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PROCEDURAL AND JUDICIAL LIMITATIONS ON VOIR DIRE—CONSTITUTIONAL IMPLICATIONS AND PRESERVATION OF ERROR IN CIVIL CASES

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I. INTRODUCTION

The right to a trial by jury is one of the oldest and most protected rights existing among citizens of Texas.[1] However, the right to a trial by jury is in large part dependent upon the right of the litigant to appropriately question the venire to ensure that a jury of his peers has been assembled. Without this right, a litigant has no ability to test the fitness or qualifications of those sitting in judgment of him.[2] Using voir dire—"a French phrase meaning 'to

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1. The right to a trial by jury has long been considered to be "one of our most precious rights." Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997) (citing White v. White, 108 Tex. 570, 581, 196 S.W. 508, 512 (1917)). Furthermore, it "is a basic and fundamental feature" of our system of justice. Jacob v. City of New York, 315 U.S. 752, 752 (1942).

2. *See* Sanchez v. State, 165 S.W.3d 707, 710–11 (Tex. Crim. App. 2005) (en banc) (establishing three possible purposes for voir dire examination as being to elicit information that might establish bias or prejudice of a venireman, to facilitate the use of

speak truly, to tell the truth'"—a litigant is able to expose potential bias, prejudice, or other grounds for disqualification, thereby shaping a proper jury.[3] Without the right to an effective voir dire, the parties' right to a trial by jury is meaningless.

There have been several recent changes in the judicial landscape of Texas that have made the need for full and complete voir dire even more important. Some of these changes are issue driven while others are technology driven. Nonetheless, all have resulted in jurors with preconceived attitudes about important issues in civil litigation, and the parties must explore those attitudes to determine whether jurors are biased or prejudiced and whether peremptory challenges should be exercised. The constitutional basis for the right to an impartial jury is unquestionable, and with the right to trial by an impartial jury clearly comes the right to voir dire. Case law has established both the purposes for voir dire and its effective limitations.[4] However, our changing society has increased the need for parties to effectively question the potential jurors through voir dire. Two examples—recent tort reform measures in Texas and the Rodney King incident—expose how the media and technological advances have increased the need for a more effective and exhaustive voir dire.

A. *Tort Reform*

Tort reform has been a recurring issue in Texas politics for a good portion of the last two decades. Inevitably, courts are faced with the prospect that the venire has been tainted by this intense political exposure. In *Babcock v. Northwest Memorial Hospital*,[5] Babcock had broken her pelvis and was hospitalized, during which time she developed complications, eventually leading to a double leg amputation.[6] Babcock and her husband then brought suit

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peremptory challenges, and to indoctrinate jurors with the party's theory on the case).

3. *See* 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 ("'Voir dire,' a French phrase meaning 'to speak truly, to tell the truth,' is one of the most important aspects of any trial. In the context of jury selection, it is considered by many to be the single most significant procedure in the entire trial process.").

4. *See, e.g.*, Johnson v. Reed, 464 S.W.2d 689, 691 (Tex. App.—Dallas 1971, writ ref'd n.r.e.) (recognizing that voir dire is limited to inquiries that are material and relevant to the case at hand).

5. Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705 (Tex. 1989).

6. *Id.* at 706.

against the hospital and doctors alleging negligence.[7] However, the trial court refused to allow the plaintiffs' counsel to question prospective jurors regarding the alleged "lawsuit crisis" in Texas.[8] The Texas Supreme Court, in reversing the trial court's refusal of lawsuit crisis questions, noted that the tort reform debate created a greater need for full and complete voir dire.[9] The circumstances the *Babcock* trial court found so prejudicial,[10] such that a fair and impartial trial was unlikely, have only intensified over time.

In recent years, particularly since 2003, the issue of tort reform has been at the forefront of the media as well as the legislature.[11] The media exposure surrounding Proposition 12, which proposed new non-economic damage caps in civil lawsuits against health care practitioners, was compounded by the fact that Proposition 12 was subject to a constitutional election.[12] The debate over

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7. *Id.*

8. *Id.*

9. *Id.* at 709 ("The trial court's actions, which resulted in the denial of the Babcocks' constitutional right to trial by a fair and impartial jury, was harmful." (citing Tex. & Pac. Ry. v. Van Zandt, 159 Tex. 178, 182, 317 S.W.2d 528, 531 (1958))).

10. *See Babcock*, 767 S.W.2d at 708–09 ("[T]ort reform and the debate concerning the alleged 'liability insurance crisis' and 'lawsuit crisis' were the subject of much media attention.... Media coverage of the [crisis] has unquestionably created the potential for bias and prejudice on both sides of the personal injury docket.").

11. In 2003, House Bill 4, Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847, was passed by the legislature, resulting in many changes to Texas tort law. *See* House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003) (relating the purposes of the bill as intended to address problems in the then-existing litigation environment, including: "non-meritorious lawsuits, a general increase in jury awards, a disproportionate increase in awards for non-economic damages, unreasonable pressure to settle defensible claims and other procedural aspects of our current court system that are patently unbalanced"), *available at* http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB4. The bill was touted as both a "'comprehensive civil justice reform bill' and a 'comprehensive tort reform bill.'" Patricia F. Miller, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 517–18 (2006) (quoting House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S. (2003)). However, some provisions of the bill had significant impacts on the "questions and instructions that Texas juries should receive on a variety of topics." Claudia Wilson & J. Bret Busby, *Charging the Jury in the Wake of HB 4*, 67 TEX. B.J. 276, 276 (2004).

12. The House Joint Resolution 3, otherwise known as Proposition 12, was described on the ballot as: "'The constitutional amendment concerning civil lawsuits against doctors and health care providers, and other actions, authorizing the legislature to determine limitations on non-economic damages.'" Texas Secretary of State, Proposed Constitutional Amendments September 13, 2003, http://www.sos.state.tx.us/elections/voter/2003sepconsamend.shtml (last visited Apr. 3, 2009). Once passed, article III of the Texas constitution was amended to include section 66, which provides as follows:

Proposition 12 was hotly contested.[13] Electronic ads ran daily in the weeks leading up to the election. The print media were also inundated with ads in favor of and against Proposition 12.[14] Some residents received mailings almost on a daily basis.[15] In total, the

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(a) In this section "economic damages" means compensatory damages for any pecuniary loss or damage. The term does not include any loss or damage, however characterized, for past, present, and future physical pain and suffering, mental anguish and suffering, loss of consortium, loss of companionship and society, disfigurement, or physical impairment.

(b) Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or any combination of theories of liability. The claim or cause of action includes a medical or health care liability claim as defined by the legislature.

(c) Notwithstanding any other provision of this constitution, after January 1, 2005, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, in a claim or cause of action not covered by Subsection (b) of this section. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or any combination of theories of liability.

(d) Except as provided by Subsection (c) of this section, this section applies to a law enacted by the 78th Legislature, Regular Session, 2003, and to all subsequent regular or special sessions of the legislature.

(e) A legislative exercise of authority under Subsection (c) of this section requires a three-fifths vote of all the members elected to each house and must include language citing this section.

TEX. CONST. art. III, § 66.

13. *See* Mariano Castillo, *Perry Pushes Malpractice Cap; Governor Urges Voter Support in Harlingen Hospital Speech*, SAN ANTONIO EXPRESS-NEWS, Sept. 6, 2003, at 5B (characterizing Proposition 12 as "contentious"); Editorial, *Split Decision Vote in Favor of Prop 12 Was: No Mandate*, DALLAS MORNING NEWS, Sept. 16, 2003, at 14A (attributing the relatively large voter turnout and close election to the factiousness of Proposition 12).

14. *See* Mariano Castillo, *Perry Pushes Malpractice Cap; Governor Urges Voter Support in Harlingen Hospital Speech*, SAN ANTONIO EXPRESS-NEWS, Sept. 6, 2003, at 5B ("As the Sept. 13 election nears, advertisements for and against the amendment have proliferated.").

15. *See, e.g.*, Editorial, *Split Decision Vote in Favor of Proposition 12 Was: No Mandate*, DALLAS MORNING NEWS, Sept. 16, 2003, at 14A (joking that the passage of Proposition 12 would result in mounds of campaign literature mercifully making its way to landfills). However, the media pitch also made its way into voters' homes via telephone

opponents and proponents of Proposition 12 spent over $14 million, making it the most expensive vote on a constitutional question in Texas history.[16] In the end, 1,470,443 Texans voted on the issue with 751,896 voting in favor of Proposition 12 and 718,547 voting against.[17] The results varied widely by county.[18] In some counties, the proposition passed by more than 80% of the vote.[19] However, in other counties, it failed by over 70% of the vote.[20]

It is against this intense debate and backdrop that attorneys in civil cases must select juries. In those instances where the support for Proposition 12 was in excess of 80%, plaintiffs would need to carefully conduct voir dire to determine a jury's attitude toward lawsuits and tort reform to then determine whether any prejudice or bias exists. Likewise, defendants in those counties where voters' position against Proposition 12 was in excess of 70% would need to explore the jury's attitude as well to determine whether preexisting attitudes would prejudice the jury against the defendants in the particular litigation.

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campaigning. *See* Dan Wood, Editorial, *Pro and Con on Prop 12*, FORT WORTH STAR-TELEGRAM, Aug. 31, 2003, at 3 ("Under the guise of protecting the Texas court system, [trial lawyers are] calling my house at least twice a day, pitching their cause to protect their income.").

16. Terry Maxon, *Prop 12 Approved by Narrow Margin: Millions of Dollars Spent by Backers, Opponents of Caps on Noneconomic Damages*, DALLAS MORNING NEWS, Sept. 14, 2003, at 1A (stating "Proposition 12 was the most controversial of the 22 proposed constitutional amendments" and cost backers and opponents at least $14 million). *But see* John Williams, *Election Date May Have Clinched Proposition 12; Low Turnout Seen As a Major Factor*, HOUS. CHRON., Sept. 16, 2003, at A13 (noting that despite the $12 million spent on advertising by proponents and opponents of the proposition, the vote in Harris County was very close and the vote may have had different results had the election been held in conjunction with the mayoral vote).

17. OFFICE OF THE SEC'Y OF STATE, RACE SUMMARY REPORT, 2003 CONSTITUTIONAL AMENDMENT ELECTION (2003), http://elections.sos.state.tx.us/elchist.exe.

18. *See id.* (providing a county-by-county summary of the election results).

19. *See id.* (indicating that Proposition 12 passed by more than 80% of the vote in Parmer and Sterling counties). *See generally* Sally Gunter, *Proposition 12 Passes by Slim Margin*, DAILY TOREADOR, Sept. 15, 2003, at 1 (noting unofficial results indicated the proposition passed 51% to 49% statewide and passed by a 69% to 31% margin in Lubbock).

20. *See generally* OFFICE OF THE SEC'Y OF STATE, RACE SUMMARY REPORT, 2003 CONSTITUTIONAL AMENDMENT ELECTION (2003), http://elections.sos.state.tx.us/elchist.exe (detailing the number of votes cast for Proposition 12 in each Texas county).

B. *Technological Advances*

On March 2, 1991, Rodney King was at the home of Bryant "Pooh" Allen watching a basketball game.[21] While watching the game, the men drank heavily.[22] Following the game, King, Allen and another friend left Allen's home and drove down Highway 210.[23] In the early morning hours of March 3, 1991, two California Highway Patrol officers spotted King's Hyundai speeding on the 210 freeway.[24] The California Highway Patrol officers pursued King at speeds in excess of 110 miles per hour for over fifteen minutes.[25] After an extensive chase, King's vehicle was finally brought to a stop.[26] As the California Highway Patrol officers

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21. Douglas O. Linder, *Los Angeles Police Officers' (Rodney King Beating) Trials: A Trial Account*, *in* FAMOUS AMERICAN TRIALS, http://www.law.umkc.edu/faculty/projects/ftrials/lapd/lapd.html (last visited Apr. 3, 2009).

22. *Id.*; *see also* David Whitman, *The Untold Story of the LA Riot*, U.S. NEWS & WORLD REP., May 31, 1993, at 34 (discussing King's evening prior to his encounter with the police). According to Whitman, King and his friends had been enjoying the inexpensive, high-alcohol beer Olde English 800, or "eightballs." David Whitman, *The Untold Story of the LA Riot*, U.S. NEWS & WORLD REP., May 31, 1993, at 34. During the course of the evening, King had "consumed enough eightballs—roughly the equivalent of a case of regular 12-ounce beers—to put his blood alcohol level at twice the legal limit." *Id.*

23. Douglas O. Linder, *Los Angeles Police Officers' (Rodney King Beating) Trials: A Trial Account*, *in* FAMOUS AMERICAN TRIALS, http://www.law.umkc.edu/faculty/projects/ftrials/lapd/lapd.html (last visited Apr. 3, 2009).

24. *Id.*; *see also* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 517 (1994) (detailing the events leading up to the beating of King).

25. *See, e.g.*, Sally Ann Stewart, *Tape Prompts Calls for L.A. Police Chief's Ouster*, USA TODAY, Mar. 7, 1991, at 3A (recounting that King was traveling at 115 miles per hour); Douglas O. Linder, *Los Angeles Police Officers' (Rodney King Beating) Trials: A Trial Account*, *in* FAMOUS AMERICAN TRIALS, http://www.law.umkc.edu/faculty/projects/ftrials/lapd/lapd.html (last visited Apr. 3, 2009) (chronicling the chase lasting approximately fifteen minutes). *But see* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 517 (1994) (recounting a defense witness's testimony that while she had clocked King traveling at up to 80 miles per hour, King's driving was often awkward rather than dangerous); Jim Dwyer, *Maintaining the Calm: Clergy Try to Channel Rage, King Friend Stomps on the Juror's Case*, NEWSDAY, May 4, 1992, at 4 (calling into question the ability of King's Hyundai, which the author sarcastically dubs the "fastest-in-the-world," to travel at speeds of 115 miles per hour and stating that the only police broadcast of King's speed stated he was going 55 miles per hour, contrary to early reports provided by the police officers charged in the assault).

26. California Highway Patrol officers Melanie Singer and Timothy Singer pursued King for approximately ten minutes, beginning at 12:40 a.m. Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 517 n.29 (1994). It is worth noting sources vary in regards to

attempted to arrest King, four Los Angeles Police Department (LAPD) officers joined them.[27] A nearby resident, George Holliday, videotaped the arrest scene as three LAPD officers struck King over fifty times with metal batons before finally getting him into handcuffs.[28] The next day, Holliday gave his videotape to KTLA, a Los Angeles television station.[29] On March 5, 1991, the Holliday videotape played on the evening news for all major networks and cable companies.[30] Many of those viewing the tape expressed shock as to what they saw.[31] King, as a result of the videotape, was released from jail without charges.[32]

On March 10, 1991, an *L.A. Times* poll reported that of those who had seen the videotape, 92% believed that excessive force had

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when the pursuit began and how long it lasted. *See, e.g.*, LOU CANNON, OFFICIAL NEGLIGENCE 25 (1997) (indicating the pursuit began at 12:30 a.m.).

27. *See* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 518 (1994) (naming the police officers present during the beating). Three of the four officers were visible on the videotape actively participating in the assault, namely: Laurence M. Power, Timothy Wind, and Theodore Briseno. *See* STACEY C. KOON, PRESUMED GUILTY: THE TRAGEDY OF THE RODNEY KING AFFAIR 243–49 (1992) (setting forth a forensic lab analysis of the Holliday videotape). Sergeant Stacey Koon supervised the beating. Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 516 (1994). However, "[i]n all, 23 LAPD officers and 13 LAPD units (including one helicopter unit) responded to the scene." *Id.* at 520 n.45. Many of those officers were there merely to see what was occurring and watched the assault with their arms folded. *Id.*

28. *See* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 516, 519–20 (1994) (describing the beating of King and his resulting injuries).

29. *Id.* at 524. Per the Christopher Commission Report, Holliday first tried to report the King incident to the local police; however, he refused to provide the videotape to the police when they refused to confirm the assault. *Id.*

30. *See The Times Poll: Majority Says Police Brutality Is Common*, L.A. TIMES, Mar. 10, 1991, at 1 (reporting a poll that indicated 86% of respondents had seen the televised video); *see also* YouTube.com, Rodney King, http://www.youtube.com/watch?v=ROn_9302UHg (last visited Mar. 17, 2009) (broadcasting the video shot by Holliday of the King assault).

31. *See* Sally Ann Stewart, *L.A. Police Beating Victim: 'Glad I'm Not Dead,'* USA TODAY, Mar. 7, 1991, at 3A (attributing King's release from jail, in part, to the reaction of the public to the video, which resulted in thousands of calls to the LAPD by citizens and police officers nationwide). Another result of the airing of the King video was the increase in reports of police brutality. *See* AARON DOYLE, ARRESTING IMAGES 74–75 (2003) (explaining that the video prompted the public to report incidents of police brutality).

32. Sally Ann Stewart, *L.A. Police Beating Victim: 'Glad I'm Not Dead,'* USA TODAY, Mar. 7, 1991, at 3A.

been used.[33] The incident resulted in at least two separate criminal trials and two separate civil trials. More importantly, the Rodney King incident signaled a change in how incidents such as this were covered in the national media and the role that technology played in media coverage.[34] Video and photographic coverage of events coming from the media itself was no longer the principal means of gathering information; rather, it was coming from participants and from viewers of the events.[35] Surveillance and police cameras initially provided much of the coverage;[36] now, cameras and video recorders built into cell phones have greatly expanded the number of observers with these capabilities.[37] Because of the increased use of alternative video sources, it would be logical to surmise that the number of incidents giving rise to litigation which are caught on tape and which subsequently receive local, regional or national news coverage has greatly expanded.[38]

These technological advances have increased the probability that one or more veniremen may have received some information

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33. *The Times Poll: Majority Says Police Brutality Is Common*, L.A. TIMES, Mar. 10, 1991, at 1. Two-thirds of the respondents said they believed brutality incidents by LAPD were common. *Id.* The poll also reflected both a substantial distrust of the department and a belief King was accosted because of his race. *Id.* Finally, the poll reflected unease among the respondents about whether justice would ever be done. *See id.* (reporting that 58% of respondents indicated they were at least somewhat confident justice would be done and that 37% were doubtful).

34. *See* AARON DOYLE, ARRESTING IMAGES 74 (2003) (discussing how the Rodney King incident's national media coverage was a strong stimulus to amateur videographers).

35. *See id.* (noting the worldwide attention given to the King video). The shift in the images that were used in television began in 1987 when "CNN inaugurated its *News Hound* program, in which viewers who had amateur footage for CNN could call a 1-800-number" to have the video aired by CNN. *Id.* By 1989, CNN was airing several *News Hound* videos a day. *Id.* However, the King video "was a massive further stimulus to amateur videographers," and by 1993, a survey of 100 news directors found that 77% utilized similar videos. *Id.*

36. *See* AARON DOYLE, ARRESTING IMAGES 3, 64 (2003) (discussing a trend in television broadcasting of using surveillance footage, and explaining the pivotal role surveillance and video cameras have played in changes to news reporting).

37. *See id.* at 5, 165 n.9 (attributing the rise in the use of amateur video to the increased ownership of camcorders and other sources of video, and explaining the early role cell phones played in providing real-time updates of news stories); Adam J. Rappaport & Amanda M. Leith, *Brave New World? Legal Issues Raised by Citizen Journalism*, COMM. LAW., Summer 2007, at 1, 29 (listing several recent crime incidents in which the first footage was taken by cell phone video cameras).

38. *Cf.* Regina Austin, *The Next "New Wave": Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809, 849–56 (2006) (exploring the ways in which video technology has changed legal advocacy, including using video as an evidentiary source).

regarding a particular event or occurrence. Stories that were once local stories are now national stories. It is because of this expansion of information available to potential jurors through technology that a more rigorous and more thorough voir dire is required. Greater care and caution must now be exercised to ensure that jurors come into the trial with no prior knowledge of the events or occurrences, or if they do have prior knowledge, that it is explored.

This article will first address the constitutional background of voir dire as well as the constitutional rights implicated by voir dire. Second, the article will discuss the permitted purposes of voir dire. Finally, the article will revisit the constitutional rights implicated as well as the scrutiny to be applied by courts in determining whether those rights have been violated.

II. BACKGROUND

A. *Constitutional History of Right to a Trial by Jury*

The right to a trial by jury is firmly entrenched in Texas jurisprudence. Every constitution involving Texas, whether Texas was part of the Republic of Mexico, its own Republic, a state in the Confederate States of America, or a state in the United States, recognized and, almost uniformly contained, a right to trial by jury.[39]

Texans were first offered the hope of the right to trial by jury under their state constitution while Texas was a state in the

39. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); TEX. CONST. of 1876, art. I, §§ 10, 15 (guaranteeing the right to trial by jury in criminal cases and declaring that the right to trial by jury must remain inviolate); TEX. CONST. of 1869, art. I, §§ 8, 12, art. V, § 16 (guaranteeing the right to trial by jury in criminal and civil cases, as well as cases in equity and those tried in district court, and maintaining that the right to a jury must remain inviolate); TEX. CONST. of 1866, art. IV, § 8 ("In the trial of all causes in equity in the District Courts, the plaintiff or defendant shall . . . have the right of trial by jury."); TEX. CONST. of 1861, art. IV, § 16 ("In the trial of all cases in equity in the District Court, the plaintiff or defendant shall . . . have the right of trial by jury . . . ."); TEX. CONST. of 1845, art. IV, § 16 (joining the United States and guaranteeing the right to a jury); REPUB. TEX. CONST. of 1836, Declaration of Rights, § 6, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1083 (Austin, Gammel Book Co. 1898) (declaring the Declaration of Rights, which contains the right of jury trial, to be an inviolable part of the Constitution of the Republic of Texas). *But see* COAHUILA AND TEX. CONST. of 1827, tit. III, art. 192, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 423, 449 (Austin, Gammel Book Co. 1898) (outlining as one of the "main objects of attention of congress," a plan to establish the right to trial by jury in certain cases).

Republic of Mexico.[40] However, despite the many aspirations of this early constitution, no right to trial by jury was established.[41] The failure to establish the right to a trial by jury was one of the grievances listed by the planners of the Texas Declaration of Independence on March 2, 1836, when they declared their independence from the Republic of Mexico.[42] Furthermore, the

40. *See* COAHUILA AND TEX. CONST. of 1827, tit. III, art. 192, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 423, 449 (Austin, Gammel Book Co. 1898) (indicating that one of the main goals of the new congress "shall be" to create the right to trial by jury).

41. *See* S.S. McKay, *Constitution of Coahuila and Texas*, *in* 2 TEX. STATE HISTORICAL ASS'N, THE NEW HANDBOOK OF TEXAS 287, 287 (Ron Tyler et al. eds., 1996) ("Trial by jury, promised by the constitution, was never established . . . ."); Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 98 (1988) ("There was no trial by jury in either criminal or civil cases, although such was to be established in the future. The right to trial by jury was never established in Texas prior to its independence in 1836."); Ricky J. Poole & Kimberly S. Keller, *Jury Erosion: The Effects of* Robinson, Havner, *&* Gammill *on the Role of Texas Juries*, 32 ST. MARY'S L.J. 383, 388 (2001) (confirming that prior to Texas's independence, its constitution had not contained a right to trial by jury).

42. *See* THE DECLARATION OF INDEPENDENCE (Repub. Tex. 1836), *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1063, 1065 (Austin, Gammel Book Co. 1898) (listing as a grievance the failure and refusal "to secure, on a firm basis, the right of trial by jury"); *see also* Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 99 (1988) ("One of the main complaints that caused the citizens of Texas to declare their independence from Mexico was the lack of trial by jury . . . ."); Lone Star Junction, The Texas Declaration of Independence (March 2, 1836), http://www.lsjunction.com/docs/tdoi.htm (last visited Mar. 17, 2009) (describing the urgent circumstances leading to the drafting of the declaration). The Texas declaration parallels the United States Declaration of Independence. Lone Star Junction, The Texas Declaration of Independence (March 2, 1836), http://www.lsjunction.com/docs/tdoi.htm (last visited Mar. 17, 2009). *Compare* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) ("For depriving us in many cases, of the benefits of Trial by Jury . . . ."), *with* THE DECLARATION OF INDEPENDENCE (Repub. Tex. 1836), *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1063, 1065 (Austin, Gammel Book Co. 1898) ("[The Mexican government] has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen."). Furthermore, the circumstances surrounding the inclusion of the right to trial by jury in the Texas constitution are very similar to those preceding the drafting of the United States Constitution. In both instances, the right to a trial by jury was guaranteed by a pre-Republic constitution, the central government acted to deny the inhabitants of the right to a trial by jury, such denial was a motivating grievance listed in the Declaration of Independence, and finally, the right was safeguarded respectively in the Bill of Rights and the Declaration of Rights. *Compare* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (noting the history of the King of Great Britain depriving the people of the benefit of trial by jury), U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury . . . ."), *and* U.S. CONST. amends. VI, VII (providing for jury trials in civil and criminal cases), *with* THE DECLARATION OF INDEPENDENCE (Repub. Tex. 1836), *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF

right to a trial by jury was likewise one of the foundations of the Constitution of the Republic of Texas.[43]

When Texas originally joined the United States in 1845, the right to a trial by jury was well embodied in the federal Constitution.[44] When Texas withdrew from the United States and became a member of the Confederate States of America, Texas continued the tradition of the right to a trial by jury by including this right in the Constitution of 1861.[45] This constitution even guaranteed the right to a trial by jury to slaves in certain circumstances.[46] Finally, the Constitution of 1876 continues to guarantee its citizens the right to a trial by jury.[47]

TEXAS 1822–1897, at 1063, 1063 (Austin, Gammel Book Co. 1898) (explaining that the Mexican government's failure to protect certain rights was the impetus for the Declaration of Independence), *and* REPUB. TEX. CONST. of 1836, Declaration of Rights, § 6, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1082–84 (Austin, Gammel Book Co. 1898) (reiterating the right to trial by jury).

43. *See generally* REPUB. TEX. CONST. of 1836, Declaration of Rights, § 6, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1083 (Austin, Gammel Book Co. 1898) (asserting that the government would guarantee the right to trial by jury). The original constitution of the Republic of Texas was adopted on March 17, 1836, and contained a provision adopting the list of grievances in the Declaration of Independence. REPUB. TEX. CONST. of 1836, Declaration of Rights, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1082 (Austin, Gammel Book Co. 1898). Specifically, the 1836 constitution provided:

> This declaration of rights is declared to be a part of this constitution, and shall never be violated on any pretence whatever. And in order to guard against the transgression of the high powers which we have delegated, we declare that every thing in this bill of rights contained, and every other right not hereby delegated, is reserved to the people.

Id. In its fourth section, the Declaration of Rights secured the right to a jury trial for civil libel prosecutions. REPUB. TEX. CONST. of 1836, Declaration of Rights, § 4, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1082 (Austin, Gammel Book Co. 1898). Likewise, the drafters specifically provided for the right to a trial by jury in criminal cases, ensuring the right to a speedy, public trial by an impartial jury. REPUB. TEX. CONST. of 1836, Declaration of Rights, § 6, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1082–83 (Austin, Gammel Book Co. 1898). Finally, the ninth section of the Declaration of Rights provided that "the right of trial by jury shall remain inviolate." REPUB. TEX. CONST. of 1836, Declaration of Rights, § 9, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1069, 1082–83 (Austin, Gammel Book Co. 1898).

44. U.S. CONST. amend. VI.

45. TEX. CONST. of 1861, art. IV, § 16.

46. TEX. CONST. of 1861, art. VIII, § 4. The constitution prohibited the legislature from depriving slaves of the right to a trial by jury, so long as the slave was charged with a crime of a grade higher than petit larceny and the crime did not concern the laws of insurrection of slaves. *Id.*

47. TEX. CONST. art. I, §§ 10, 15; *see also* Ricky J. Poole & Kimberly S. Keller, *Jury*

B. *The Constitutional Implications of Voir Dire*

Babcock v. Northwest Memorial Hospital was one of the first cases addressing the right to a trial by an impartial jury as being impacted by limitations on voir dire.[48] Prior to the trial on medical negligence, the trial court granted a motion in limine prohibiting "[a]ny mention of the alleged 'liability insurance crisis,' [or] 'medical malpractice crisis'" and another motion in limine preventing any discussion of print, radio or television advertisements paid for by insurance companies that discuss the aforementioned crises.[49] During the course of voir dire, Babcocks' counsel raised the issue again, arguing that such a limitation prevented them from being able to select an impartial jury.[50] The Texas Supreme Court agreed, ruling that the refusal to allow questions directed at exposing bias or prejudice denied the plaintiffs the right to a trial by a fair and impartial jury.[51] Therefore, the constitutional right to a trial by jury will be implicated when a court places unreasonable restrictions on voir dire.[52]

Restrictions on voir dire have also been found to impact the right of a party to be represented by counsel or to represent himself.[53] In *Ex parte McKay*,[54] the Texas Court of Criminal

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Erosion: The Effects of Robinson, Havner, & Gammill *on the Role of Texas Juries*, 32 ST. MARY'S L.J. 383, 388 (2001) ("Under the present state constitution, the right to trial by jury is protected by two separate provisions.").

48. *See generally* Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989) (determining the "trial court's refusal to allow questions during voir dire" regarding the liability insurance or lawsuit crises "resulted in the denial of the Babcocks' constitutional right to trial by a fair and impartial jury").

49. *Id.* at 706.

50. *Id.* at 706–07. In fact, the motivating factor for renewing the objection seems to have been the fact that a juror, on his own accord, questioned his ability to be impartial after having seen advertisements regarding the malpractice crisis. *Id.* at 706.

51. *Id.* at 709.

52. *See* Sw. Elec. Power Co. v. Martin, 844 S.W.2d 229, 237 (Tex. App.—Texarkana 1992, writ denied) (recognizing the constitutional implications accrued by restrictions on voir dire). Furthermore, if a trial court abused its discretion by limiting voir dire, a party would be denied the right to a trial by jury. *Id.*

53. Article I, section 10 of the Texas constitution provides: "In all criminal prosecutions the accused shall have . . . the right of being heard by himself or counsel, or both . . . ." TEX. CONST. art. I, § 10. While the provisions of article I, section 10 are limited to right to counsel in criminal cases, there are, in those cases, constitutional implications arising in voir dire. This right was first recognized in *Mathis v. State*, which held the right to be represented by counsel subsumes the right to adequate voir dire. Mathis v. State, 576 S.W.2d 835, 836 (Tex. Crim. App. 1979).

54. *Ex parte* McKay, 819 S.W.2d 478 (Tex. Crim. App. 1990) (en banc).

Appeals held that "[t]he constitutionally guaranteed right to counsel encompasses the right to question prospective jurors in order to intelligently and effectually exercise peremptory challenges and challenges for cause during the jury selection process."[55] To ensure that right is protected, "trial judges should allow defendants much leeway in questioning a jury panel during voir dire."[56] In particular, courts should be wary of dispatching the business of the court with promptness and expedition if this result is "attained at the risk of denying to a party on trial a substantial right."[57]

Finally, it is worth noting that courts have also recognized that the due process clauses[58] of the Texas and United States Constitutions may be implicated by jury selection.[59] These cases are somewhat limited in number and in scope. In all probability, courts have made sparse use of this constitutional provision because of the tremendous rights conferred by the right to trial by jury provisions previously discussed.

III. PURPOSE OF VOIR DIRE

Understanding the purpose of voir dire is critical in assessing whether there have been infringements upon a party's constitutional rights by limitations placed upon the voir dire process. If the questions to be asked are not directed toward the purpose of voir dire, then in all likelihood there will be no

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55. *Id.* at 482 (citing Gardner v. State, 730 S.W.2d 675, 689 (Tex. Crim. App. 1987); Smith v. State, 703 S.W.2d 641, 643 (Tex. Crim. App. 1985); Mathis v. State, 167 Tex. Crim. 627, 629, 322 S.W.2d 629, 631 (1959)).

56. *Id.*; *see also* McCarter v. State, 837 S.W.2d 117, 118, 120 (Tex. Crim. App. 1992) (en banc) (quoting *McKay* in deciding whether the limitation of voir dire to thirty minutes was an unreasonable limitation on the constitutional right to a trial by jury); Morris v. State, 1 S.W.3d 336, 339–40 (Tex. App.—Austin 1999, no pet.) (relying on a three-prong test outlined in Ratliff v. State, 690 S.W.2d 597, 599–600 (Tex. Crim. App. 1985) (en banc), to determine if the trial court abused its discretion in limiting the amount of time available for voir dire).

57. *McCarter*, 837 S.W.2d at 120 (quoting *Smith*, 703 S.W.3d at 645).

58. Article I, section 19 of the Texas constitution provides as follows: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. The United States Due Process Clause provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

59. *See, e.g.*, Collier v. State, 959 S.W.2d 621, 623–24 (Tex. Crim. App. 1997) (en banc) (holding that proper voir dire questions can implicate due process rights, but declining to find error in the court's refusal to allow questions relating to parole).

infringement.[60] On the other hand, if the questions the trial court refuses to allow strike at the heart of voir dire's purpose, then the appellate courts are more likely to find that a violation of the party's constitutional rights has occurred.[61]

The purpose of voir dire is manifold. Some authors have recognized at least six goals an attorney should attempt to achieve in conducting voir dire.[62] At its broadest level, voir dire and its attendant preparation can enhance and improve overall trial strategy.[63] More specifically, voir dire has five goals that relate to the jurors themselves.[64] First, counsel should use voir dire to establish a rapport with potential jurors.[65] Voir dire also allows counsel to introduce jurors to the case, condition the jurors to the parties' issues, and obtain favorable pledges from jurors.[66] Perhaps the most commonly known goal of voir dire is to identify favorable and unfavorable jurors in order to most effectively use challenges.[67] However, it is worth noting that the purposes of voir dire extend beyond these challenges; it is a useful tool for making those seated jurors feel special about being chosen.[68]

Likewise, Texas courts have also judicially recognized at least three legitimate or semi-legitimate purposes for the conduct of voir dire.[69] Although these purposes are certainly not exclusive,

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60. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 757–58 (Tex. 2006) (holding as impermissible, questions that seek to gauge the weight jurors would place on specific items of evidence).

61. *See id.* at 756 (holding that if a question probes for prejudices and not a probable verdict, it will be permissible, subject to the trial court's discretion).

62. *See* Arthur H. Patterson, *The Goals of Voir Dire*, 7 A.L.I.-A.B.A. COURSE OF STUDY 413, 415–16 (2006), *available at* WESTLAW SM007 ALI-ABA 413 (listing the six goals of voir dire).

63. *See id.* at 415 (discussing that a major goal of preparation for a jury trial is the use of voir dire to improve general trial strategy).

64. *See id.* at 415–16 (listing the five goals relating to the jurors themselves).

65. *Id.* at 415.

66. *Id.* at 416.

67. Arthur H. Patterson, *The Goals of Voir Dire*, 7 A.L.I.-A.B.A. COURSE OF STUDY 413, 416 (2006), *available at* WESTLAW SM007 ALI-ABA 413.

68. *Id.*

69. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749 (Tex. 2006) (noting that an important purpose of voir dire is to discover improper views and prejudices of potential jurors); Sanchez v. State, 165 S.W.3d 707, 710–11 (Tex. Crim. App. 2005) (en banc) (listing, as a purpose of voir dire, discovery of information that would support a challenge for cause); Sadler v. State, 977 S.W.2d 140, 142 (Tex. Crim. App. 1998) (en banc) (discussing how voir dire may be utilized to discover an improper bias of a potential juror); Smith v. State, 907 S.W.2d 522, 529 (Tex. Crim. App. 1995) (en banc) (stating that a

their enumeration is important for the constitutional analysis of limitations placed upon voir dire. These purposes are as follows: (1) to elicit information to allow a party to challenge a potential juror for cause;[70] (2) to elicit information to allow a party to intelligently exercise his or her peremptory challenges;[71] and (3) to indoctrinate the jury on the party's view of the case.[72] Each of the three judicially recognized purposes will be discussed below with their impact on the constitutional protection afforded litigants during voir dire.

A. *Challenges for Cause*

Undisputedly, a valid and integral part of voir dire is to allow a party's attorney to elicit information from the venireman in order to exercise challenges for cause.[73] A party may exercise a challenge for cause for several reasons: (1) statutory disqualification; (2) affinity of the juror with the case, party or a witness; or (3) the juror's bias or prejudice.

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purpose of voir dire is to discover if a juror will be unable to be fair and impartial); Dhillon v. State, 138 S.W.3d 583, 587 (Tex. App.—Houston [14th Dist.] 2004, pet. struck) ("The purposes of voir dire are to: (1) develop rapport between the officers of the court and the jurors; (2) expose juror bias or interest warranting a challenge for cause; and (3) elicit information necessary to intelligently use peremptory challenges."); Tobar v. State, 874 S.W.2d 87, 89 (Tex. App.—Corpus Christi 1994, pet. ref'd) (listing the exposure of juror bias and testing of juror qualifications as primary purposes of voir dire).

70. *See Hyundai*, 189 S.W.3d at 749 (stating that the first purpose of voir dire is to discover views of prospective jurors that would prevent them from performing their statutory duties); *Sanchez*, 165 S.W.3d at 711 (citing TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon 2006)) (stating that a purpose of voir dire is to garner information that could support a juror challenge for cause); *Sadler*, 977 S.W.2d at 142 & n.3 (noting the use of voir dire to discover potential biases that could lead to a juror challenge); *Smith*, 907 S.W.2d at 528–29 (illustrating an example where a potential juror's bias against the State was revealed in voir dire and how that bias was sufficient to support a challenge for cause).

71. *See Hyundai*, 189 S.W.3d at 749 (recognizing that gathering information to intelligently utilize challenges is one purpose of voir dire); *Sanchez*, 165 S.W.3d at 710–11 (asserting that voir dire serves the purpose of providing counsel with information necessary to utilize challenges intelligently).

72. *Sanchez*, 165 S.W.3d at 711. However, it is important to note that the *Sanchez* court viewed the third purpose—indoctrination—as neither constitutionally nor statutorily based. *See id.* (noting that indoctrination is "not necessarily a legally legitimate" purpose).

73. *E.g.*, *Hyundai*, 189 S.W.3d at 749 (recognizing a litigant's ability to assess whether a statutory basis for disqualifying a particular juror exists as the overarching purpose of voir dire examination).

1. Challenges for Cause Based upon Qualifications

Greater latitude is allowed by trial courts for attorneys to question jurors for statutory bases for disqualification than perhaps any other area.[74] The legislature has been granted the authority by the constitution to pass laws pertaining to jury selection.[75] Under section 62.102 of the Texas Government Code, a person may not serve as a petit juror unless the person is at least eighteen years of age and a citizen of Texas, as well as of the county in which the person will serve as a juror.[76] Additionally, the person must be able to read and write, must be of sound mind and good moral character, and must have no previous felony or misdemeanor theft convictions nor be under a felony or misdemeanor theft indictment.[77] Finally, the last ground for disqualification is prior service as a petit juror.[78] A potential juror may not have "served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court."[79]

The eight qualifications mentioned above go to a person's ability to serve as a juror.[80] In most counties in Texas, these areas are determined not by the attorneys, but by the trial judge or by the clerk administering the impaneling of the jury. However, it is not uncommon for a potential juror to not hear or understand the qualifications to serve as a petit juror. Often, in the course of voir dire, one or more of these disqualifications becomes apparent. If this happens, then a challenge for cause would be appropriate.[81]

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74. *See, e.g.*, Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 708 (Tex. 1989) (acknowledging that if counsel has reason to believe that a juror has either a direct or indirect interest in the trial's outcome, counsel has a right to inquire into that juror's interest (citing Green v. Ligon, 190 S.W.2d 742, 747 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.))).

75. *Hyundai*, 189 S.W.3d at 749. In guaranteeing fairness and impartiality, the Texas constitution enables the state legislature to enact such measures as are necessary "to maintain [the] purity and efficiency" of the manner in which trials are conducted. TEX. CONST. art. I, § 15. As a result, "[t]he [l]egislature ... has authority to pass laws establishing those qualified to serve, consistent with the right to a jury trial." *Hyundai*, 189 S.W.3d at 749.

76. TEX. GOV'T CODE ANN. § 62.102(1)–(3) (Vernon 2005).

77. *Id.* § 62.102(4)–(5), (7)–(8).

78. *Id.* § 62.102(6).

79. *Id.*

80. *Id.* § 62.102 (listing the eight qualifications to serve as a petit juror in Texas courts).

81. *See* TEX. GOV'T CODE ANN. § 62.102 (Vernon 2005) (setting forth the minimum

2. Challenges for Cause Based upon Affinity with Case, Witnesses or Parties

An area in voir dire typically not covered by the court or by the clerk administering the panel is possible disqualification based upon affinity with the case, witnesses or parties. Section 62.105 of the Texas Government Code disqualifies certain individuals who have prior knowledge of the case or affinity with parties associated with the case.[82] The basis or logic for this disqualification is that jurors who are hearing the case should base their decision upon the evidence received from the exhibits admitted and testimony admitted on the witness stand.[83] Should the juror have prior knowledge of the facts of the case or prior knowledge of the witnesses or parties, then it would be difficult for that juror to differentiate whether his or her decision was based upon the facts that came in during the trial or rather, in prior experience with the parties, witnesses, or the case. Of particular importance is section 62.105(4), which disqualifies from jury service one who "has a bias or prejudice in favor of or against a party in the case."[84]

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prerequisites to one's legal ability to serve as a juror); Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749 (Tex. 2006) (noting that a juror who does not satisfy the requirements set forth by the legislature must be disqualified).

82. *See* TEX. GOV'T CODE ANN. § 62.105 (Vernon 2005) (listing juror disqualifications based on the juror's knowledge or affinity to the particular case). Section 62.105 of the Texas Government Code provides:

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

Id.

83. *Cf. Hyundai*, 189 S.W.3d at 749 (stating that voir dire allows the discovery of a prospective juror's views that would substantially impair the juror from performing his or her statutory duty); State v. Morales, 253 S.W.3d 686, 693 (Tex. Crim. App. 2008) (en banc) (holding that a trial court could, but is not required to, confer a challenge for cause against a juror based solely on relationship to the case because the juror asserted that she could be impartial); Silsbee Hosp., Inc. v. George, 163 S.W.3d 284, 295 (Tex. App.—Beaumont 2005, pet. denied) (reiterating that the purpose of jury selection is to provide an impartial jury).

84. TEX. GOV'T CODE ANN. § 62.105(4) (Vernon 2005). Courts have acknowledged the importance of allowing litigants sufficient procedural flexibility to properly determine whether an improper juror bias exists. *See generally Hyundai*, 189 S.W.3d at 749 ("Thus,

3. Challenges for Cause Based upon Bias or Prejudice

Because the Government Code does not define "bias" or "prejudice," the supreme court has defined those terms.[85] In the 1963 case of *Compton v. Henrie*,[86] the Texas Supreme Court originally adopted the definition used today. In *Compton*, the court provided the following definition:

> Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined for it means prejudgment, and consequently embraces bias; the converse is not true.[87]

Other sources provide greater definition to those two terms. Bias generally relates to inclinations.[88] On the other hand, other sources have defined prejudice to generally mean "prejudgment."[89] Despite the Government Code's lack of definitions for these terms, courts have extended the definitions of bias or prejudice to include jurors who are biased or prejudiced against certain types of cases.[90]

There are certain types of biases and prejudices that are disqualifying and there are certain types that are not disqualifying.[91] For example, a juror who is prejudiced against all types

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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.").

85. *See* Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963) (defining "bias" as leaning to one side of an issue rather than the other, and "prejudice" as prejudgment).

86. Compton v. Henrie, 364 S.W.2d 179 (Tex. 1963).

87. *Id.* at 182.

88. *See* BLACK'S LAW DICTIONARY 171 (8th ed. 2004) (defining bias as "[i]nclination; prejudice; predilection"); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 118 (11th ed. 2006) (defining bias as "an inclination of temperament or outlook; [especially]: a personal and sometimes unreasoned judgment").

89. *See* BLACK'S LAW DICTIONARY 1218 (8th ed. 2004) (defining prejudice as "[a] preconceived judgment formed without a factual basis; a strong bias"); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 979 (11th ed. 2006) (defining prejudice as "(1): preconceived judgment or opinion (2): an adverse opinion or leaning formed without just grounds or before sufficient knowledge").

90. *See, e.g.*, *Compton*, 364 S.W.2d at 182 (explaining that the Texas statutory disqualifications of bias and prejudice also extend to bias or prejudice against the type of case).

91. *See id.* (instructing that in order to be disqualified, certain degrees of bias or prejudice must exist, though if the required state of mind is established the juror would be

of a particular case is necessarily prejudiced "against a party in the case" and should be disqualified.[92] In addition, a juror will be disqualified if he or she has the "general inability to follow the court's instructions regarding the law."[93]

On the other hand, courts have "refused to hold that statements that reflect a juror's judgment about the facts of a case as presented, rather than an external unfair bias or prejudice, amount to a disqualifying bias."[94] In *Cortez ex rel. Puentes v. HCCI—San Antonio*,[95] the supreme court indicated that statements intended to elicit a venire member's initial leanings in the case are not permitted and are not a basis for disqualification.[96] The attorney gave a summary of the evidence during his voir dire presentation and asked the potential jurors whether one party was "starting out ahead" of the other.[97] The supreme court held such questions were not proper questions and that responses to these questions would not disqualify a juror because the inquiry sought "an opinion about the evidence" rather than external or unfair bias.[98] The constitution does not guarantee a party to have a jury sympathetic to the facts of his own case; it only guarantees the right to a trial by a fair and impartial jury.[99] If there were a

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disqualified as a matter of law, and further explaining that when the grounds for disqualification are outside the statute, the trial judge may use his discretion in determining disqualification on the basis of either prejudice or bias).

92. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 751 (Tex. 2006) (citing TEX. GOV'T CODE ANN. § 62.105(4) (Vernon 2005)) (explaining that if a juror is prejudiced against all claims of a particular type, he would meet the necessary level of prejudice to be disqualified from service).

93. *Id.*

94. *Id.* The *Hyundai* court addressed the notion of impermissible commitment questions, which seek to "determine the weight to be given (or not to be given) a particular fact or set of relevant facts." *Id.* at 750. The court crafted an approach steeped in recognition of the practical reality that the broad scope of voir dire frequently results in jury exposure to salient facts of the case during voir dire. *Id.* Specifically, the *Hyundai* court stated that trial courts act within their discretion in precluding litigants from asking questions that include a preview of the evidence; however, where questions of this nature are permitted, the jurors' corresponding responses cannot be disqualifying. *Hyundai*, 189 S.W.3d at 750. This approach rests on the notion that, as an operation of the questions, the answers reveal "fact-specific opinion[s]," which do not amount to "improper subject-matter bias[es]." *Id.* at 751.

95. Cortez *ex rel.* Puentes v. HCCI—San Antonio, Inc., 159 S.W.3d 87 (Tex. 2005).

96. *Id.* at 93–94.

97. *Id.* at 94.

98. *Id.*

99. *Id.*; *cf.* TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate.").

guarantee of sympathetic jurors, every potential juror in civil or criminal cases involving extremely egregious conduct could be disqualified and it would be impossible to impanel a jury.[100]

B. *Peremptory Challenges*

The second purpose of voir dire is to collect information to allow counsel to intelligently exercise their peremptory challenges.[101] This purpose applies in both civil and criminal cases.[102] The right to peremptory challenges has controlled civil trials for over one hundred years in Texas.[103] Under Rule 232 of the Texas Rules of Civil Procedure, "[a] peremptory challenge is made to a juror without assigning any reason therefor."[104] Thus, under the rules, peremptory challenges may be "exercised without a reason stated, without inquiry and without being subject to the court's control,"[105] so long as the reason is not prohibited by law.[106] In civil cases, the United States Supreme Court has held

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100. *Cf.* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1095 (1995) (advancing the proposition that while a party has no right to a sympathetic jury, the peremptory challenge provides one); Julie A. Wright, Comment, *Challenges for Cause Due to Bias or Prejudice: The Blind Leading the Blind Down the Road of Disqualification*, 46 BAYLOR L. REV. 825, 828 (1994) (contending that it is improper to excuse potential jurors for answering questions that inquire into the weight of the evidence).

101. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 750 (Tex. 2006) ("Voir dire inquiry into potential juror bias and prejudice thus is proper to determine whether jurors are disqualified by statute and to seek information that allows counsel to intelligently exercise their peremptory strikes.").

102. *See* TEX. R. CIV. P. 233 (allotting six peremptory strikes to each party in a civil case); Sanchez v. State, 165 S.W.3d 707, 711 (Tex. Crim. App. 2005) (en banc) (acknowledging the State's and defendant's statutory right to peremptory strikes in criminal cases).

103. Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 917 (Tex. 1979).

104. TEX. R. CIV. P. 232; *see also* TEX. R. CIV. P. 233 ("[E]ach party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court."). However, this lack of reason can result in concerns that a peremptory strike was utilized for improper purposes. *See, e.g.*, Goode v. Shoukfeh, 943 S.W.2d 441, 445–46 (Tex. 1997) (outlining procedures when race is alleged to have been the basis of a peremptory strike). Peremptory strikes, although requiring no stated reason, are not intended to allow a party to select the jury. Craig T. Enoch & David F. Johnson, *Narrowing the Ability to Strike Jurors: The Texas Supreme Court Addresses Important Voir Dire Issues*, 39 TEX. TECH L. REV. 229, 233 (2007). "When the number of strikes allowed to one side of the suit is grossly disproportionate to the number allowed the other side, it permits the side with the greater number to actually construct the jury." *Patterson Dental Co.*, 592 S.W.2d at 919.

105. *Sanchez*, 165 S.W.3d at 711.

106. *See Hyundai*, 189 S.W.3d at 750 (noting parties are prohibited from "select[ing]"

that private parties may not base their peremptory challenges on a juror's race.[107] The rationale for this ruling is that when private litigants participate in the selection of jurors, "they serve an important function within the government and act with its substantial assistance."[108] The prohibition on use of peremptory challenges based on race has been extended by the Texas Supreme Court to jury selection within this state.[109]

It should also be noted that "[t]he purpose of allowing strikes is not to allow a party to [s]elect a jury; instead, strikes are intended to permit a party to [r]eject certain jurors based upon a subjective perception that those particular jurors might be unsympathetic to his position."[110] Ultimately, counsel's wide latitude in voir dire with respect to peremptory challenges is constrained by reasonable control of the trial court,[111] because "'[t]hough the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body.'"[112]

C. *Jury Indoctrination*

The third purpose of voir dire identified by the courts "is to indoctrinate the jurors on the party's theory of the case and establish rapport with prospective jury members."[113] Professor Dorsaneo recognizes the importance of this first encounter with the jury and urges:

> Counsel should not underestimate the importance of appearance and conduct ... and must endeavor to create a favorable first impression. The task at hand is more than the mere gleaning of information helpful to counsel in exercising challenges against unwanted jurors. Added purposes of voir dire include setting the jurors at ease, creating a degree of rapport with them, and stating

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favorable jurors on the basis of race).

107. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 617–31 (1991).

108. *Id.* at 628.

109. *See* Powers v. Palacios, 813 S.W.2d 489, 490 (Tex. 1991) (holding that using a peremptory challenge to exclude a juror based on race is a violation of the challenged juror's equal protection rights).

110. *Hyundai*, 189 S.W.3d at 750; Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979).

111. *Hyundai*, 189 S.W.3d at 750.

112. *Id.* (quoting *Edmonson*, 500 U.S. at 626).

113. Sanchez v. State, 165 S.W.3d 707, 711 (Tex. Crim. App. 2005).

> the general nature of the case, all in such a way that the jurors will be on counsel's side from the beginning.[114]

However, as the court noted in *Sanchez v. State*,[115] this third purpose is "not necessarily a legally legitimate one."[116] While the court recognized the practical interests explained by Professor Dorsaneo, the court concluded that the parties' interests in using voir dire as a means of indoctrination were undercut by the fact that this purpose has neither a statutory nor constitutional basis.[117] Furthermore, questions relating to legal theory do not go to the ability of the jurors to be impartial.[118] Based on the lack of legal basis for the purpose, the court placed its use at the discretion of the trial court, providing that the trial judge "may permit or prohibit it as he deems appropriate."[119]

In *Hyundai Motor Co. v. Vasquez*,[120] the Texas Supreme Court provided additional guidance. The court explained:

> Statements during voir dire are not evidence, but given its broad scope in Texas civil cases, it is not unusual for jurors to hear the salient facts of the case during the voir dire. If the voir dire includes a preview of the evidence, we hold that a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts.[121]

Thus, questions seeking commitment of jurors as to specific factual scenarios are not proper and should not be allowed in voir dire.[122] Likewise, it is improper to ask prospective jurors what their verdict would be if a certain set of facts existed.[123]

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114. 5 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 120.02[1] (2007).

115. Sanchez v. State, 165 S.W.3d 707 (Tex. Crim. App. 2005).

116. *Id.* at 711.

117. *See id.* (noting that the purpose of voir dire "to indoctrinate the jurors on the party's theory of the case and to establish rapport with the prospective jury members ... has neither a constitutional nor a statutory basis").

118. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 753 (Tex. 2006).

119. *Sanchez*, 165 S.W.3d at 711.

120. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743 (Tex. 2006).

121. *Id.* at 753; *see* Cortez *ex rel.* Puentes v. HCCI—San Antonio, Inc., 159 S.W.3d 87, 94 (Tex. 2005) ("[A]ttempts to preview a veniremember's likely vote are not permitted.").

122. *See generally Hyundai*, 189 S.W.3d at 751–53 ("Fair and impartial jurors reach a verdict based on the evidence, and not on bias or prejudice. Voir dire inquiries to jurors should address the latter, not their opinions about the former.").

123. *Cortez*, 159 S.W.3d at 94; *see also* S.R. Shapiro, Annotation, *Propriety and Effect of Asking Prospective Jurors Hypothetical Questions, on Voir Dire, As to How They*

IV. VOIR DIRE QUESTIONS TRIGGERING CONSTITUTIONAL IMPLICATIONS

Not all voir dire questions incur constitutional implications. Rather, Texas courts have been somewhat narrow in the scope of questions that they have held trigger constitutional protection. As stated earlier, some commentators have recognized at least six distinct purposes for voir dire while Texas courts have recognized three.[124] However, of those reasons discussed by the courts, only two are afforded constitutional protection.

Courts are very clear that one of the primary purposes of voir dire is to allow a party to challenge a potential juror for cause. Because the exercise of challenges for cause is one of the fundamental purposes of voir dire, the courts have held that a denial of the right to ask proper questions to determine when grounds exist to challenge for cause would deny the party the right to a trial by a fair and impartial jury.[125]

When the proposed voir dire questions go to the issue of a party's exercise of peremptory challenges, constitutional issues are likewise implicated. Again, this is one area that the courts have held to be a legitimate and proper purpose of voir dire. Any limitation on the exercise of rights in this area would result in a denial of the right to a trial by an impartial jury.[126]

Would Decide Issues of Case, 99 A.L.R.2D 7 (1965) (discussing the general rule pertaining to posing hypothetical questions to veniremen as adopted in *Cortez*).

124. *See Sanchez*, 165 S.W.3d at 710–11 (observing that the three purposes of voir dire are: "to elicit information which would establish a basis for a challenge . . . [,] to facilitate the intelligent use of peremptory challenges . . . [, and] to indoctrinate the jurors on the party's theory of the case and to establish rapport with the prospective jury members").

125. Sw. Elec. Power Co. v. Martin, 844 S.W.2d 229, 237 (Tex. App.—Texarkana 1992, writ denied).

> A court abuses its discretion when its denial of the right to ask a proper question prevents the determination of when grounds exist to challenge for cause or denies intelligent use of peremptory challenges. If such an abuse of discretion exists, the result is to deny the party the right to trial by a fair and impartial jury, a right guaranteed by the Texas [c]onstitution and by statute.

Id. (citations omitted).

126. *Hyundai*, 189 S.W.3d at 749. The Texas Supreme Court recently stated:

> The Bill of Rights in the Texas Constitution guarantees litigants a right to a trial by a fair and impartial jury and authorizes the legislature to pass laws "to maintain its purity and efficiency." . . . Voir dire examination protects the right to an impartial jury by exposing possible and improper jury biases that form the basis for statutory

V. STANDARD OF REVIEW APPLIED TO DETERMINE IF LIMITATION OF VOIR DIRE VIOLATES CONSTITUTIONAL RIGHTS

"[T]he scope of the voir dire examination quite obviously can not be bounded by inflexible rules of thumb, for of all the delicate psychological factors inherent in a jury trial perhaps none is more essentially subjective and hence less submissive to dogmatic limitations."[127] Perhaps because of the subjective nature of voir dire, "[i]t has been held that a broad latitude should be allowed counsel on voir dire examination of a jury panel in order that peremptory challenges may be exercised, and that such examination is a matter within the discretion of the trial judge."[128] "Inherent in the trial court's discretion over the scope and course of voir dire is his ability to (1) place reasonable time limits on the examination, (2) disallow questions which are improper, and (3) prevent the propounding of vexatious or repetitious questions."[129]

A. *Limitations on Time Permitted for Voir Dire*

"Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed

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disqualification. Thus, 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.

In addition, this Court recognizes that trial courts should allow "broad latitude" to counsel "to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised."

Id. (citations omitted). Similarly, in *Babcock*, the court noted:

A broad latitude should be allowed to a litigant during voir dire examination. This will enable the litigant to discover any bias or prejudice by the particular jurors so that peremptory challenges may be intelligently exercised.... [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 v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989).

127. 4 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 21:19 (2d ed. 2001).

128. Tex. Employers Ins. Ass'n v. Loesch, 538 S.W.2d 435, 440 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

129. Mathis v. State, 576 S.W.2d 835, 839 (Tex. Crim. App. 1979) (en banc); *see also* Abron v. State, 523 S.W.2d 405, 408 (Tex. Crim. App. 1975) ("This court has consistently held that the trial court has wide discretion over the course of the voir dire of the jury panel.").

absent a clear abuse of discretion."[130] What constitutes an abuse of discretion depends upon the restrictions that are placed upon counsel's voir dire examination. Different tests have been applied by Texas courts depending upon whether the restrictions are on the amount of time or on the subjects of voir dire.[131]

The courts of appeals and the court of criminal appeals have addressed the issue of time limitations on voir dire in criminal trials repeatedly, and very specific rules for review of the trial court's action have been developed. The appellate standards applied in determining whether a trial court has abused its discretion in limiting the time for voir dire may be gleaned from the case of *Ratliff v. State*.[132] Under the *Ratliff* decision, the appellate court must examine three prongs in order to determine whether the trial court abused its discretion by imposing a certain time limitation on voir dire.

The reviewing court must determine:

1. whether the party attempted to prolong the voir dire,
2. whether the questions that the party was not permitted to ask were proper voir dire questions, and
3. whether the party was not permitted to examine prospective jurors who actually served on the jury.[133]

The courts of appeals have also applied these same rules in civil cases. These rules were first applied in a civil case in *McCoy v. Wal-Mart Stores, Inc.*[134] During pretrial proceedings, the court agreed to give each side thirty minutes for voir dire.[135] Before the

130. Haryanto v. Saeed, 860 S.W.2d 913, 918 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

131. *Compare id.* (applying the following standard to an abuse of discretion determination related to a subject rather than time limitation: whether the "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"), *with* McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793, 800 (Tex. App.—Texarkana 2002, no pet.) (applying the same standard as *Haryanto* to a case involving a time limitation, but also indicating that the three-prong test of *Ratliff*, discussed below, was relevant).

132. Ratliff v. State, 690 S.W.2d 597 (Tex. Crim. App. 1985) (en banc).

133. McCarter v. State, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992) (en banc) (citing *Ratliff*, 690 S.W.2d at 599–600); Cunigan v. State, No. 05-00-01571-CR, 2002 WL 31810941, at *9 (Tex. App.—Dallas Dec. 16, 2002, pet. ref'd) (not designated for publication); Morris v. State, 1 S.W.3d 336, 340 (Tex. App.—Austin 1999, no pet.).

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

135. *Id.* at 795.

completion of "voir dire questioning, the trial court informed counsel for [the plaintiff] that his time was up, but he would be given 'about two minutes' more."[136] Thereafter, the judge interrupted counsel and advised him that his time was up.[137] On appeal, the plaintiff contended that the trial court abused its discretion in placing time limits on voir dire.[138] In addressing the standard of review for time limitations on voir dire, the court of appeals followed the three-prong test set forth in *Ratliff*.[139] Similarly, in *Greer v. Seales*,[140] the trial court placed time limitations on counsel for voir dire.[141] The plaintiff's counsel complained that "the trial court erred in failing to allow them additional time for voir dire."[142] In addressing whether the trial court abused its discretion, the court of appeals applied the three-prong test set forth in *Ratliff*.[143]

1. Whether the Party Attempted to Prolong the Voir Dire

The scope of inquiry with respect to the first prong is whether "counsel made an effective use of the limited time the court allocated for voir dire by inquiring into relevant and accepted areas."[144] Although the courts "recognize that justice should never be sacrificed for the sake of expediency,"[145] the courts do not allow deliberate attempts to create appellate issues. At issue is whether it appears that counsel "deliberately wasted time on inappropriate matters in an attempt to create an appellate issue."[146] In examining this prong, courts will frequently break down voir dire by topics covered and whether counsel spent an

136. *Id.*

137. *Id.*

138. *Id.* at 797.

139. *See McCoy*, 59 S.W.3d at 797 (stating that the relevant inquiries involved, *inter alia*, are the following: "1) whether a party's voir dire examination reveals an attempt to prolong the voir dire . . . ; 2) whether the questions that were not permitted were proper voir dire questions; and 3) whether the party was precluded from examining veniremembers who served on the jury").

140. Greer v. Seales, No. 09-05-001-CV, 2006 WL 439109 (Tex. App.—Beaumont Feb. 23, 2006, no pet.) (mem. op.).

141. *Id.* at *3–5.

142. *Id.* at *5.

143. *See id.* (delineating three factors central to the analysis).

144. Morris v. State, 1 S.W.3d 336, 341 (Tex. App.—Austin 1999, no pet.).

145. McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793, 801 (Tex. App.—Texarkana 2001, no pet.).

146. *Morris*, 1 S.W.3d at 341.

inordinate amount of time on issues not relevant to voir dire.[147] For example, in *Morris v. State*,[148] the court noted that counsel was faced with a pre-established forty-five minute limitation and spent "nearly 20 percent of his time speaking to the panel about private religious matters, including professing his own personal belief in Jesus, the Bible, and the actual existence of demons."[149] An example of the breakdown by the court of appeals can be found in *Tamez v. State*.[150] In that case, the opinion contains a chart listing each area of inquiry during the voir dire and the time spent for such inquiry.[151] After reviewing the areas of inquiry and the amount of time the attorney spent on each area, the court of appeals concluded that "the trial court could have reasonably surmised that she did not budget her time appropriately."[152]

The law in Texas is well established that each case must be examined upon its own facts. "A reasonable time limitation for one case may not be reasonable for another."[153] Applying this rule in criminal cases, the court of criminal appeals and the courts of appeals have held different time periods to be arbitrary, depending upon the facts and circumstances of each case. For example, in *Whitaker v. State*,[154] the trial court limited the defendant's voir dire to fifty minutes.[155] Without discussing the particular facts leading up to the trial court's decision to limit the voir dire to fifty minutes, the court of criminal appeals held that fifty minutes was not unreasonable in that particular case.[156] In *Barrett v. State*,[157] the trial court limited each side to thirty

147. *Cf.* Rios v. State, 122 S.W.3d 194, 198 (Tex. Crim. App. 2003) (en banc) (noting the proper procedure for courts to follow when reviewing the entire voir dire process); Wappler v. State, 183 S.W.3d 765, 775 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (recognizing the court's process for reviewing counsel's time management during voir dire); *Morris*, 1 S.W.3d at 342 (acknowledging the manner in which the court broke down defense counsel's voir dire process for review).

148. Morris v. State, 1 S.W.3d 336 (Tex. App.—Austin 1999, no pet.).

149. *Id.* at 341.

150. Tamez v. State, 27 S.W.3d 668 (Tex. App.—Waco 2000, pet. ref'd).

151. *Id.* at 673.

152. *Id.* at 673–74.

153. Ratliff v. State, 690 S.W.2d 597, 600 (Tex. Crim. App. 1985) (en banc); *Morris*, 1 S.W.3d at 340.

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

155. *Id.* at 781.

156. *See id.* ("We find appellant has shown no harm and the trial court's limitation of appellant's jury voir dire to fifty minutes was not unreasonable.").

157. Barrett v. State, 516 S.W.2d 181 (Tex. Crim. App. 1974).

minutes to conduct voir dire examination of the jury panel.[158] After thirty minutes, the court instructed the defendant's counsel that his allotted time for voir dire had elapsed.[159] Counsel sought additional time, but did not state why he required the additional time.[160] The court of criminal appeals held that under the facts and circumstances of the case, no abuse of discretion was shown in limiting the voir dire to thirty minutes.[161]

On the other hand, in *Rios v. State*,[162] the trial court limited each side to forty-five minutes of the voir dire.[163] After forty-five minutes had passed, counsel for the defendant informed the court that he still had proper voir dire questions to ask.[164] On appeal, the appellant argued that because of the voir dire time limitation, "he was unable to exercise his peremptory challenges intelligently."[165] It is worth noting that defense trial counsel described to the trial court the questions that he wanted to ask the venire panel.[166] The appellate court in this case found error and reversed the case for a new trial.[167]

Similarly, in *Ratliff v. State*, the trial court told counsel for each side that they had one hour in which to conduct voir dire.[168] The State spent a total of forty-three minutes conducting voir dire.[169] After defense counsel spent one hour in voir dire, the court told him that his allotted hour was up, but that he would be given fifteen more minutes.[170] Counsel for the defendant offered a list of fifteen questions he wanted to ask and which he asserted were

158. *Id.* at 182–83.

159. *Id.* at 181.

160. *Id.* at 182.

161. *See id.* ("However, under the circumstances presented here, we are unable to conclude the trial court abused its discretion in limiting the voir dire.").

162. Rios v. State, 4 S.W.3d 400 (Tex. App.—Houston [1st Dist.] 1999), *pet. dism'd, improvidently granted*, 122 S.W.3d 194 (Tex. Crim. App. 2003) (per curium).

163. *Id.* at 401.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See Rios*, 4 S.W.3d at 404–05 (reasoning that, under the circumstances, reversal was required).

168. Ratliff v. State, 690 S.W.2d 597, 598 (Tex. Crim. App. 1985) (en banc).

169. *Id.*

170. *See id.* at 599 ("After appellant had examined three veniremembers individually the court told him that his hour was 'up', but that the court would give him fifteen more minutes.").

necessary to exercising peremptory challenges.[171] "The court actually allowed twenty-one more minutes," however much of the time was devoted to ferreting out jurors for cause.[172] The appellate court held that the defendant's voir dire revealed no attempt to prolong the examination and that the questions set out in the defendant's bill of exception were proper—and not irrelevant.[173] And therefore, the court reasoned that the trial court abused its discretion in limiting the voir dire examination.[174]

In *Clark v. State*,[175] the trial court limited each side's voir dire to thirty minutes.[176] At the request of the defendant's counsel, "[the] questioning was allowed to extend an additional eight minutes at which time the court then precluded any further interrogation."[177] After the defendant's counsel's voir dire was stopped, he objected to the court's limitation of the voir dire and offered a list of questions that he wanted to ask each juror.[178] The appellate court noted that the defendant had not attempted to prolong voir dire, and it appeared that the questions he sought to propose to the jury were "relevant, material, and necessary" questions.[179] The court held that error existed and ruled that reversal of the judgment was required.[180]

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171. *See id.* ("He offered a list of fifteen questions that he wanted to ask and which he alleged were necessary so that he could exercise his peremptory challenges and provide adequate representation.").

172. *Id.*

173. *Ratliff*, 690 S.W.2d at 599.

174. *Id.* at 600–01.

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

176. *Id.* at 668–69.

177. *Id.* at 668.

178. *Id.* at 668–69.

179. *Id.* at 670 ("[W]e find no attempt to merely prolong the voir dire as his questions appeared to be relevant, material, and necessary to aid him in intelligently exercising his peremptory challenges.").

180. *Clark*, 608 S.W.2d at 670. Other courts have likewise found limitations on voir dire to be an abuse of discretion. *See* McCarter v. State, 837 S.W.2d 117, 118, 122 (Tex. Crim. App. 1992) (en banc) (reasoning that thirty minutes was an unreasonably brief amount of time to conduct voir dire); Thomas v. State, 658 S.W.2d 175, 176 (Tex. Crim. App. 1983) (en banc) (sustaining the first point of error on grounds that the trial court unduly restricted counsel's voir dire examination of prospective jurors); Kemph v. State, 12 S.W.3d 530, 534 (Tex. App.—San Antonio 1999, pet. ref'd) (recognizing that the twenty minutes allotted for voir dire may "not have passed the abuse of discretion standard had we considered the issue"); Morris v. State, 1 S.W.3d 336, 342 (Tex. App.—Austin 1999, no pet.) (holding forty-five minutes to be unreasonable under the facts and surrounding circumstances); Tobar v. State, 874 S.W.2d 87, 88, 90–91 (Tex. App.—Corpus Christi 1994, pet. ref'd) (holding that counsel did not improperly prolong voir dire; thus, the trial court

From the foregoing, it is evident that no one general rule can be drawn. While many of these cases involve limitations of less than one hour, each case must be examined on its own facts.[181]

2. Whether the Questions the Party Was Not Permitted to Ask Were Proper Voir Dire Questions

The second prong under the *Ratliff* test is whether the questions that the party was not permitted to ask were proper voir dire questions.[182] In determining whether the party was or was not permitted to ask proper voir dire questions, courts focus on questions that go toward bias or prejudice.[183] Where counsel is prevented from asking questions that go toward bias or fairness, the second prong of the *Ratliff* test is met.[184] For example, in *Morris*, the party was prevented from asking potential jurors whether they knew a key witness in the case.[185] The court noted that the witness in that case gave "substantial, significant testimony."[186] The court, based upon the fact that the jurors knew this particular key witness, concluded that counsel was not permitted to ask proper voir dire questions of those jurors.[187]

By contrast, in *Cunigan v. State*,[188] counsel used much of his

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abused its discretion in limiting counsel to forty-five minutes).

181. *See* Tamez v. State, 27 S.W.3d 668, 673 (Tex. App.—Waco 2000, pet. ref'd) ("It is true that each case must be examined on its own facts.").

182. *See* Ratliff v. State, 690 S.W.2d 597, 600 (Tex. Crim. App. 1985) (en banc) (reasoning that because counsel's questions were proper, there was no attempt to prolong voir dire).

183. *See* Clemments v. State, 940 S.W.2d 207, 210 (Tex. App.—San Antonio 1996, pet. ref'd) (explaining that voir dire is meant to expose any bias or prejudice that would prevent a juror from giving full and fair consideration to the evidence presented at trial); *cf.* Wappler v. State, 183 S.W.3d 765, 774 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) ("A 'proper' voir-dire question is one that seeks to discover a venire member's views on issues relevant to the case."); Dhillon v. State, 138 S.W.3d 583, 589 (Tex. App.—Houston [14th Dist.] 2004, pet. struck) (stating that in order to preserve error regarding voir dire, the court must have disallowed an answer to a proper question); *Morris*, 1 S.W.3d at 341 (concluding that defense counsel was not permitted to ask proper voir dire questions because counsel was unable to ask the jurors whether they would be able to carry out their duty despite their relationship with the witness).

184. *See Morris*, 1 S.W.3d at 341 (holding that where counsel is prohibited from asking a proper voir dire question, the second prong of *Ratliff* is satisfied).

185. *See id.* (reciting defense counsel's argument that he would have asked the jurors about their relationship to the witness had he not been prevented by the voir dire time limit imposed by the court).

186. *Id.*

187. *Id.*

188. Cunigan v. State, No. 05-00-01571-CR, 2002 WL 31810941 (Tex. App.—Dallas

allotted time to speak to jurors concerning whether the jurors would hold counsel's aggressiveness against his client.[189] The court noted that since "[c]ounsel was not prevented from asking any question related to fairness," the second prong of *Ratliff* had not been met.[190] In reviewing the second prong of the *Ratliff* test, any questions not geared toward bias or prejudice of the jurors will likely not be sufficient to trigger error on the part of the trial court.[191] However, it is worth remembering that advocates approach jury selection with various strategies; just because the advocate utilizes a process that is different from his opponent or from the trial court's preferred method does not inherently mean the process will result in questions that violate the *Ratliff* test.[192]

3. Whether the Party Was Not Permitted to Examine Prospective Jurors Who Actually Served on the Jury

The third prong of the *Ratliff* test is whether the party was or was not permitted to examine prospective jurors who actually served on the jury.[193] This prong can be problematic in its

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Dec. 16, 2002, pet. ref'd) (not designated for publication).

189. *Id.* at *9.

190. *Id.* at *9–10.

191. *See* Rios v. State, 122 S.W.3d 194, 199 (Tex. Crim. App. 2003) (en banc) (holding that the trial court did not abuse its discretion in denying counsel additional voir dire time to ask non-specific questions); Anson v. State, 959 S.W.2d 203, 206 (Tex. Crim. App. 1997) (en banc) (holding that the trial court abused its discretion when it denied counsel the opportunity to ask proper voir dire questions aimed at discovering a potential juror's bias or prejudice); McCarter v. State, 837 S.W.2d 117, 121–22 (Tex. Crim. App. 1992) (en banc) (explaining that the second prong asks whether counsel was denied the opportunity to ask proper voir dire questions, and defining a proper voir dire question as a question that has the purpose of discovering jurors' views on an issue applicable to the case); Wappler v. State, 183 S.W.3d 765, 774 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (holding that counsel was denied the opportunity to ask proper voir dire questions, and defining proper voir dire questions as those that seek to discover jurors' views on an issue relevant to the case).

192. *See* McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793, 801 (Tex. App.—Texarkana 2001, no pet.) ("Our system is capable of accommodating a variety of strategies in selecting a jury, and the innovative advocate should not be punished for not doing it the same way an opponent does, or even the way the trial court would.").

193. *See* Ratliff v. State, 690 S.W.2d 597, 600 (Tex. Crim. App. 1985) (en banc) (citing Thomas v. State, 658 S.W.2d 175 (Tex. Crim. App. 1983); Clark v. State, 608 S.W.2d 667 (Tex. Crim. App. 1980); De La Rosa v. State, 414 S.W.2d 668 (Tex. Crim. App. 1967)) (adopting the three-factor test, which, in addition to asking whether counsel attempted to prolong voir dire and whether counsel was permitted to ask proper voir dire questions, asks whether counsel was permitted to ask proper questions to potential jurors who actually served on the jury).

application. In certain circumstances, counsel will request additional time to ask follow-up questions for specific jurors.[194] For example, in *Morris*, counsel specifically mentioned two jurors who indicated they knew one of the key witnesses in the case.[195] Counsel asked for additional time in order to inquire about the relationship with the witness and whether the relationship would affect their ability to be impartial jurors.[196] On appeal, the defendant in that case was able to demonstrate that those two particular jurors were actually selected and did serve on the jury, thus satisfying the third prong of the *Ratliff* test.[197]

There is a distinction between not being permitted to ask a juror questions and not asking a juror questions that are specific enough to require a response. In *Cunigan*, the court noted that the record did not indicate the party's "counsel was 'not permitted' to talk to individuals who actually served on the jury."[198] Although the attorney identified jurors with whom he did not personally speak, the record was clear that these individuals "simply did not respond to counsel's questions in a way that caused him to ask follow-up questions of them."[199] There was nothing in the record to show that counsel "would have spoken specifically to those jurors had he been given more time."[200]

However, a different issue is presented when counsel is not permitted to ask broad questions, such as those pertaining to a juror's opinions regarding lawsuit abuse or tort reform. In those cases, there will be a presumption of harm.[201] For example, in *Babcock v. Northwest Memorial Hospital*, the plaintiffs stated:

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194. *See* Clemments v. State, 940 S.W.2d 207, 210 (Tex. App.—San Antonio 1996, pet. ref'd) ("Because appellant has demonstrated that she was prevented from proffering relevant questions to individual jurors by reason of the trial court's time limitation, she has satisfied the second prong of the *Ratliff* test.").

195. Morris v. State, 1 S.W.3d 336, 341 (Tex. App.—Austin 1999, no pet.).

196. *See id.* (stating that counsel for the defense told the court he would have asked specific questions of the two venire members who knew the witness if he had not been prevented from doing so by the court's voir dire time limitation).

197. *Id.*

198. Cunigan v. State, No. 05-00-01571-CR, 2002 WL 31810941, at *10 (Tex. App.—Dallas Dec. 16, 2002, pet. ref'd) (not designated for publication).

199. *Id.*

200. *Id.*

201. *See* Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989) (holding that the trial court abused its discretion in not allowing counsel to ask questions of potential jurors regarding the "lawsuit crisis" and that this denied the Babcocks an impartial jury, which was harmful and probably caused the rendition of an improper judgment).

> The Court asked us yesterday if we objected to the jurors who were seated with respect to the strikes that had been made. We don't have any objections to the strikes that were made. We didn't put anybody on the jury that we struck. We do have an objection that goes back to our urging the Court to allow us to go into the tort liability, liability crisis, lawsuit crisis, and I want to reurge that objection now.
>
> He was concerned with malpractice insurance premiums. I feel that [it is] my duty now to reurge the Court, although it's too late to reurge the Court, that we should have been allowed to go into those questions and if the Court wants me to at—I understand your ruling's already been made, but I would ask that at some recess maybe today or late this afternoon I be allowed to put those questions that I would have asked in the record so they might be reviewed later on if necessary.[202]

In *Babcock*, the record reflected that "[d]uring voir dire, the matter arose when a prospective juror expressed doubt about his ability to be impartial because of [the impact of lawsuits] on insurance premiums."[203] Away from the rest of the panel, "the juror was questioned about his concerns for malpractice premiums."[204] The juror stated that he had read advertisements about the difficulty in "obtaining insurance because of jury verdicts" and that "he believed the assertions made in the advertisements."[205] After the juror was struck for cause, "the Babcocks again requested permission to question the remaining prospective jurors about the 'lawsuit crisis,'" and the request was denied.[206] The court in this case did not require the plaintiffs to identify any specific jurors who actually served on the jury who would have been subject to additional questions because counsel was not even allowed to go into that area of questioning.[207]

B. *Limitations on Subjects Permitted for Voir Dire*

The analysis on whether a trial court abused its discretion in

202. *Id.* at 707 n.1.
203. *Id.* at 707.
204. *Id.*
205. *Id.*
206. *Babcock*, 767 S.W.2d at 707.
207. *See id.* at 708 (holding that because the specific questions sought were apparent from the context, it was not necessary that the specific questions be preserved in the record).

restricting the topics for voir dire is generally a much simpler issue to address than cases involving restrictions on time for voir dire. Generally speaking, the scope of voir dire examination is a matter that rests largely in the sound discretion of the trial court.[208] However, the trial 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."[209] Therefore, if the question goes to bias or prejudice on the part of a juror, denial of the right to ask the question is an abuse of discretion because it prevents a party from determining whether grounds exist for challenge.[210] For a classic example of this type of denial, refer to the *Babcock* discussion on the previous page.

Earlier cases have held that a party has the right to ask such questions in order to determine whether prejudice existed as a result of the advertising.[211] Questions that would go to a lack of impartiality would impact a party exercising its challenge for cause.[212] This questioning is protected by the right to a trial by jury in article I, section 15, and the right to be represented by counsel in article I, section 10 of the Texas constitution.[213]

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208. *Id.* at 709.

209. *Id.*

210. *Id.*

211. Nat'l County Mut. Fire Ins. Co. v. Howard, 749 S.W.2d 618, 621 (Tex. App.—Fort Worth 1988, writ denied). *See generally* Richard L. Ruth, Annotation, *Propriety of Inquiry on Voir Dire As to Juror's Attitude Toward, or Acquaintance with Literature Dealing with, Amount of Damage Awards*, 63 A.L.R.5TH 285 (1998) (discussing courts that have held that upon a showing of possible prejudice, attorneys may inquire into possible prejudice from advertising during voir dire, and also discussing courts that are fearful of the unfairness inherent in allowing insurance companies to spend large amounts of money on prejudicial advertising campaigns while at the same time prohibiting attorneys from asking jurors about any biases or prejudices stemming from such advertising).

212. *See* Benson v. State, 240 S.W.3d 478, 483 (Tex. App.—Eastland 2007, pet. ref'd) (explaining that when a potential juror is found to be biased as a matter of law, that potential juror must be excused when challenged); Mount v. State, 217 S.W.3d 716, 722 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (stating that when a venire member is found to have a prejudice or bias as a matter of law, she must be excused from service); Gant v. Dumas Glass & Mirror, Inc., 935 S.W.2d 202, 207 (Tex. App.—Amarillo 1996, no writ) (asserting that when a court overrules a challenge for cause, that holding carries with it a presumption that bias or prejudice does not exist); *cf.* 49 TEX. JUR. 3D *Jury* § 103 (2008) (defining a challenge for cause as an objection made as to a potential juror alleging that some fact of law disqualifies him from serving as a juror on that particular case).

213. TEX. CONST. art. I, §§ 10, 15; *see also* Morris v. State, 1 S.W.3d 336, 339 (Tex. App.—Austin 1999, no pet.) (noting that article I, section 10 of the Texas constitution encompasses the right of counsel to question potential jury members (citing Ratliff v.

A more difficult issue is presented with regard to questions by counsel to determine intelligent use of peremptory challenges. The Supreme Court of Texas has noted that the purpose of peremptory challenges is to "permit a party to *reject* certain jurors based upon a subjective perception that those particular jurors might be unsympathetic to his position."[214] These jurors do not have to demonstrate bias or prejudice.[215] Counsel has wide latitude in exploring areas to determine whether peremptory challenges should be exercised. However, the right to exercise peremptory challenges is not absolute.[216] Mentioned previously, in civil cases, the United States Supreme Court has held that private parties may not base peremptory challenges on a juror's race.[217] However, the use of peremptory challenges can be based upon any number of other factors. These can range from a person's employment to how a particular juror reacts to the lawyer during voir dire.[218] Because the areas for exercise of peremptory challenges are much broader than those of bias or prejudice, if an attorney is denied the opportunity to go into a particular topic by the trial court, and it does not go to the issue of bias or prejudice, the attorney, in order to preserve error, should take the opportunity to demonstrate how the area would affect the exercise of his or her peremptory challenges and how, without such information, the party will not be able to make an intelligent use of

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State, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985) (en banc))).

214. Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979) (emphasis added); *see also* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 750 (Tex. 2006) (explaining that peremptory challenges exist to allow counsel to reject jurors who they believe will be unsympathetic to their clients' cause).

215. *See* TEX. R. CIV. P. 232 ("A peremptory challenge is made to a juror without assigning any reason therefor.").

216. *See* Lamons v. State, 938 S.W.2d 774, 777 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) ("[Peremptory] strikes may be exercised *for any reason whatsoever*, so long as the reason is not inherently discriminatory.").

217. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991).

218. *See id.* (stating that for the purpose of exercising peremptory challenges, a private actor becomes an actor of the state and may exercise said challenges for any reason other than race); Wappler v. State, 183 S.W.3d 765, 772 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (stating that peremptory challenges may be made for any reason stated and are not subject to inquiry or the control of the court); *cf.* Anson v. State, 959 S.W.2d 203, 204 (Tex. Crim. App. 1997) (en banc) (explaining that where defense counsel was unable to ask follow-up questions of certain jurors, he used peremptory challenges to strike those jurors); Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989) (reasoning that broad latitude should be granted to a litigant during voir dire in order to determine whether there is bias or prejudice on part of potential jurors).

his or her peremptory challenges.[219]

C. *Limitations on Vexatious or Repetitious Questions*

Appellate courts have recognized the inherent power of the trial court to prevent attorneys from propounding vexatious or repetitious questions.[220] The courts have not provided any specific definition regarding what constitutes vexatious or repetitious questions; rather, each case has tentative time limits on facts.[221] For example, in *Ford v. State*,[222] a venire member had already stated his position regarding a hypothetical set of facts.[223] The court of appeals held that the trial court did not abuse its discretion in refusing to allow continued questioning regarding the venire member's position since it had already been stated unequivocally.[224] In *McCray v. State*,[225] a venire member "stated to the trial court three times that she could follow the court's instructions on what the law is in this state."[226] The court of

219. *See Wappler*, 183 S.W.3d at 773 (explaining the appellant's argument that because counsel was not able to ask the questions in his bill of exceptions, he was unable to intelligently exercise his peremptory challenges); Dhillon v. State, 138 S.W.3d 583, 587 (Tex. App.—Houston [14th Dist.] 2004, pet. struck) (stating counsel's argument that he was unable to intelligently use peremptory strikes because the trial court impermissibly restricted the questions he was permitted to ask the venire members during voir dire).

220. *See* Ratliff v. State, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985) (en banc) (holding that a thirty-minute limitation on voir dire was not unreasonable where counsel's questions were repetitious and irrelevant (citing Barrett v. State, 516 S.W.2d 181, 181–82 (Tex. Crim. App. 1974))); *Wappler*, 183 S.W.3d at 773, 778 (holding that counsel did not unnecessarily prolong voir dire because his questions were not repetitious, irrelevant, or immaterial).

221. *See Ratliff*, 690 S.W.2d at 600 (stating that determining whether a trial court's voir dire time limit is reasonable must be judged on the facts of each case); *Wappler*, 183 S.W.3d at 773 (refusing to assert a bright-line rule for the amount of time allotted for voir dire, and opining that what is reasonable must be judged on the facts of each case); Ganther v. State, 848 S.W.2d 881, 882 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) ("'A reasonable time limitation for one case may not be reasonable for another . . . . The amount of time allotted is not, by itself, conclusive.'" (quoting *Ratliff*, 690 S.W.2d at 600)).

222. Ford v. State, 14 S.W.3d 382 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

223. *See id.* at 389 (noting a venire member's response to a question posed by counsel, in which the venire member stated that it was his determination that if a person worked at a place that sold beer, and that person provided beer to a minor without doing anything to check the identification of the minor, then that person would be criminally negligent).

224. *See id.* at 390–91 (stating that it is not impermissible for a trial court to limit voir dire where the potential juror had already clearly and unequivocally stated her opinion).

225. McCray v. State, No. A14-89-00271-CR, 1991 WL 235281 (Tex. App.—Houston [14th Dist.] Nov. 14, 1991, pet. ref'd) (not designated for publication).

226. *Id.* at *5.

appeals held that the trial court did not abuse its discretion by limiting defense counsel's questions on this matter since it had been addressed previously.[227] Similarly, in *Parker v. State*,[228] a juror had already stated that he could not follow the law with respect to the punishment involved in the particular situation.[229] The trial court refused to allow defense counsel to continue with questions regarding rehabilitation of that juror.[230] The court of appeals found that such limitation was proper since the juror had already committed to a position.[231]

In *Pierson v. State*,[232] defense counsel attempted to question a juror using a hypothetical question; although the "general proposition of the hypothetical was important, the facts of the hypothetical . . . were not on point."[233] The court held that such questioning was improper and that vexatious questioning would not be allowed.[234] In *Roberts v. State*,[235] defense counsel had previously questioned a juror about the required culpable mental states for both capital murder and murder.[236] The trial judge terminated the questioning when counsel attempted to ask the same questions but only in a negative form.[237] The appellate court held that this type of questioning was repetitious and prohibition by the trial court did not constitute an abuse of discretion.[238] Finally, in *Reed v. State*,[239] defense counsel was prohibited from asking an additional question that was the same, or closely similar, to a previous question that the specific

227. *Id.*

228. Parker v. State, 792 S.W.2d 795 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd).

229. *Id.* at 798.

230. *See id.* (stating that the trial court refused to allow further questioning of the venire member because the hypothetical situation was improper).

231. *Id.*

232. Pierson v. State, No. A14-87-00274-CR, 1988 WL 79003 (Tex. App.—Houston [14th Dist.] July 28, 1988, no pet.) (not designated for publication).

233. *Id.* at *1.

234. *Id.* at *2 (citing Abron v. State, 523 S.W.2d 405, 408 (Tex. Crim. App. 1975)).

235. Roberts v. State, No. 01-84-00679-CR, 1988 WL 30372 (Tex. App.—Houston [1st Dist.] Mar. 31, 1988, no pet.) (not designated for publication).

236. *Id.* at *3.

237. *Id.*

238. *Id.*

239. Reed v. State, No. 01-86-0151-CR, 1987 WL 7652 (Tex. App.—Houston [1st Dist.] Mar. 12, 1987, no pet.) (not designated for publication).

venireman had already answered.[240] The appellate court held that the question was repetitious and that the trial court did not abuse its discretion in limiting questioning in this matter.[241]

In some cases, voir dire examination can become the lengthiest part of the proceedings. To curb some of the prolixity, courts must have the power to limit even relevant and proper questions once they become repetitious and vexatious.[242] If a venire member has previously answered the question, the trial court is certainly entitled to prevent such repeated questions, and such limitations will not infringe upon the constitutional rights of the parties.[243]

VI. PRESERVATION OF ERROR

The fact that undue restrictions may have been placed on a party does not automatically entitle that party to a new trial. As a general rule, in order to be entitled to a new trial, the error must be preserved for appellate review.[244] Section 33.1(a) of the Texas Rules of Appellate Procedure reads as follows:

> As a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion that . . . stated the grounds for the ruling that the complaining party sought . . . with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context . . . .[245]

This rule ensures the trial court "the opportunity to rule on

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240. *Id.* at *4.

241. *Id.*

242. *See* Clark v. State, 608 S.W.2d 667, 669 (Tex. Crim. App. 1980) (stating that it is within the court's discretion to decide how to conduct voir dire and whether reasonable restrictions will be imposed); King v. State, 17 S.W.3d 7, 22 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (listing the proper situations in which a judge can limit the voir dire examination, including "where the questions are duplicative or repetitious"); Estrada v. State, 2 S.W.3d 401, 406–07 (Tex. App.—San Antonio 1999, pet. ref'd) (recognizing that a trial court has "a duty to impose reasonable limitations on voir dire" and listing the grounds for limitations).

243. *See King*, 17 S.W.3d at 22 (stating that it is proper for a court to limit voir dire where a venire member has already unambiguously stated his position); Ford v. State, 14 S.W.3d 382, 390 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (recognizing that a trial court can impose reasonable restrictions on voir dire and listing the circumstances that could make limitations reasonable).

244. TEX. R. APP. P. 33.1(a).

245. *Id.* The final step to preserve error is for the trial court to make a ruling on the complaint or to refuse to make a ruling over the complaining party's objection. *Id.*

matters for which the parties later seek appellate review."[246] In the event that a trial court refuses to allow further voir dire questioning, the complaining party must "'adequately apprise[] the trial court of the nature of [the party's] inquiry.'"[247]

A. *Specific Questions*

To preserve error when the trial court limits the time for voir dire, the objecting party must identify the specific questions it was not allowed to ask.[248] Identifying general topics for questions is insufficient.[249] In *Dhillon v. State*,[250] the State asserted that it would have asked three more jurors questions had there been more time for voir dire.[251] Specifically, counsel provided that one juror would have been dismissed had he been able to "talk about aggressive drunk driving" and people exhibiting such conduct.[252] The court found that the proposed question was vague and overly broad, presented only a general topic for discussion, was not narrowly tailored in scope, and thus could contain both proper and improper inquiries.[253] Another juror would have been questioned concerning his beliefs that he should not drink and drive.[254] The court decided this question was also a general topic concerning drinking and driving.[255] Last, counsel stated that he needed to question yet another juror regarding her thoughts on alcohol and its effect on the body.[256] The court concluded this question was

246. Odom v. Clark, 215 S.W.2d 571, 574 (Tex. App.—Tyler 2007, no pet.) (citing *In re* E. Tex. Med. Ctr. Athens, 154 S.W.3d 933, 936 (Tex. App.—Tyler 2005, orig. proceeding)).

247. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 758 (Tex. 2006) (quoting Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 707 (Tex. 1989)). The court has strictly required that voir dire objections be timely and plainly presented because it can be difficult after the trial for the court to decide whether the denial of the inquiry was prejudicial. *Id.* at 758–59.

248. Godine v. State, 874 S.W.2d 197, 200–01 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

249. S.D.G. v. State, 936 S.W.2d 371, 380 (Tex. App.—Houston [14th Dist.] 1996, pet. denied); *Godine*, 874 S.W.2d at 200–01.

250. Dhillon v. State, 138 S.W.3d 583 (Tex. App.—Houston [14th Dist.] 2004, pet. struck).

251. *Id.* at 588.

252. *Id.*

253. *Id.* at 589.

254. *Id.* at 588.

255. *Dhillon*, 138 S.W.3d at 590.

256. *Id.* at 588–89.

similarly vague and that such an open-ended question "could contain a wide range of specific questions, both proper and improper."[257] Thus, the court concluded that error had not been preserved for review.[258]

Further, in *Greer v. Seales*, the court of appeals examined an objection to limitation of voir dire.[259] The plaintiff's counsel requested additional time for voir dire of the panel because "[t]he jury panel had a great deal of folks who identified particular bias and mind sets that would normally exclude them," including both "pain and suffering" and "prior accidents."[260] Counsel explained that excluding jurors based upon "pain and suffering" took a great deal of time so that he was not able to complete voir dire of the jury on many serious issues, including frivolous lawsuits, chiropractic care, burden of proof, and preexisting injury.[261] The trial court overruled the objection.[262] The court of appeals concluded that "[c]ounsel's objection[s] failed to identify to the trial court specific questions he was not permitted to ask."[263] Instead, the court found that "counsel merely identified general areas of inquiry he desired to pursue," and as a result, the issue was not preserved for appeal.[264]

Similarly, in *Odom v. Clark*,[265] the trial court imposed a one-hour time limit for both parties to conduct voir dire.[266] At the conclusion of the voir dire, counsel for the plaintiff asserted that he had not been given the timely requested five additional minutes.[267] The trial court denied the request.[268] "Counsel was allowed to ask the panel two additional questions" and then the "trial court ended counsel's voir dire."[269] "Following the end of his voir dire, counsel for the Odoms reasserted the motion to

257. *Id.* at 589.
258. *Id.* at 589–90.
259. Greer v. Seales, No. 09-05-001-CV, 2006 WL 439109, at *6 (Tex. App.—Beaumont Feb. 23, 2006, no pet.) (mem. op.).
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Greer*, 2006 WL 439109, at *6.
265. Odom v. Clark, 215 S.W.3d 571 (Tex. App.—Tyler 2007, no pet.).
266. *Id.* at 573.
267. *Id.*
268. *Id.*
269. *Id.*

enlarge time for voir dire."[270] Counsel indicated that there were additional areas of inquiry that required questioning.[271] The counsel for the plaintiff made the following request:

> We would ask the Court, please for more time to voir dire and to ask a number of questions, including areas with regard to frivolous lawsuits and frivolous defenses, tort reform. Your Honor, we need to ask these jurors . . . about some of their businesses that they did not fully answer in their questionnaire. We need to visit with them about the controversy regarding caps on damages and punitive damages. We need to ask their feelings about trial lawyers in general. We need to ask them about their experiences with regard to lawsuits and injuries.[272]

The trial court denied their request.[273] On appeal, the court held that counsel had not accurately preserved error.[274] The court held that counsel had not presented any specific questions but rather had merely informed the court of broad areas of inquiry.[275] The court of appeals held that because the potential questions were not apparent from the context in which the inquiries were stated, they failed to preserve error for review.[276]

B. *Specific Jurors Counsel Was Prevented from Questioning*

A party complaining about limitations on voir dire must, in addition to specifying the questions he would have asked, point out which jurors he was prevented from questioning. A blanket statement that "jurors" on the list are objectionable without identifying those jurors is not sufficient to preserve error.[277] For example, in *Howell v. State*,[278] the defendant stated during voir dire that she disagreed with two individuals on the jury list, but did not specifically name those individuals.[279] It was not until the hearing on the motion for new trial that she complained she would

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270. *Odom*, 215 S.W.3d at 573.
271. *Id.*
272. *Id.*
273. *Id.* at 574.
274. *Id.* at 575.
275. Odom v. Clark, 215 S.W.3d 571, 574–75 (Tex. App.—Tyler 2007, no pet.).
276. *Id.* at 575.
277. Moreno v. State, 587 S.W.2d 405, 408 (Tex. Crim. App. 1979).
278. Howell v. State, No. 03-03-00158-CR, 2006 WL 2450920 (Tex. App.—Austin Aug. 25, 2006, no pet.) (mem. op., not designated for publication).
279. *Id.* at *7.

have removed a specific juror if she had not used a peremptory strike on the other.[280] The court of appeals determined she should have pointed out specific jurors who were objectionable during the original trial.[281]

C. *Timeliness*

Not only must specific questions and specific jurors be presented to the court, the counsel complaining of the insufficiency of voir dire must also present the proposed questions to the trial court in a timely fashion.[282] In *Odom v. Clark*, following a take-nothing judgment against the plaintiffs, the plaintiffs filed a motion for new trial listing the potential areas of inquiry with specificity.[283] The court of appeals held that error had not been preserved because the specific areas of inquiry were not presented at the time of voir dire.[284] The court held that the specific areas of inquiry must be presented to the trial court at a time that provides that court an opportunity to consider and to make an informed decision on whether additional time should be allowed.[285] Waiting until after the verdict has been rendered would not afford the trial court with such an opportunity.

D. *Complete Record*

In addition, in order to determine whether error was committed, the court of appeals must have the entire voir dire examination before it.[286] Without such examination, the court is "unable to determine if the questions asked were proper or duplicitous, or whether the answers sought were not otherwise obtained."[287] In

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280. *Id.* at *8.

281. *Id.*; *see also* Allen v. State, 108 S.W.3d 281, 282–83 (Tex. Crim. App. 2003) (stating that identifying an objectionable juror in the appellate brief is too late to preserve error).

282. *See* TEX. R. APP. P. 33.1(a)(1) (stating that, in addition to the complaint being specific, it must also be made in a timely manner).

283. Odom v. Clark, 215 S.W.3d 571, 574 (Tex. App.—Tyler 2007, no pet.).

284. *Id.* at 574–75.

285. *Id.* at 574; *see also Howell*, 2006 WL 2450920, at *8 (citing *Allen*, 108 S.W.3d at 282–83) (holding that a motion addressing which jurors were objectionable presented on appeal was too late).

286. *See* Burkett v. State, 516 S.W.2d 147, 150 (Tex. Crim. App. 1974) (stating that without examining the entire voir dire record, the court cannot decide whether the questions were proper).

287. Dickson v. Burlington N. R.R., 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987,

Dickson v. Burlington Northern Railroad,[288] the plaintiff complained that it was error for the trial court to deny him an opportunity during voir dire to have prospective jurors disclose each "religious organization to which they belong."[289] The plaintiff argued that because he was black, he thought this information was vital to the selection of an impartial jury and for the exercise of peremptory challenges.[290] In that case, the record only contained the portion of the voir dire examination in which the plaintiff stated generally the proposed question, and a portion of the "judge's order restricting the form of the questioning."[291] The court of appeals held that without a complete record of the proceeding, it could not determine whether the plaintiff was denied the answers he sought.[292] As a result, the court of appeals held that the plaintiff had failed to preserve error on appeal.[293]

VII. CONCLUSION

The right to a full and complete voir dire is an integral part to the right to a trial by jury and to the right to due process. Without question, courts have an interest in seeing that their dockets move along swiftly and that their courts are administered efficiently. However, these interests are subservient to the constitutional rights of the litigants in those courts. Where litigants are not wasting the time of the court with repeated questions and where the questions being proffered go to issues of challenge for cause and the exercise of peremptory challenges, the courts may not unduly restrict the time or scope of these questions without impeding the constitutional rights of the litigants. No magic number exists for the minimum time that courts must allow a litigant to perform voir dire. Each case will turn on its own facts and the conduct in that particular case.

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writ ref'd n.r.e.).

288. Dickson v. Burlington N. R.R., 730 S.W.2d 82 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

289. *Id.* at 85.

290. *Id.*

291. *Id.* at 85–86.

292. *Id.* at 86.

293. *Dickson*, 730 S.W.2d at 86.