenses associated with jury service, not as payment for their time or services.[201] Counties are not required to provide transportation or parking for prospective jurors,[202] and a transportation problem does not automatically exempt or excuse a person from jury service.[203]
Texas jurors may elect to donate all of their reimbursement for jury service to charity.[204] The charities selected by the Texas Legislature include: (1) the fund for compensation to victims of crime; (2) the child welfare board of the county; (3) any program selected by the commissioners court that is operated by a public or private nonprofit organization and that provides shelter and services to victims of family violence; and (4) any other program approved by the commissioners court of the county.[205]

C. Financing the Jury System. For the most part, the costs of running the jury system are borne by the counties that fund the judicial system.[206] There are exceptions, however. For example, while jury compensation is paid from the county's jury fund,[207] the state reimburses each county $34 per day for the reimbursement paid to jurors for service after the first day.[208] In addition, the Secretary of State compiles jury lists free of charge.[209] Also, parties in a civil case must pay a jury fee,[210] which is applied to the county treasury for use by the county.[211]

D. One Day/One Trial. The One Day/One Trial system, which is promoted by the National Center for State Courts (the "NCSC"), is a method of jury service where each individual's service is limited to the completion of either one day or one trial.[212] If that person is not selected for a jury during their first day of service, he or she fulfills the jury service requirement simply by having been available that entire day.[213]

The One Day/One Trial system began in 1972 in Harris County,[214] and has since been implemented in Dallas County.[215] The advantages of the One Day/One Trial system include a reduced hardship associated with jury service,[216] which may lead to a reduced need for exemptions or excuses from jury service and an increase in the representative and inclusive nature of the jury pool. The system encourages courts to make more efficient use of juror time since they only have one day to use the prospective juror's services. The disadvantages of the One Day/One Trial system include the need to summon greater numbers of prospective jurors, increased administrative costs for postage and forms, and more frequent juror orientations by the courts.[217]

ENDNOTES TO APPENDIX

1 Tex. Gov't Code § 62.102.
2 *Id.* § 62.103(a).
3 *Id.* § 62.103(b).
4 *Id.* § 62.105.
5 *Id.* §§ 62.104, 62.1041.
6 *See id.* § 62.001.
7 *Id.* § 62.001(c), (i).
8 *Id.* § 62.001(g).
9 *Id.* § 62.001(a), (g).
10 *Id.* § 62.001(a)(2).
11 *Id.* § 62.001(f).
12 *Id.* § 62.001(j).
13 *Id.* §§ 62.108, 62.109.
14 *See id.* §§ 62.004-.008.
15 *See id.* § 62.011.
16 *See id.* §§ 62.002, 62.004.
17 *See id.* § 62.004.
18 *Id.* §§ 62.004, 62.006.
19 *Id.* §§ 62.006, 62.008.
20 *See id.* §§ 62.004, 62.012.
21 Tex. R. Civ. P. 224.
22 *Id.*
23 Tex. Gov't Code § 62.012.
24 *Id.* § 62.015(b).
25 *Id.* § 62.011(a).
26 *See id.* §§ 62.012, 62.016, 62.017, 62.0175.
27 *Id.* §§ 62.016, 62.017, 62.0175.
28 *See id.* § 62.016.
29 *Id.* § 62.013(a). A prospective juror cannot be summoned to appear for jury service on the date of a general election. *Id.* § 62.0125.
30 Id. § 62.013(b).
31 *Id.* § 62.013(a).
32 *Id.* § 62.013(d).
33 *Id.* § 62.0131; *see also* Office of Court Administration: Official Uniform Model Jury Summons and Questionnaire, http://www.courts.state.tx.us/oca/PublicInfo/jsummons.asp (last visited Nov. 8, 2006).
34 Tex. Gov't Code § 62.0132; *see also* Official Uniform Model Jury Summons, note 33 above.
35 Tex. Gov't Code § 62.0132(c).
36 *See id.* §§ 62.0141, 62.111.
37 *Id.* § 62.0111(a).
38 *See id.* § 62.0132(d).
39 *Id.* § 62.0111(b)(5).
40 *Id.* § 62.0132(g).
41 *See id.*
42 Those counties include El Paso, Tom Green, and Travis Counties. *See* i-Juror, https://www.epcounty.com/ijuror/index.asp (El Paso County) (last visited Oct. 30, 2006); Tom Green County, Juror Information, http://www.co.tom-green.tx.us/distclrk/jurorinfo.htm (follow "I-Jury" hyperlink) (last visited Oct. 30, 2006); Travis County, I-Jury: Online Impaneling of Travis County Jurors, https://www.co.travis.tx.us/ijury/ (last visited Oct. 30, 2006).
43 Op-Ed, *Travis County Simplifies Lengthy Process of Jury Duty*, U. Star (Sw. Tex. St. U., San Marcos, Tex.), Oct. 15, 2003, *available at* http://star.txstate.edu/03/10/15/opinions.html.
44 *See* Tex. Gov't Code § 62.102.
45 Jacci Howard Bear, Answering a Jury Summons Online (June 6, 2002), http://austin.about.com/od/crime/a/ijuryduty.htm (last visited Oct. 26, 2006).
46 *Id.*
47 Travis County District Clerk, Answers to Questions About Jury Duty, http://www.co.travis.tx.us/district_clerk/jury/B4.asp (last visited Oct. 26, 2006).
48 Tex. Gov't Code §§ 62.0141, 62.111. If a summons is not deliverable, the person's name is removed from the jury wheel. *Id.* § 62.0145.
49 *Id.* § 62.111.
50 *See id.* § 62.0141.
51 Tex. Code Crim. Proc. art. 45.027.
52 Rhea Davis, *Legislation Aims To Raise Texans' Paltry Pay for Jury Service*, San Antonio Express-News, May 10, 2005.

53 *Id.*
54 K.B. Battaglini et al., Essay, *Jury Patriotism: The Jury System Should Be Improved for Texans Called To Serve*, 35 ST. MARY'S L.J. 117, 131 (2003).
55 *See Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979); *In re Houston*, 92 S.W.3d 870, 876-77 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Contempt proceedings in Texas have been characterized as quasi-criminal proceedings that should conform as nearly as practical to those in criminal cases. *Ex parte Johnson*, 654 S.W.2d 415, 421 (Tex. 1983); *In re Ross*, 125 S.W.3d 549, 553 (Tex. App.—Austin 2003, no pet.).
56 *See, e.g.*, *Ex parte Adell*, 769 S.W.2d 521, 522 (Tex. 1989); *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969).
57 *Ex parte Blanchard*, 736 S.W.2d 642, 643 (Tex. 1987) ("Due process requires that the alleged contemnor be personally served with a show cause order or that it be established that he had knowledge of the content of such order.").
58 *See* Battaglini, note 54 above, at 133; *see also* Annette Fuller, *Demanding Duties: Low Pay, Inconvenience Among County Jurors' Challenges*, DALLAS MORNING NEWS, July 4, 2001, at 1M.
59 *See* TEX. GOV'T CODE § 62.106.
60 *Id.* §§ 62.108, 62.109.
61 *Id.* § 62.107(a), (b). If a person files a sworn statement claiming an exemption with the sheriff, tax assessor-collector, or district or county clerk of the county of his residence, that person may not be placed in the jury wheel for the ensuing year. *Id.* § 62.107(b).
62 Official Uniform Model Jury Summons, note 33 above.
63 TEX. GOV'T CODE § 62.0142(a).
64 *Id.*
65 *See id.* § 62.0142(b).
66 *Id.* § 62.0142(c).
67 *Id.* § 62.112.
68 *See id.* § 62.112(c).
69 *Id.* § 62.110(a).
70 *Id.* § 62.110(c).
71 *See id.* § 62.015(a).
72 *Id.* § 62.201. Parties may agree to try a case with less than twelve jurors. *Id.*
73 *Id.* § 62.020(a).
74 *Id.* § 62.301.
75 *Id.* § 62.020(b).
76 TEX. R. CIV. P. 233. Many county courts at law in Texas have the same subject-matter jurisdiction as district courts. *See*, e.g., TEX. GOV'T CODE § 25.0722. In these courts, litigants are permitted only a six-person jury with three peremptory strikes per side even though the same case could be filed in district court and receive a twelve-person jury with six peremptory strikes per side.
77 *Id.* § 62.015(b); TEX. R. CIV. P. 225.
78 *See* TEX. GOV'T CODE § 62.015(c).
79 *See* TEX. R. CIV. P. 221; *see also Martinez v. City of Austin,* 852 S.W.2d 71, 73 (Tex. App.—Austin 1993, writ denied).
80 TEX. R. CIV. P. 221.
81 *Id.*
82 *State ex rel. Hightower v. Smith*, 671 S.W.2d 32, 36 (Tex. 1984).
83 TEX. R. CIV. P. 221, 222.
84 *Id.* 222.
85 *See* Appendix VII for discussion of voir dire.
86 TEX. R. CIV. P. 223.
87 *Id.*
88 *See* Scott A. Brister, *Wanted: Docile, Uninformed Jurors? If We Want a Truly Representative Jury, There Are 10 Practices We Shouldn't Allow in Voir Dire*, TEX. LAW., Jan. 27, 1997.
89 *Id.*
90 *See* TEX. R. CIV. P. 226.
91 *See Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92 (Tex. 2005) ("the rules of civil procedure contain no rule on voir dire"); *see also* Brister, note 88 above (noting that the Texas Rules of Civil Procedure "contemplate voir dire" but do not define or require it).
92 *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989) (citation omitted).
93 *See Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006) (identifying the fundamental right to a trial by a fair and impartial jury).
94 *See id.* at 749-52.
95 TEX. GOV'T CODE § 62.105.
96 *See* TEX. R. CIV. P. 228.
97 *Id.* 232; *see also Hyundai*, 189 S.W.3d at 749-50.
98 *See Hyundai*, 189 S.W.3d at 750.
99 *See id.*
100 *Goode v. Shoukfeh*, 943 S.W.2d 441, 444-45 (Tex. 1997) (discussing *Batson v. Ky.*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *J.E.B. v. Ala.*, 511 U.S. 127 (1994)).
101 TEX. R. CIV. P. 233.

102 Tex. Gov't Code § 62.020(e).

103 Tex. R. Civ. P. 233; *see also Garcia v. Cent. Power & Light Co.*, 704 S.W.2d 734, 737 (Tex. 1986) and *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 921 (Tex. 1979) (failure to equalize strikes among antagonistic parties may result in reversal).

104 Cortez, 159 S.W.3d at 92; see also Brister, note 88 above.

105 *See Cortez*, 159 S.W.3d at 92 (citing *Babcock*, 767 S.W.2d at 709).

106 *See* U.S. Dep't of Justice, State Court Organization 1998, Table 41: Who Conducts Voir Dire and the Allocation of Peremptory Challenges, at 273, http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf.

107 *See Babcock*, 767 S.W.2d at 709.

108 *See id.*; Tex. Gov't Code § 62.105(4).

109 *See Compton v. Henrie,* 364 S.W.2d 179, 181-82 (Tex. 1963) (once prejudice in the mind of a member of the jury panel is estab lished, that member is automatically disqualified from serving on the jury as a matter of law).

110 *Id.* at 182.

111 *Id.*

112 *Id.* (citations omitted).

113 *Hyundai*, 189 S.W.3d at 751 (citations omitted) ("We recognized in *Compton* that the statute extends to bias or prejudice concerning types of cases. A juror who is prejudiced against all medical malpractice claims, for example, is necessarily prejudiced 'against a party in the case,' even if they have never met.").

114 *Compton*, 364 S.W.2d at 181-82.

115 *See, e.g., Goode,* 943 S.W.2d at 453 (prejudice is defined as prejudgment); *Sosa v. Cardenas,* 20 S.W.3d 8, 11 (Tex. App.—San Antonio 2000, no pet.) ("The Texas Supreme Court has defined 'prejudice' as 'prejudgment'…"); *Red River Pipeline v. Amonett,* 695 S.W.2d 802, 806-07 (Tex. App.—Amarillo 1985, no writ) (prejudgment of damages to land in condemnation action established disqualifying prejudice as a matter of law); *State v. Burke,* 434 S.W.2d 240, 242-43 (Tex. Civ. App.—Waco 1968, no writ) (jurors had prejudged condemnation case and were disqualified as a matter of law).

116 *See, e.g., Sosa*, 20 S.W.3d at 11 ("Bias as a ground of disqualification requires an inclination toward one side of an issue rather than to the other to such an extent that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality.").

117 *See Buls v. Fuselier,* 55 S.W.3d 204, 210 (Tex. App.—Texarkana 2001, no pet.); *Sosa,* 20 S.W.3d at 11; *Gant v. Dumas Glass & Mirror, Inc.,* 935 S.W.2d 202, 208 (Tex. App.—Amarillo 1996, no writ) (all citing Julie A. Wright, Challenges for Cause Due To Bias or Prejudice: The Blind Leading the Blind Down the Road of Disqualification, 46 Baylor L. Rev. 825, 838 (1994)).

118 *See William V. Dorsaneo III,* 8 Texas Litigation Guide § 120.02[2] ("In civil cases, Texas trial courts have traditionally followed the practice of permitting counsel to conduct voir dire examination by previewing the evidence before the prospective jury during the jury selection process. Hence, it is not unusual for jurors to hear the salient facts of the case during voir dire. It is also not unusual for counsel to examine jurors about the anticipated evidence, including the jurors' ability to fairly consider any element of the parties' claims or defenses under the evidence.").

119 *Goode,* 943 S.W.2d at 453.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* There are numerous appellate court opinions giving examples of how lawyers use voir dire. In *Cortez,* the plaintiff's lawyer recited the facts and, based on questioning to the venire, determined that one prospective juror might not be favorable. 159 S.W.3d at 90. On individual questioning, that person admitted that the defendant was "starting out ahead" but stated that he was willing to try to decide the case on the facts and law. *Id.* The trial court refused to disqualify the juror and informed the attorneys that asking the jurors which party was "ahead" based on the stated facts was an improper attempt to preview jurors' likely votes. *Id.* The trial court's decision was affirmed on appeal. *Powers v. Palacios* is another example. 794 S.W.2d 493, 496 (Tex. App.—Corpus Christi 1990), rev'd on unrelated grounds, 813 S.W.2d 489 (Tex. 1991). In *Powers,* the plaintiff's attorney asked the venire if any panelist had a problem with awarding substantial damages in the case as he had described it. *Id.* Three venire members responded affirmatively. *Id.* The trial court then interrupted and asked if the jurors could award full and fair compensation. *Id.* Two agreed they could. *Id.* The third said he would have difficulty in awarding several hundred thousand dollars for losing part of a finger, which resulted in further questioning by the plaintiff's attorney. *Id.* Ultimately, the third prospective juror agreed that he could award what he determined was fair based on the evidence. *Id.* The trial court refused to dismiss any of three jurors for cause. *Id.*

125 *Hyundai,* 189 S.W.3d 743; *Hafi v. Baker,* 164 S.W.3d 383 (Tex. 2005); and *Cortez,* 159 S.W.3d 87.

126 *Hyundai*, 189 S.W.3d at 755.

127 *Cortez*, 159 S.W.3d at 92.

128 *See* Tex. R. Civ. P. 224.

129 *See id.* 227.

130 *See id.* 229.

131 *See id.* 232, 233.

132 *See id.* 234.

133 *See id.*

134 *See id.*; Tex. Gov't Code § 62.301.

135 TEX. R. CIV. P. 234.
136 *Id.* 280.
137 *Id.* 226a.
138 *Id.*
139 *Id.*
140 Texas civil courts appear to be split on this issue. *Compare Manges v. Willoughby*, 505 S.W.2d 379, 383 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) ("no error was shown in the juror's use of notes taken during the trial"), *with English v. Am. & Foreign Ins. Co.*, 529 S.W.2d 810, 813 (Tex. Civ. App.—Texarkana 1975, no writ) (recognizing a wide difference of opinion among the authorities as to the propriety of the use of a juror's notes and finding that allowing the use of a juror's written notes as evidence or as authority on their face as being a true representation of a portion of the testimony in order to persuade the other jurors as to a disputed issue would seem to violate the spirit, if not the letter of the Texas Rules of Civil Procedure). However, criminal trial courts have discretion to allow jurors to take notes in criminal trials. *See Price v. State*, 887 S.W.2d 949, 954 (Tex. Crim. App. 1994) (providing trial courts discretion to allow jurors in criminal trials to take notes and setting forth rules for the use of such notes during deliberations).
141 Some civil trial courts have permitted juror questioning. *See* Judge Ken Curry & M. Beth Krugler, *The Sound of Silence: Are Silent Juries the Best Juries?*, 62 TEX. B.J. 441, 442 (1999); *see, e.g., Hudson v. Markum*, 948 S.W.2d 1, 3 (Tex. App.—Dallas 1997, writ denied); *Fazzino v. Guido*, 836 S.W.2d 271, 275 (Tex. App.—Houston [1st Dist.] 1992, writ denied). It is generally within the trial court's discretion to allow the jurors in civil trials to take notes and ask questions during the trial because such actions will typically not be held harmful error by the appellate courts. *See Hudson*, 948 S.W.2d at 3; *Fazzino*, 836 S.W.2d at 276; *Manges*, 505 S.W.2d at 384. For criminal courts, the Texas Court of Criminal Appeals has held that jury questioning is not allowed. *See Morrison v. State*, 845 S.W.2d 882, 887-89 (Tex. Crim. App. 1992).
142 *See* TEX. R. CIV. P. 271, 272.
143 *Id.* 273.
144 *See id.* 275.
145 *Id.* 282.
146 *Id.* 282, 283.
147 *Id.* 283.
148 *Id.*
149 *See id.* 281.
150 *Id.*
151 *Id.* 287.
152 *Id.*
153 *See id.* 286.
154 *See id.*
155 *See id.*
156 *See id.*
157 *Id.* 282.
158 *Id.*
159 *See id.* 284.
160 *Id.* 290.
161 *Id.* 292.
162 *Id.* 292(b).
163 *See id.*
164 *Id.* 292(a).
165 *Id.* 292. As few as five jurors can render a verdict if a six-person jury is used. *Id.*
166 *Yanes v. Sowards,* 996 S.W.2d 849, 850 (Tex. 1999).
167 *Id.*
168 *Id.*
169 TEX. GOV'T CODE § 62.020(d).
170 *See id.*
171 *See* TEX. R. CIV. P. 283.
172 *Id.*
173 *Union City Transfer v. Adams*, 248 S.W.2d 256, 258-59 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.).
174 *See Stevens v. Travelers Ins. Co.*, 563 S.W.2d 223, 226-29 (Tex. 1978) (citations omitted).
175 *See id.* at 226; *see also Allen v. United States*, 164 U.S. 492 (1896) (the case from which the name "*Allen*" charge was derived).
176 BLACK'S LAW DICTIONARY 82 (8th ed. 2004).
177 *See Stevens,* 563 S.W.2d at 228-29.
178 *See, e.g., Firestone Tire & Rubber Co. v. Battle*, 745 S.W.2d 909, 916-17 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (jury reported deadlock after twenty-six hours of deliberation, but court's reference to "the portions of the verdict that you have yet to address" and comment that the jurors were "very close to reaching a verdict in this matter" were not coercive); *Hernandez v. S. Pac. Transp. Co.,* 641 S.W.2d 947, 954-55 (Tex. App.—Corpus Christi 1982, no writ) (not coercive when judge told jury "In response to your note…the Court asks you to consider the matter further. Please again consider the instructions preceding Special Issue Number 17 and consider the issue further.").

179 *See Stevens*, 563 S.W.2d at 232.
180 Tex. R. Civ. P. 293.
181 *See id.* 294.
182 *See id.*
183 *Id.*
184 Black's Law Dictionary 873 (8th ed. 2004).
185 Tex. R. Civ. P. 289.
186 *See* Tex. Disciplinary R. Prof'l Conduct 3.06(d), *reprinted in* Tex. Gov't Code, tit. 2, subtit. G app. A (Tex. State Bar R. art. X, § 9).
187 *See* Tex. Civ. Prac. & Rem. Code § 122.001(a); *see also* Fuller, note 58 above .
188 Tex. Civ. Prac. & Rem. Code § 122.001(b).
189 *Id.* § 122.002(a).
190 *Id.* § 122.002(c).
191 *Id.* § 122.0021.
192 *Id.* § 122.0022.
193 *Id.* § 122.003(a).
194 *Id.* § 122.003(b).
195 Tex. Gov't Code § 61.001(a). Prior to January 1, 2006, jurors in a civil or criminal case in a district court, criminal district court, county court, county court at law, or justice court were entitled to receive as reimbursement for travel and other expenses an amount not less than $6 or more than $50 for each day or fraction of each day served as a juror. *See id.* (amended 2005). Each county in Texas could set the amount of juror compensation per day and compensation varied greatly among the counties. *See id.* § 61.001(c).
196 *Id.* § 61.001(b).
197 *Id.* § 61.001(d).
198 *Id.* § 61.001(c).
199 *Id.* § 61.001(c-1).
200 *Id.*
201 *Id.* § 61.001(a).
202 *See id.* § 61.001.
203 *See id.* §§ 62.106, 62.110.
204 *See id.* § 61.003.
205 *Id.* § 61.003(a).
206 *See id.* § 61.001(c).
207 *See id.*
208 *Id.* § 61.0015.
209 *Id.* § 62.001(g).
210 In a civil case, a party must demand a jury and pay a jury fee of $30 in district courts and $22 in county courts and probate courts. *See* Tex. R. Civ. P. 216; Tex. Gov't Code §§ 51.604(a), 101.101(12), 101.121(4). In the event that a party is unable to afford the jury fee, the party must file an affidavit attesting to the fact that the party is unable to pay the fee, and the fee is waived. *See* Tex. R. Civ. P. 217.
211 Tex. Gov't Code §§ 51.402(c).
212 National Center for State Courts, Jury Administration and Management, http://www.ncsconline.org/projects_Initiatives/BPI/JuryAdminManage.htm (last visited Oct. 29, 2006).
213 James Carroll, The Many Roads to One Day/One Trial, Court News 1 (March-April 1999), http://www.courtinfo.ca.gov/court-news/03990499.pdf.
214 National Center for State Courts, note 212 above.
215 Dallas County, Texas, Dallas County Jury Services, Jury Service System, http://www.dallascounty.org/department/juryservices/jury-serv_system.html (last visited Oct. 30, 2006).
216 *See* Carroll, note 213 above, at 3.
217 *Id.* at 2-3.

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