JURY SELECTION IN COVERAGE AND BAD FAITH CASES

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I. Introduction

Insurance litigation provides unique challenges for the insurer's defense team. From the beginning, the insurer may be at a disadvantage because it is the "faceless big company." In coverage and bad faith cases, the argument is often framed that this uncaring, faceless company wrongfully denied a claim by the innocent-insured. How does one combat such themes? The defense attorney has an opportunity to change the narrative during jury selection, perhaps the most critical stage of trial. Thus, one must understand the nature of insurance coverage and bad faith suits and the legal aspects of jury selection. The attorney can then blend these considerations in order to tailor the jury selection to suit his needs. We begin with a brief discussion of the legal nature of coverage and bad faith claims.

II. Legal Bases for Coverage Litigation

It is well established under Texas law that the insured bears the initial burden of showing that there is coverage under the insurance policy in question. *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) ("Initially, the insured has the burden of establishing coverage under the terms of the policy."); *L.P. Employers Cas. Co. v. Block*, 744 S.W. 2d 940, 944 (Tex. 1988) ("An insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy."). Once the insured has established coverage, the burden shifts to the insurer to prove that some policy exclusion negates coverage. *Gilbert*, 327 S.W.3d at 124. If the insurer proves that an exclusion applies, the burden shifts back to the insured to show that an exception to the exclusion brings the claim back within coverage. *Id.* Thus, if the insurer has one advantage, it is that the plaintiff bears the burden of proving coverage.

III. Legal Bases for Bad Faith Claims

Bad-faith liability in the insurance context arises from the contractual relationship between the insured and the insurer. *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212 (Tex. 1988). A duty of good faith and fair dealing is imposed on the insurer because of the disparity of bargaining power and the exclusive control that the insurer exercises over the processing of claims. *Id.* While the duty of good faith and fair dealing arises from the insurance policy, causes of action for breach of contract and breach of the duty of good faith and fair dealing are separate and distinct actions. *See Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 283 (Tex. 1994). To prevail on a bad-faith claim, the plaintiff must prove that (1) there was an insurance contract between the plaintiff-insured and the defendant-insurer, which created a duty of good faith and fair dealing, (2) the defendant-insurer breached its duty by (a) denying or delaying payment when liability was reasonable clear, or (b) canceling an insurance policy without a reasonable basis, and (3) the defendant's breach proximately caused the plaintiff's damages. *See Universe Life Ins. Co. v Giles*, 590 S.W.2d 48, 50-51 (Tex. 1997); *Shelton*, 889 S.W.2d at 283; *Aranda*, 748 S.W.2d at 212-13.

IV. Voir Dire – Legal Considerations

A. Basis for Voir Dire

When one mentions "jury selection," the mind typically conjures up the voir dire,

or practice of examination—by the court and/or the attorneys—of the potential jury members.[1] Voir dire is often considered the single most important procedure in the entire trial process. Cooper & Faust, *supra* note 1 at 753 n.3; Charles M. Lollar, *Voir Dire: Selecting the Judges of Just Compensation*, 102 A.L.I.-A.B.A. Course of Study 281, 283 (2007), *available at* WESTLAW SM102 ALI-ABA 281.

The Texas Constitution[2] and related statutes guarantee litigants a right to trial by a fair and impartial jury. *See* TEX. CONST. art. I, § 15, TEX.GOV'T CODE ANN. § 62.105 (Vernon 1987). While the Constitution itself does not guarantee a right to voir dire, there is no question that the right to question venire members is firmly established in Texas law. *Johnson v. Reed*, 464 S.W.2d 689 (Tex. Civ. App.--Dallas 1971, writ ref'd n.r.e.). The primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006) (citing *Morgan v. Illinois*, 504 U.S. 719, 734-35 (1992)). Except for good cause, the party with the burden of proof on the whole case—the insured in this instance—should be allowed to initiate voir dire. *See* Tex. R. Civ. P. 265, 266, 269; *Ocean Transp. v. Greycas, Inc.*, 878 S.W.2d 256, 268-69 (Tex. App.—Corpus Christi 1994, writ denied).

B. Scope of Voir Dire

The trial court has broad discretion to rule on the propriety of the voir dire questions. *Dickson v. Burlington N.R.R.*, 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.). That being said, the Texas Supreme Court has stated that trial courts should allow "broad latitude" to a litigant "to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised." *Vasquez*, 189 S.W.3d at 749; *Babcock v. Northwest Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). A court abuses its discretion when its denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges. *Babcock*, 767 S.W.2d at 709.

A party is entitled to inquire into matters reasonable related to the kinds of issues presented by the case *See Babcock*, 767 S.W.2d at 709. For example, in *Babcock*, the plaintiff's attorney learned that one of the prospective juror expressed doubt about his ability to be impartial because of his concern about the effect of judgments on insurance premiums. *Id.* at 707. After the juror was questioned outside the presence of the other panel members and struck for cause, the plaintiff wished to question the remaining venire members about the "lawsuit crisis." *Id.* The trial court twice denied this request and the appellate court affirmed. *Id.* But the supreme court reversed, noting that recent media coverage of the alleged "lawsuit crisis" had created the potential for bias and prejudice on both sides of the personal injury docket; thus, the plaintiff had a right to question the jury members on this issue. *Id.* at 708 ("If

[1] "Voir dire" is a French phrase meaning "to see and speak the truth" Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*, 95 Ill. B.J. 474, 474 (Sep. 2007); R. Brent Cooper & Diana L. Faust, *Procedural & Judicial Limitations on Voir Dire – Constitutional Implications & Preservation of Error in Civil Cases*, 40 St. Mary's L.J. 751, 752-53 (2009).

[2] "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." Tex. Const. art. I, § 15.

counsel has reason to believe that a juror is directly or indirectly interested in the result of the trial to be had, he has a right to question the juror touching that interest." (quoting *Green v. Ligon*, 190 S.W.2d 742, 747 (Tex. Civ. App.--Fort Worth 1945, writ ref'd n.r.e.)))

Other matters that are the proper subject of voir dire inquiry include the panelist's relationship to a party. TEX. GOV'T CODE §§ 62.105(3), 573.022-025. Inquiry into the prospective juror's bias or prejudice against the *type* of lawsuit is proper. *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963). Questions about the panelist's bias in favor of or against a party based on nationality, wealth or status are allowed. *Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The attorney may ask about the panelist's bias or prejudice towards a party in the case. *American Cyanamid Co. v. Frankston*, 732 S.W.2d 648, 653 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.). Similarly, the attorney may inquire about the panelist's relationship with possible witnesses in the case. *Employer's Mut. Liab. Ins. Co. v. Butler*, 511 S.W.2d 323, 325-26 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.). And, the panelist's financial interest in the litigation is a proper subject of inquiry. *See* TEX. GOV'T CODE § 62.105(2); *Carey v. Planters' State Bank*, 280 S.W. 251, 252 (Tex. Civ. App.—San Antonio 1926, writ dism'd).

Of course, not all subjects or questions raised by an attorney during the voir dire are proper. In *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 756-57 (Tex. 2006), the Texas Supreme Court frowned upon an attempt by the plaintiff's lawyer to obtain a commitment from a jury panelist after revealing specific facts of the case. The case involved the death of a child passenger as a result of an auto accident and the subsequent airbag deployment. *Id.* at 747. Defendant Hyundai argued that the child's aunt had not buckled the child into the seat, and that had she been so buckled, would not have been struck by the airbag. *Id.* The Vasquez's attorney wanted to introduce the fact that the child was not wearing a seat belt and ask the prospective jurors as to whether this would determine their verdict. *Id.* at 748. The trial court refused to allow such questions and ultimately the supreme court agreed with that decision. *Id.* at 748.

While generalized questions that seek to ferret out bias or prejudice are proper, questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts are typically not proper. *Id.* at 753. *See also In re Commitment of Barbee*, 192 S.W.3d 835, 946 (Tex. App.—Beaumont 2006, no pet.) (improper to ask if panelist could be fair to a party in spite of party's convictions for crimes against children). Similarly, it is improper for a plaintiff to mention before the jury panel that the defendant has insurance or that the plaintiff has no insurance; conversely, it is improper for the defendant to refer to the fact that the plaintiff is protected by some form of insurance. *Ford v. Carpenter*, 216 S.W.2d 558, 559 (Tex. 1949), *overruled in part on other grounds by Condra Funeral Home v. Rollin*, 314 S.W.2d 277 (Tex. 1958). Counsel may not advise the jury panel of the effect of their answers to voir dire questions. *Texas Employers Ins. Ass'n v. Loesch*, 538 S.W.2d 435, 442 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.). Nor may an attorney discuss evidence that would be inadmissible at trial. *Travelers Ins. Co. v. DeLeon*, 456 S.W.2d 544, 545 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.).

V. Challenges for Cause

We know generally what types of questions and subjects are proper and improper during the voir dire process. But, assuming a proper question is posed, what are the bases for disqualifying a potential juror? As will be discussed below, parties are limited in the number of peremptory strikes they will be allowed. No such limitation is placed on strikes for cause, thus, these types of strikes will typically make up the larger portion of strikes exercised.

A challenge for cause is expressly defined in Rule 228 to mean "an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror in the case or in any case, or which in the opinion of the court, renders him an unfit person to sit on the jury." Tex. R. Civ. P. 228. An exhaustive discussion of the proper grounds for challenges for cause is beyond the scope of this article, but generally a juror may be dismissed because he or she does not meet the statutory qualifications for jury service, or is statutorily disqualified for some other reason. As for statutory qualifications, some requirements include: being at least eighteen years old, being a citizen of Texas and the county of jury service, literacy, and the juror must not have been convicted of misdemeanor theft of a felony. *See generally*, TEX. GOV'T CODE § 62.102. Thus any venire member would be subject to a challenge for cause on these bases.

Conversely, a person may be statutorily *disqualified* from jury service for numerous reasons under the Government Code. If a person is disqualified by statute, the court *must* excuse that person from service. *Compton*, 364 S.W.2d at 182. Some disqualifications seem rather obvious and self-explanatory, e.g. a person who is a witness in the case is disqualified. TEX. GOV'T CODE § 62.105(1). Similarly, a person that has a direct, or in some instances, an indirect interest in the case is disqualified. *Id.* § 62.105(2). For example, the employee of a party might be disqualified, *Galveston H. & S.A. Ry. v. Thornsberry*, 17 S.W. 521, 522 (Tex. 1891), as well as stockholders of a party that is a corporation. *Texas Power & Light Co. v. Adams*, 404 S.W.2d 930, 943 (Tex. Civ. App.—Tyler 1966, no writ). In the insurance context, the insureds of a party insurer may be disqualified based on interest. *Texas Employers' Ins. Ass'n v. Lane*, 251 S.W.2d 181, 182 (Tex. Civ. App.--Fort Worth 1952, writ ref'd n.r.e.). Certain relatives of parties are disqualified, as well as a person that has served as a juror in an earlier trial of the same case or in another case involving the same questions of fact. *See* TEX. GOV'T CODE § 62.105(3), (5).

A potential juror's bias or prejudice is the final ground for statutory disqualification, and as seen in the discussion above, it is a common ground of dispute between attorneys and courts. *Id.* § 62.105(4). Bias is an inclination toward one side of an issue rather than to the other. *Compton*, 364 S.W.2d at 182. To disqualify a panelist because of bias, it must appear that the state of mind of the juror leads to the natural inference that he or she will not or cannot act with impartiality. *Id.* For example, in *Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998), a prospective juror indicated that he could not be fair and objective in looking at the medical facts and evidence, and that the plaintiff would start out ahead of the defense because the juror's father had also died of a heart attack. The court refused to strike the juror for cause, but the appellate and supreme courts determined that the juror had indicated bias as a matter of law, and thus should have been struck from the panel. *Id. See also*

Silsbee Hosp., Inc. v. George, 163 S.W.3d 284, 295 (Tex. App.—Beaumont 2005, pet. denied) (Bias shown as a matter of law where venire members indicated they would disregard instructions by the trial court on the burden of proof, and there was no indication that they would try to follow the trial court's instructions).

An initial "leaning" toward one party is not disqualifying if it represents skepticism rather than an unshakeable conviction. *Cortez v. HCCI-San Antonio, Inc.* 159 S.W.3d 87, 94 (Tex. 2005). A statement that is more of a preview of a panelist's opinion rather than expression of actual bias is not a ground for disqualification. *Id.* In *Cortez*, a venire member admitted having a better understanding of the defense's side, having worked as an insurance adjuster. *Id.* at 93. His statements also indicated that he had a potential bias against lawsuit abuse. *Id.* But the trial court refused to strike the juror for cause because he was willing to listen to all the evidence and to withhold judgment until the entire case had been presented. *Id. See also Goode v. Shoukfeh,* 943 S.W.2d 441, 452 n.4, 453 (Tex.1997) (Where venire member admitted that the plaintiff was "starting off a little behind," he also stated that he could make his decision based on evidence presented and had not made a decision based on what attorneys had said, the courts found no bias or prejudice).

Prejudice, on the other hand, means prejudgment, and necessarily embraces bias; but the converse is not true. *Id.* The *Flowers* case is often cited as a textbook example of prejudice. *Flowers v. Flowers*, 397 S.W.2d 121, 123-24 (Tex. Civ. App.—Amarillo 1965, no writ). The case concerned the custody of three children during a divorce suit, and one of the venire members stated that she did not approve of drinking in any manner. *Id.* at 122. The prospective juror also stated that she would not award custody of the children to either party if they drank. *Id.* The trial court refused to strike the juror but the appellate court reversed, stating: "Mrs. Schmidt's statements indicate to us both bias and prejudice factually and such a prejudgment of the case as to indicate she could not have acted with impartiality." *Id.* at 123.

A potential juror who is biased or prejudiced in favor of or against a party or the type of lawsuit should be disqualified. *Murff v. Pass*, 249 S.W.3d 407, 411 (Tex. 2008). If bias or prejudice is established as a matter of law, the prospective juror is automatically disqualified. *Goode*, 943 S.W.2d at 452-53. However, if a venire member has expressed some bias, he is not automatically excused, and the court or counsel may attempt to "rehabilitate" the venire member if possible by further questioning. *Cortez,* 159 S.W.3d at 91-92. As noted above, a jury panelist in *Cortez* stated that as an insurance adjuster he had a better understanding of the defense's side, and the record indicated he may have had potential bias against lawsuit abuse. *Id.* at 93. Cortez argued—citing several Texas appellate court decisions[3]—that once a venire member expresses bias, the questioning must cease and the member must be dismissed. *Id.* at 91-92. But the supreme court disagreed with Cortez and

[3] See *State v. Dick*, 69 S.W.3d 612, 620 (Tex. App.-Tyler 2001, no pet.); *White v. Dennison*, 752 S.W.2d 714, 718 (Tex. App.-Dallas 1988, writ denied); *Gum v. Schaefer*, 683 S.W.2d 803, 808 (Tex. App.-Corpus Christi 1984, no writ); *Erwin v. Consolvo*, 521 S.W.2d 643, 646 (Tex. Civ. App.-Fort Worth 1975, no writ); *Carpenter v. Wyatt Constr. Co*., 501 S.W.2d 748, 750 (Tex. Civ. App.-Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Lumbermen's Ins. Corp. v. Goodman*, 304 S.W.2d 139, 145 (Tex. Civ. App.-Beaumont 1957, writ ref'd n.r.e.).

those appellate cases applying such a rule. *Id.* The high court stated that broad latitude is allowed for examination of jurors, and trial courts have discretion in overseeing voir dire:

> Both of these principles are completely inconsistent with the assertion that voir dire must stop at the moment a veniremember gives any answer that might be disqualifying . . . the proper stopping point in efforts to rehabilitate a veniremember must be left to the sound discretion of the trial court.

Id. And, because trial judges are actually present during voir dire, they are in a better position to evaluate the juror's sincerity and his capacity for fairness and impartiality. *Id.* at 93. Ultimately, the court will look to the entire record and examination as a whole to determine if bias or prejudice has been established as a matter of law; if so, that panelist must be dismissed. *Id.* at 92-93. As a final matter, the court itself may exercise its discretion and excuse a panelist for cause even when there is no statutory ground for disqualification. *See* Tex. R. Civ. P. 228.

VI. Exercising Challenges for Cause and Preserving Error

Armed with the knowledge of what questions and subjects are proper during voir dire and the bases for challenging a juror for cause, how does one exercise a challenge for cause and preserve error if the court denies the challenge?

During voir dire, the attorney must challenge/object to a panelist for cause. If there is a discussion with the challenged panelist at the bench, the attorney must make sure to get such communications on the record. If the court refuses to strike a juror for cause, counsel must be careful to take several critical steps to preserve error for appellate review. First, the attorney must make sure, and the record should reflect, that he objected to the exhaustion of peremptory strikes before or contemporaneously to submitting his peremptory strike list. *See Cortez*, 159 S.W.3d at 91.; *Hallett v. Houston Nw. Med. Ctr.*, 689 S.W.2d 888, 890 (Tex. 1985) ("[T]he complaining party waives any error by not timely bringing such error to the attention of the trial court *prior* to making his peremptory challenges.")(emphasis added).The attorney must them inform the court that, as a result of the court's refusal to strike the "for-cause" panelist, the party will exhaust its peremptory challenges before it can strike another objectionable panelist on the list. *Cortez*, 159 S.W.3d at 90-91; *Hallett*, 689 S.W.2d at 890. Counsel must do this before he learns of the composition of the jury; once the jury is chosen, it is too late to notify the court of the objectionable panelist. *Cortez*, 159 S.W.3d at 91.

The objecting attorney must then identify an objectionable panelist who will remain on the jury list after the exhaustion of the party's peremptory strikes. *Id.* The objectionable panelist may be the individual that should have been struck for cause or another objectionable panelist. *E.g., Cortez*, 159 S.W.3d at 90; *Shepherd*, 962 S.W.2d at 34. However, the attorney does not need to specify *why* the prospective juror is objectionable. *Cortez*, 159 S.W.3d at 91. After giving notice to the court that an objectionable panelist will remain on the jury list, the attorney must turn in his or her peremptory strike list. *Id.* If the objectionable panelist does not serve on the jury, no harm occurs. *Id.* But, the appellate court will presume harm if the party uses all

of his peremptory challenges and is thus prevented from striking other objectionable jurors from the list because he has no additional peremptory challenges, i.e. the objectionable panelist serves on the jury. *Id.*

VII. Peremptory Challenges

A peremptory strike is a challenge to a jury panelist "without assigning any reason therefore." Tex. R. Civ. P. 232; *Vazquez*, 189 S.W.3d at 749-50. Peremptory challenges allow parties to reject jurors they perceive to be unsympathetic to their position. *Vasquez*, 189 S.W.3d at 750. Peremptory strikes are not intended, however, to permit a party to "select" a favorable jury. *Id.* In a typical two-party lawsuit, the court grants three peremptory strikes to each side in county court, and six strikes to each side in district court. Tex. R. Civ. P. 233. In multiple party cases, the rules mandate that the court equalize the number of peremptory strikes so that no party or side is given an unfair advantage regarding peremptory strikes. *Id.* The party must move for the equalization or allocation of further strikes before exercising any peremptory strikes. *Id.* Upon the motion, the trial court will conduct a hearing to determine whether the litigants on the same side of the case are antagonistic with respect to any issue to be submitted to the jury. *Id.*; *Scurlock Oil Co. v. Smithwick,* 724 S.W.2d 1, 5 (Tex. 1986). If the court determines that the parties on the same side are antagonistic to each other, the court has discretion to allocate strikes to each party so neither has an unfair advantage. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 919 (Tex. 1979). However, equalization of strikes does not necessarily mean or require that each party have the exact same number of peremptory strikes. *Id.* at 920.

After the jury panel has been interviewed by both parties and challenges for cause have been resolved, the parties will exercise their peremptory strikes by turning in the strike list to the court. However, as with strikes for cause, not all peremptory strikes are valid. In the landmark case *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), the United States Supreme Court held that a litigant cannot exercise peremptory strikes to exclude jury members based on race. While *Batson* was a criminal case, the same prohibition on race-based strikes was extended to civil cases in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991). Similarly, parties cannot make peremptory strikes based on ethnicity or gender *Hernandez v. New York*, 500 U.S. 352, 362 (1991) (ethnicity); *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994) (gender). But, a litigant may exercise peremptory strikes to eliminate prospective jurors based on appearance, age or employment status. *See Purkett v. Elem*, 514 U.S. 765, 769 (1995) (shabby unkempt hair); *Mayr v. Lott*, 943 S.W.2d 553, 556-57 (Tex. App.—Waco 1997, no writ) (large gold hat indicating flamboyant character); *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 916 (Tex. App.—Houston [14th Dist. 2002, pet. denied) (employment with a union is a race-neutral explanation for peremptory strike).

If one party believes that the other has used its peremptory strikes to discriminate against potential juries, the first party may make a "*Batson*" challenge to the peremptory strikes. To succeed, the movant must first make a prima facie case the respondent has used its peremptory strikes in a discriminatory manner. *Goode v. Shoukfeh*, 943 S.W.2d 441, 445 (Tex. 1997). A prima facie case is established by showing a suspect pattern of strikes against members of a protected class. *Dominguez v. State Farm Ins. Co.*, 905 S.W.2d 713, 716-17 (Tex. App.—El Paso 1995, writ dism'd). If the movant establishes this prima facie case,

the respondent must offer some neutral explanation for the strikes. *Goode*, 943 S.W.2d at 445. The explanation does not need to be plausible, only neutral. *Molina v. Pigott*, 929 S.W.2d 538, 545 (Tex. App.—Corpus Christi 1996, writ denied). The court must accept a facially neutral explanation unless a discriminatory intent is inherent in the explanation. *Id.* Even "silly or superstitious" explanations for the strike will suffice, so long as that explanation is race neutral. *Goode*, 943 S.W.2d at 445. At the final stage, the court will weigh the evidence and determine if the party challenging the strike has proven purposeful racial discrimination, or if the respondent's explanations were neutral. *Id.* If the court determines that the respondent used its strikes in a discriminatory manner, the court may reinstate the challenged panelist or dismiss the panel and call a new one. *Price v. Short*, 931 S.W.2d 677, 682 (Tex. App.—Dallas 1996, no writ). Misused strikes will not be restored to a party because this would reward discriminatory behavior. *Peetz v. State*, 180 S.W.3d 755, 760-61 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

The foregoing substantive and procedural rules must be at the forefront of the mind of every attorney conducting or assisting with jury selection, no matter what type of case is involved. However, there are other more subtle and unwritten "rules" that attorneys must consider and keep in mind during jury selection, a subject to which we now turn.

VIII. Jury Selection - Extra-Legal Considerations

A. Appearance

"*You never get a second chance to make a first impression***."**

Selecting the jury in any lawsuit begins from the moment the jury venire members are led into the courtroom. What is the first impression they will have of you? your client? other members of your legal team? Perhaps the most basic consideration is what to wear. Of course, the legal rules of decorum and local court rules will largely dictate what the trial attorney wears in court, the standard being business attire, e.g.: "Business attire is appropriate for men and women. Business pantsuits are acceptable for women. Jackets are to remain on in the courtroom." Requirements for District Judge Barbara M.G. Lynn, Northern District of Texas, Rule IV(D) Courtroom Decorum, *available at* http://www.txnd.uscourts.gov/judges/blynn_req.html (last visited Mar. 16, 2012).

Most lawyers want to look their best for the jury and dress to impress, but some jury consultants suggest that a lawyer would be better served by looking more "approachable." Harry Plotkin, *Juror Perceptions of You*, TrialLawyerTips.com, Mar. 2, 2010, http://www.triallawyertips.com/2010/03/juror-perceptions-of-you-by-harry.html. In other words, an attorney may want to wear less expensive (yet still appropriate) attire such as a lighter-colored suit and leave the Rolex at home. *Id.* It is well known that many people have a stereotypically negative view of attorneys as lying and greedy, and an attorney may want to distance one's self from such notions by dressing down to a degree. Of course, an attorney should not completely eschew professional attire and appearance.

What about the client? If people are already somewhat biased against lawyers in general, there's no reason to have them disliking your client as well. Does that necessitate a client in a three-piece suit? No, but the attorney will want to avoid having a

client that looks like he or she just spent the night on the street. A client dressed in such a manner puts the attorney behind, not only with the jury, but the court too. The lawyer should advise clients new to the legal system that first (and lasting) impressions count and admonish them to dress appropriately. Perhaps the best rule of thumb is the old adage that your client should be wearing "church clothes."

B. Verbal Communication

We know that the attorney's and client's visible appearance is important, but what should they being saying to the jury panel? Aside from ferreting out potential juror bias or prejudice, voir dire is an opportunity for the attorney to get to know the jury, and vice versa. Why not take the time to establish that you, the attorney, are a normal, likeable human being, just like the venire members? Little details of your normal life can be woven into the context of your voir dire. For example, casually mentioning taking the dog for a walk before coming to court can be highly relatable. Or, maybe you explain to the jury that you appreciate that they came down to the court so early in the morning, after you yourself spent a late night assisting your son with a Boy Scout project. Like proper wardrobe, such subtle tactics can make you more approachable to potential jury members, and that can only aid in your cause.

One of the authors likes to get the jury on his side by "giving time back" to them. For example, if the judge has allotted three hours for each side's voir dire and opposing counsel took the entire time, the defense will assure the jury that his voir dire will not take nearly as long. The jury should respect you for respecting their time.

While voir dire is *usually* the first chance the attorneys get to interact with the panel, it's not *always* the first chance. Remember, jury panel members park in the same parking lots, ride the same elevators, use the same restrooms, and walk the same hallways as attorneys and parties. "Loose lips sink ships" was a catchphrase of the United States Government during World War II, an admonition that citizens should be aware of unguarded talk. So too must attorneys and their clients guard their discussions before and during trial. You never know who might be listening.

C. Other Behavior

Continuing our nautical theme for a moment, if 95% of all communication is nonverbal, then the attorney has an opportunity to steer a course toward success, or perhaps scuttle the ship, by her nonverbal cues alone. It is a normal human trait to react with bodily gestures to positive or negative news, rulings, or outcomes, but jurors pick up on such behavior. Rolling of the eyes, shoulder shrugs, furrowed brows, and furtively crossed arms can all paint a negative picture for the attorney and client; so too with audible sighs, gasps, or grunts, however slight. The attorney and client would do well to remember that controlling such reactions is not only a sign of emotional maturity, but also a way to show the jury that you are calm, in control, and not phased when things don't go your way.

IX. So What's Different About Insurance Coverage and Bad Faith Cases?

The foregoing discussions are applicable across the spectrum of lawsuits, not just those involving insurance coverage questions or bad faith issues. But, there are a few additional considerations attorneys will want to keep in mind in coverage and bad faith cases, largely due to the nature of the parties involved.

The defense for the insurer may already be at a disadvantage because of the nature of the client. "Simply stated, jurors do not like or trust insurance companies." Rutledge R. Liles, *Insurance Bad Faith: The "Setup Myth"*, 77 Fla. B.J. 18, 19 (June 2003). According to practitioner Liles, jurors generally believe that if someone pays a premium, that person is entitled to coverage, and insurance companies "jerk their insureds around." *Id.* And, it was on the basis of a disparity of bargaining power that Texas courts began to recognize the tort of breach of good faith and fair dealing in insurance suits. *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212 (Tex. 1988) ("The duty of good faith and fair dealing is thus imposed on the insurer because of the disparity of bargaining power and the exclusive control that the insurer exercises over the processing of claims."); *Arnold v. National County Mutual Fire Ins. Co*., 725 S.W.2d 165, 167 (Tex.1987).

Jurors are preconditioned to a negative response to institutions like insurance companies, railroads, banks, and utility companies. H. Robert Powell, *Establishing a Strategy for Trial of a Bad Faith Case*, 8 No. 8 Cal. Ins. L. & Reg. Rep. 260 (Aug. 1996). Most people have had to deal with an insurance company at one time or another, and any claim denial or other interaction perceived by the insured as negative is not easily forgotten. *Id.* And, recent headline-making events such as corporate failures and bailouts, and "Occupy Wall Street" protests have put large corporations in the crosshairs. Today's insurance defense will need to minimize negative pre-conceived notions that prospective jurors might have about insurance companies.

So how does the defense attorney accomplish this task during jury selection? As with the jury's impression of the attorney, one can make the insurer more approachable, individualized, and "human." Bad faith claims and coverage questions will always involve some mention of the claims handling process and the decisions that were made at the company. Those decisions were made by human beings, so humanize the process. As Powell states: "Build a rapport between the jurors and company personnel involved in the challenged decisions so that the *ethos* of these individuals provides an attractive alternative *persona* to that of the company itself." *Id.* One might say to the jury panel "Are any of you familiar with Bethany Virtue, the young woman who has worked for ten years to learn and keep her job as a claims handler?" A similar appeal to the jurors' worries might help personalize the insurer through its employee witnesses: "Do any of the jury panel ever worry that your job performance might be questioned?" By this questioning the jury may recognize that if they unjustly assess the employees' behavior during the claims process as wrongful, the employees' careers will be hurt, along with their livelihood and families. *Id.*

There are additional ways to give the company a soul, such as by mentioning company history or its start from humble beginnings. *Id.* Similarly, if the company sponsors some event or charity, ask panel members during voir dire if they are aware of the company through its sponsorship of the event. *Id.*

One should also appeal to the jurors' basic notions of fairness regarding an exchange of promises. For example, one might inquire of the jury venire "What if you promised someone that you would do A, B, & C, and they in turn promised that they would do D, E, & F? If the other person did not bother to do D, E, & F should you have to perform A, B, & C?" Such is the nature of

an insurance dispute if the insured did not comply with the policy provisions such as notifying the carrier of an occurrence or forwarding suit papers. Other tactics include inquiring about bargains that are struck and impressing upon jurors the notion that the insurance company sells a product that is described in the policy, and the customer pays a price based on the product that is described in the policy. *Id.* Powell gives a useful analogy:

> You might, for instance, argue that if a customer bought and paid for a half-ton truck, he shouldn't come back to the truck dealer and complain that for the same price he should have gotten a three-quarter ton truck. The half-ton truck was the bargain they struck when the sale was made. In similar fashion, a claim within the bargain the parties struck when the policy was purchased is all that the insured is entitled to bring back to the company for payment.

Id.

The insured's attorney will often make the case that any of the jury members could similarly be subjected to claims denial at the hands of the insurance company. The defense might counter by asking panel members if it is fair for other insureds to shoulder the burden—via premiums—of *improperly paid* claims. Additionally, the attorney may want to introduce (to the extent allowable) and mitigate harmful evidence during the voir dire. This may help rob the wind from the sails of the plaintiff's case. The key here is to remain flexible during voir dire, and to tailor your inquiries and techniques to the case at hand.

X. Explaining the Process to the Jury & Reasonable Expectations

Explaining to the jury the role of voir dire is helpful as well. If the attorney has been successful at creating a rapport with the jury, they should feel more comfortable in giving forthright, honest answers. Here it may be helpful to let panel members know that it's okay to have certain beliefs or feelings regarding a type of lawsuit or the parties involved. Sometimes, attorneys stress that the purpose of voir dire is to get a "fair and impartial" jury, or stress themes of justice. Attorneys might consider taking a different tack, however. In the face of a "fairness" or "impartial" jury plea by the opposing counsel, one might counter with unabashed honesty: "I am the attorney for my client, the insurance company. I won't stand up here—like plaintiff's counsel did—and tell you that I'm looking for a completely impartial jury. I'd like a jury that is able to be objective, but I have a dog in this hunt, just like the plaintiff's lawyer has a dog in this hunt."

And, the attorney should explain the jury selection process to the client. A client may think that the attorney chooses the jury most favorable to the client's cause; however, the attorney must also make the client aware that picking a jury is sometimes more about excluding potentially negative jurors than about picking sympathetic jurors. While the client may have an idea that a particular venire member would make a bad/good jury person, the seasoned attorney may know better what to look for. Explaining to the client why a particular juror should be struck should help the client understand the process. And, listening to the client's concerns about a prospective juror and encouraging participation in jury selection should give the client a greater sense of ownership in the entire legal process.

Finally, it is important to have reasonable expectations during jury selection. The attorney should ask herself "What is the goal of my voir dire?" Ultimately, you would like to pick a jury that is sympathetic to your client's case. While the jury may seem great at the beginning of trial, that perception can change quickly during the course of trial, and especially after the verdict. But one should never expect to get a perfect jury, as it likely does not exist. An attorney could spend hours interviewing panel members and still fail to uncover subtle beliefs, attitudes or biases that could influence the verdict. No jury is perfect because human beings are imperfect. However, by taking a few of the steps outlined above, the attorney can move towards a jury that, if not perfect, is right for the job at hand.