STRIKE FOR CAUSE POST-*CORTEZ*

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Table of Contents

I. INTRODUCTION

This paper will show how lawyers can continue to maximize their Strikes for Cause, even after the *Cortez v. HCCI-San Antonio, Inc.* 2005 S.W.3d (04-0181) and *Hyundai v. Vasquez* 189 S.W.3d 743 (TX 2006) decisions.

Before I address *Cortez* and *Hyundai*, I will first articulate the basics of the Strike for Cause Method of Jury Selection.

Historically, lawyers used Voir Dire as an opportunity to try to sell their case. With the advent of jury consultants trained in psychology, methods arose which emphasized using Voir Dire as an opportunity to obtain information that would be useful in exercising preemptory strikes. While both of these approaches have laudable goals, they are limited in their effectiveness.

The approach proposed in this paper places as its primary goal maximizing Strikes for Cause. By careful drafting and utilization of questions and appropriate follow-up, a lawyer can significantly and consistently increase the number of Strikes for Cause he can obtain. The steps required to achieve this result are the following: accurately analyzing the hot-button issues in a case; drafting appropriate questions; effectively asking the questions; and, finally, nailing down the Strike for Cause.

This method is effective in any type of case. However, it is especially important for a lawyer who is trying personal injury cases. There are few types of cases that arouse such strong emotional reactions as personal injury cases. Both because of intense media coverage and because of many individual's intense personal experiences, the personal injury area is one in which is it especially important to control the jury selection process.

Before explaining the Strike for Cause Method of Jury Selection, it is important to address the reasons why this approach is superior to previous strategies. The traditional approach to jury selection was primarily concerned with two things: first, getting a head start in placing a

litigant's theory of the case before the jury, and, second, not poisoning the jury pool with attitudes that are contrary to one's position. This concern with persuading the jury pool during Voir Dire was fueled in part by a misreading of a study which indicated that jurors had made up their minds as to who should win a trial by the end of Voir Dire. Many people took this to mean that the lawyer must persuade the jury in Voir Dire, or they have lost the case. A more accurate reading of that study would indicate that the venire persons had made up their mind about the issues of the case before they had walked into the courtroom. It is absurd to think that what a lawyer says in a brief address to a jury pool can come close to being as important as the life experiences and attitudes that the potential jurors brought with them to the courthouse. To give an example that would resonate with a trial lawyer, ask yourself if you would rather have a jury made up of members of the Texas Trial Lawyers Association, or instead be given an opportunity to present a one and a half hour speech. Any Plaintiff's lawyer would choose to have a jury that is prejudiced in his favor than to have yet another speech. The same is true for lawyers on the Defense side. There is an inherent conflict, however, between the desire to maximize Strikes for Cause and the desire to persuade a jury panel. It is essential in order to obtain Strikes for Cause to get jurors saying bad things about your side of the case. This is the only way to expose prejudice and, ultimately, to have them struck for cause. Not only do you have to risk poisoning the jury pool by venire persons making statements antithetical to your theory of the case, you must also restrain yourself in selling your case. Individuals are much less likely to express their strongly held opinions if they believe they are going to get into an argument with a lawyer in public. These dangers inherent in the Strike for Cause Method are more than made up for by the advantage of having ten, fifteen, and, in some cases, as many as twenty Strikes for Cause, while your opposing counsel is limited to one or two. Through the process of elimination, you can

guarantee the best jury possible out a given panel.

II. IDENTIFYING HOT-BUTTON ISSUES

The first step in any case is to identify the emotional issues on which jurors will be deciding your case. If one has tens of thousands of dollars to spend on a case, this information can be obtained through the use of focus groups, mock trials and polling. It is dangerous, however, to rely too heavily on the information gleaned from these methods. There is a temptation to believe that if an individual in your focus group holds a certain opinion, then someone on a jury panel with similar demographics will hold the same opinion. There are no focus groups that have a large enough sample size to be predictive of what individuals on a jury panel are likely to believe. The only purpose of a focus group is to discern what issues may be of importance to a jury that would not be important to an attorney.

If a case does not justify the expense of a focus group, there are other alternatives that are at least as effective. One option is to develop a brief summary of the case, and then ask friends and family members what they think about the case without revealing your role in the case. Try to be as neutral as possible and include facts that you don't think are relevant, but might be important to a non-lawyer. Have staff members do the same thing. If you are a Plaintiff's lawyer, call your one Republican friend, and ask his opinion. If you are a Defense counsel, call your one Democrat or Green Party friend and ask her opinion. Be careful not to argue with the individual who is helping you. Encourage them to express their opinions fully with follow-up questions. Listen more than you talk.

Another very effective technique is to interview former jurors who have heard and decided cases similar to yours. For example, send out a query on a listserve asking if anyone has had a case go to trial with facts similar to yours. Obtain the list of jurors, then phone them and interview them about their service. This is superior to any mock trial or focus group because you are

interviewing actual jurors and finding out the basis of their decisions.

In making your notes, be sure to rely on what the non-lawyers say, rather than the lawyers, as to what issues are the most important. If non-lawyers seem to think that the fact that the Plaintiff liked to dance is important, then you need to focus on dancing, regardless of its relevance as to any issue in the case.

Once you've identified the hot-button issues, you are ready to start drafting questions.

III. DRAFTING QUESTIONS

Historically, lawyers would ask jurors "selling questions" such as, "Does everyone here agree that anybody can sue anybody for anything, and that just because a Plaintiff has filed a lawsuit that doesn't mean that there is any basis to their claim? I take it by your silence that everyone here agrees that anybody can sue anybody for anything, and it doesn't mean that the Plaintiff has a case."

This approach was replaced by the open-ended questions such as, "How do you feel about personal injury lawsuits?" Open-ended questions were introduced to try to find out jurors attitudes so that the lawyers could intelligently exercise their preemptory strikes.

The approach advocated in this paper relies upon loaded questions. These are questions that make it easy for a juror to express opinions which result in them being struck for cause. For example, "People have strong feelings about personal injury cases. There are some people who, if they were a juror, could award money for lost wages, medical bills, pain and suffering, mental anguish and punitive damages. There are other people who could award money for lost wages and medical bills, but they simply couldn't award money for something intangible such as pain and suffering and mental anguish. Which of these best describe you?"

This question works on many levels. First, by suggesting that there is a group of people that has one set of opinions and another group of people who have a different set of opinions, a juror feels comfortable in expressing his opinion because it will be

consistent with one group or the other. He is not out there alone in opposition to the law. The second level on which the question works is that the language makes saying "yes" to the second half of the question seem more reasonable by using the pejorative word "intangible" to describe "pain and suffering." The question on its face looks neutral, but to someone who is opposed to personal injury lawsuits, the question is heavily loaded toward not awarding money for pain and suffering and mental anguish.

This is not to say that loaded questions are the only questions to be asked during Voir Dire. They are simply the most important weapon in your arsenal. Certainly, open-ended questions such as, "How do you feel about personal injury lawsuits?" are useful in gaining information and in opening up a discussions about critical issues.

The first step is to list all the hot-button issues you have distinguished from your formal or informal focus groups. You then begin to write out word-for-word the questions which reveal the attitudes of the venire persons with regard to each hot-button issue. Some lawyers resist the idea of scripting out the language of the questions. This resistance is accompanied by the justification that scripting would somehow impede the natural delivery of the Voir Dire. A lawyer might say, for example, "I have to put it in my words; otherwise, it won't work." I would suggest that almost everything a lawyer says in a Voir Dire is unconsciously scripted. Lawyers repeat what they have heard other lawyers say, or what they have said in the past. The only reason that it seems natural is because they've repeated it so many times. A new, carefully crafted question will feel natural if you say it enough. I therefore recommend that on key questions that you memorize them and practice saying them until they are as natural as anything else you say over and over again.

As I have pointed out before, there are several forms in which questions can be drafted. One is an either-or form. Ex: "Some people believe x, other people believe y. Which best describes you?" Another form is the open-ended question. Ex: "How

do you feel about y?" "What have you heard about x?"

Once you have written questions covering all of the hot-button issues in your case, then examine the court's charge and the applicable law in the case to see if there are opportunities for Strikes for Cause.

An example of a series of questions would be as follows:

People have strong feeling about the burden of proof in certain types of cases. There are some who believe that a Plaintiff in a personal injury case should have to prove their case beyond a reasonable doubt, or by clear and convincing evidence, instead of the standard of preponderance of the evidence. What do you think about that?

Mrs. Smith, tell me more about that.

Is it fair to say that you may use preponderance of the evidence on every issue except the issue of mental anguish, but that you would hold me to a higher standard in proving our case with regard to the issue of mental anguish and pain and suffering?

I anticipate that the judge will instruct you that the standard to be used in this case is preponderance of the evidence. Is it fair to say that although you could follow all of the other judge's instructions, you simply would not be able to follow that instruction and hold us to the higher standard of clear and convincing evidence in a personal injury case. Is that fair to say?

This question will result in many Defense-oriented jurors being Struck for Cause. This example also demonstrates the next step in obtaining a Strike for Cause, which is drafting effective follow-up questions. By asking Ms. Smith to tell you more about that, she will provide personal experiences and statements that will be useful in seeking a Strike for Cause. The question that begins, "Is it fair to say . . ." makes it easy for Ms. Smith to agree that she cannot follow the law. Adding the phrase, "Is it fair to say . . ." softens the question and is less confrontational than if you had worded the question, "Isn't it true that you can't follow the judge's instructions?" By telling Ms. Smith that she could follow all the other judge's instructions but simply couldn't follow this one, it makes it appear as if she's getting a B+ or an A- rather than failing as a juror because she could not follow one of the judge's instructions.

The important point is to draft follow-up questions which give the potential juror permission to express prejudices.

IV. SELECTING THE JURY

Once you have drafted the questions and practiced saying them, you are ready for the day of trial. If your jurisdiction allows for you to request a larger panel, by all means do so. Judges are more likely to grant your legitimate Strikes for Cause if they are not afraid that you're going to burn the panel.

In most jurisdictions, you will have some period of time in which to review the juror cards before the beginning of trial. Quickly assign each juror a rating of "Leader" or "Follower," and an additional category of "For Me" or "Against Me." Obviously, you will have to rely on stereotypes for this initial categorization. An obvious example would be an insurance adjuster, who would be categorized as a "Leader" and "Against" the Plaintiff's side. There may be a student or file clerk that turns out to be a leader on a jury, but for the purposes of your initial evaluation, use your stereotype, and place them in the "Follower" category. Do a quick count, and if there are more "Leaders" who are against you in the first half of the jury pool than there are "Leaders" who are for you, and there are more "Leaders" who are for you than there are "Leaders" who are against you in the second half of the jury pool, request a shuffle.

Do your best to rank the jurors using the criterion of "Leaders" who are against you first, "Leaders" who are you don't know whether they are for you or against you second, and then "Followers" who are against you third. Begin the questioning with the "Leaders" who are against you and work down the list. This is also the order in which to use your preemptory strikes. Even if someone is against your case, if they were a follower, they're not nearly as dangerous as someone who is a leader that turns out to be against you in a jury room.

I like to begin Voir Dires by providing a context to the panel, which encourages full participation. The following is a good introduction:

I am going to start out by asking if there is anyone here who's ever watched one of those daytime talk programs, like Oprah Winfrey, Sally Jesse Rafael, Donahue, when he was on the air, Jerry Springer . . . go ahead and get

your hands up. Do people in the audience on those shows have any difficulty expressing their opinions?

Juror: No, people will speak right out.

Well that's exactly how people should express themselves during Voir Dire. When either I or the lawyer for the Defense asks a question, everyone needs to feel free to tell us exactly what you think.

Depending on how flamboyant you are, you can add jokes about not throwing chairs.

Always have someone taking notes for you. It is difficult, if not impossible, to listen to jurors and take notes. Have the person who is taking notes put a big "C," or a star, or an "X" to remind you who has made a statement that would support a Strike for Cause. Encourage the jurors to express their prejudices against your case. When a juror makes a statement that evidences bias or prejudice, ask the panel, "Who else agrees with this statement?" You want to create a feeding frenzy that results in ten or fifteen Strikes for Cause for your side. On the other hand, if you have mistakenly called on a Plaintiff's oriented juror who begins to extol the virtues of our tort system or the evils of the insurance industry ask the question, "Who has a different opinion?" to the panel in order to get the Voir Dire back on the track of getting Strikes for Cause.

Depending on the judge, you will either have to make your Strikes for Cause known as they occur in the panel, or at the completion of the Voir Dire. If the judge gives you an option, make your Strikes for Cause at the end of the Voir Dire. If the judge requires additional questioning at the bench of anyone who you are seeking to Strike for Cause, begin by reading the jurors words back to them from the notes. Then, follow-up with, "Are my notes accurate?" Nail the Strike down by saying, "Is it fair to say that we are starting out behind with you with regard to issue x?"

V. EFFECTIVE TECHNIQUES POST-*CORTEZ* AND POST-*HYUNDAI*

Cortez dealt with three main issues. First, it overruled *Carpenter v. Wyatt Const. Co.*, 501 S. W. 2d. 748, 750 (Tex.Civ.App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.), and reintroduced the practice of rehabilitation into the jury selection process. Second, while not overruling *Shepherd v. Ledford*,

962 S.W. 2d 28 (Tex. 1998), it held that a judge did not abuse his discretion in refusing to Strike for Cause a Defense-oriented juror who stated that the Plaintiff would be starting out behind. The final thing that *Cortez* did was begin the discussion of commitment questions that was continued in the *Hyundai* case. As we will discuss in further detail later in the paper, the *Hyundai* case stood for the proposition that a question asking if a juror can follow the law with regard to a specific fact that has been mentioned earlier in the Voir Dire, can be an improper commitment question.

Let's begin by addressing rehabilitation. As a practical matter, many judges have allowed rehabilitation, or rehabilitated jurors themselves in defiance of *Carpenter v. Wyatt* prior to *Cortez*. We have all heard judges or lawyers say, "You can be fair, can't you?" "You can follow the judge's instructions, can't you?" "You can follow the law, can't you?" All of this type of questioning is now considered proper. Smart Defense lawyers who are faced with the Strike for Cause Method will spend practically their entire Voir Dire attempting to rehabilitate people who had expressed bias and prejudice during the Plaintiff's Voir Dire. Even if the Defense lawyer fails to rehabilitate during his own Voir Dire time, many judges will call potential objectionable jurors to the stand for further questioning. It is therefore necessary to inoculate the panel against this type of questioning. First, ask the jurors if they want to change their answers. Then, ask if it is fair to say that they would give the same answers to the other lawyer and to the judge with regard to the issues that have been discussed. Finally, warn them that some lawyers will try to get them to change their answers and tell them how that attempt might be executed. Use the rehabilitation questions that you anticipate as examples such as, "You can be fair, can't you?" Then, pin them down one more time on their answers, asking if anyone would change their answers with that type of questioning.

In addition to inoculation, it is important to get jurors struck on multiple issues. For example, make sure that you not only have them struck on pain and suffering and burden

of proof, but also punitive damages. A lawyer may successfully rehabilitate a juror on one ground, but miss two others.

The second issue in *Cortez* is that it made it more difficult to get someone struck on bias and prejudice. My recommendation as to how to deal with this problem is to focus your efforts on black and white, yes or no, issues. For example, get your Strikes for Cause on the fact that they cannot award money for mental anguish and pain and suffering as opposed to attempting to get them struck on the basis that they have a general bias against personal injury cases.

The final issue raised in *Cortez* and continued in *Hyundai* is the issue of commitment questions. Fortunately, this issue has a very simple solution: Don't talk about the facts during Voir Dire.

I have long advised attorneys to refrain from talking about the facts of their case in Voir Dire. The reason behind this advice is that by introducing facts about the case during Voir Dire, you limit your ability to obtain Strikes for Cause. Jurors are less willing to say that they can't award money for mental anguish, pain and suffering, or that they have a bias against the Plaintiff, if they have heard the Plaintiff's attorney present their case in glowing terms.

Often times, a concern is raised that if we don't talk about the facts, then the Defense will, and we end up starting out behind. Prior to *Cortez* and *Hyundai*, we dealt with this issue by talking to jurors about false starts and the purpose of Voir Dire. I have now successfully addressed the issue in several trials by limiting the Defense through the use of the *Hyundai v. Vasquez* case.

The *Hyundai* case dealt with the situation where a judge refused to allow a Plaintiff's lawyer to ask a question regarding seat belts after he had told them that his client was not wearing a seat belt at the time of the accident. The Texas Supreme Court ruled that the trial court

did not abuse its discretion in preventing the Plaintiff's lawyer from asking the question regarding seat belts after he had informed the jury that his client was not wearing the seat belt. Specifically, the court stated:

"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. If the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not disqualifying, because while such responses reveal a fact-specific opinion, one cannot conclude they reveal an improper subject-matter bias." *Hyundai v. Vasquez* 189 S.W.3d 743 (TX 2006) p. 753.

In the *Cortez* case, the Plaintiff's lawyer gave a general summary of the evidence, and then asked questions about bias and prejudice, relating it to the specific facts of the case. The court ruled in *Cortez* that such questioning constitutes commitment questions.

It is my experience that trial judges are receptive to the irrefutable logic that a Strike for Cause question cannot be a commitment question if the Plaintiff has not introduced any facts into the Voir Dire. The Voir Dire scripts that I write are impeccable when it comes to leaving out facts. The most we will say is, "This is a personal injury case." This allows you to ask any question of jurors about any relevant issue. Had the Plaintiff's lawyer not said, "Little Amber wasn't wearing a seat belt," then they could have asked, "How do you feel about seat belt use? There are some people who simply could not rule for a Plaintiff if they weren't wearing a seat belt. How do you feel about that?" As a result, it is my experience that we are able to consistently obtain numerous Strikes for Cause post-*Cortez* and post-*Hyundai*. As a practical matter, I have not seen any decrease in our effectiveness as a result of these cases.

So, how can Plaintiff's lawyers use this line of cases to their advantage? If the Plaintiff's lawyer is confident that he will not be introducing facts into the Voir Dire, he is in a very strong position to argue to the court that the Defense lawyer should not be able to talk about the facts of the case, either. I begin at the pre-trials on Motions in Liminie by representing to the court that we will not be going into the facts of the case and requesting that the court limit the Defense from going into the facts of the case. Although, technically, a court is not required to so limit counsel, it is certainly within the court's discretion.

The argument that I make is that if the Defense lawyer introduces facts into the Voir Dire, then the questions that are asked after the introduction of those facts become improper commitment questions, and that we will be objecting during the Voir Dire to any such questions. There is a wide continuum among judges as to how much they will limit the introduction of facts once we have made this argument. There are some judges that will still permit a general overview of the facts, while at the other extreme, there are judges that will disallow any mention of facts during the Voir Dire. Regardless of where the judge falls on the continuum, making this argument has resulted in Defense lawyers having much less latitude with regard to discussing the facts of the case. This is good for the Plaintiff in that most Defense lawyers are not schooled in the Strike for Cause Method of Jury Selection, or even the open-ended Oprah Winfrey style of jury selection. It is our experience that, since many Defense lawyers are not prepared to actually ask questions to determine the jurors attitudes and biases, they end up giving time back to the court. At a

minimum, it interrupts a Defense lawyer's flow, and they have to adapt on the spot.

After obtaining many Strikes for Cause, the choices you must make with your preemptory strikes should not be as difficult as in the past. As mentioned earlier, “Leaders” who are against you are struck first, “Leaders” we have questions about are struck second, and then “Followers” who are against you are struck third. In order to efficiently use the time allotted for exercising your preemptory strikes, run the discussion like a meeting. Ask all of the decision makers to list which six venire persons they would strike. Go around the table, one by one, and write down the six juror numbers for each decision maker. Do not allow discussion at this point. You only want each person to give the numbers of the six people they would strike if jury selection was entirely up to them. If some venire person’s number shows up on everyone’s list, use a preemptory strike for that person without discussion. You then will have plenty of time to discuss the remaining venire persons upon whom there was not initial agreement. This system saves time and provides more clarity.

Hopefully, at the end of the process, you will look and see twelve people in a jury box with whom, if you do not have a head start, you at least are not behind the eight ball.