

The Art of Trial Advocacy

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Voir Dire: What's the Point?

Introduction

Voir dire is your first opportunity to speak to the panel. It is your introduction to a group who will make a major decision in your case and you should not underestimate their importance or take them for granted in any way.¹ So, what should you say? What should you not say? What is the point of voir dire?

Voir dire should accomplish the following four things:

- (1) Establish credibility and rapport with the panel for you and your client, if you are the defense attorney;
- (2) Elicit information from the panel to determine which members are the most and least likely to accept your theory of the case;
- (3) Educate and sell members on your theory of the case; and,
- (4) Neutralize or highlight problem areas in the case.

Voir dire should never be the same; it should be tailored to each individual case. Panels who sit repeatedly will appreciate the effort you make to customize your voir dire and they will stay attentive if it is not the same old thing again. You should begin jotting down voir dire questions as you work up your case and hopefully, by the time you get to your trial date, most of your voir dire will be complete. Always review your questions, however, with the four points in mind. If a question does not accomplish one of the points of voir dire, take it out.

Establish Credibility and Rapport

The other points of voir dire are dependent upon your ability to connect with your panel. If you have not established this connection, everything else will just miss the mark. How can you make this connection? Well, for one thing, do not talk legalese to the members of the panel. It might sound impressive but it will only distance the members and you may be treading on instructions and the military judge's territory. Ask open-ended, direct questions that elicit their feelings and opinions on the issues about which you have concerns. Talk to the members, making frequent eye contact and listen to their responses. Try to do this without too many notes and without falling into a mechanical and stilted question and answer.² Follow up on answers and engage the other members in the conversation. Read the panel member questionnaires before trial and try to incorporate what you learn into your questions.³ The fact that you are paying attention to detail with respect to individual members will not go unnoticed.

Elicit Information

You want to know who these members are and how they feel about the issues in your case.⁴ To obtain this information, again, it is important to ask open-ended, direct questions. Let the members do most of the talking. After all, if you have done most of the talking you probably will not be prepared to decide who you want on the panel and who should be off.⁵

A powerful technique in voir dire is "looping." Looping in voir dire should work as follows. First, ask a panel member a question and let him respond. Then use the member's name and repeat his exact words and ask another member for a reaction to what the first member said. Next, move on to a third member, repeating what the first two said, always using their names. This technique elicits more honest feelings and opinions and gets the members to do most of the talking. If you get an unfavorable answer, thank the member and praise him for being honest. Tell him that the beauty of our system is that everyone is entitled to his opinion and that there are no right or wrong

1. An excellent source of insight into jury selection is BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION (Bennett & Hirschhorn ed., 1993).

2. Having to record the responses after each question sometimes has this effect. You can avoid this by changing your tone and voice inflection with each new question.

3. You may also want to ask the military judge to allow additional questions in the panel member questionnaires. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(d) discussion (2000).

4. Only after an informative voir dire will you be prepared to exercise challenges against members. See *United States v. Smith*, 24 M.J. 859, 861 (A.C.M.R. 1987), wherein the court held that the "standard for measuring the legitimacy of voir dire is a question's relevance in the context of laying a foundation for possible challenges."

5. Do not forget the numbers game. Always be conscious of the number of members and how many votes are required for a decision in your case.

answers, just honest ones. Then ask the other members if they agree or disagree with the view expressed by that member. This encourages further candor from the members.

Educate and Sell

An attorney has the right to give a brief overview of the case to the panel members.⁶ Remember, though, that you want the members to do most of the talking and so you should keep your overview brief. Tell them enough to inform them of your version of the facts as well as your theory of the case. Do not get into specifics, save this for your opening statement.

Highlight and Neutralize Problem Areas

If you have weaknesses or problems in your case, bring it out in voir dire and try to defuse the issue.⁷ Of course, the opposition should try to emphasize these weaknesses or problems to their advantage. For example, a poor Criminal Investigation

Division (CID) investigation should be handled by both the prosecution and the defense in voir dire by either neutralizing the problem or highlighting to their advantage. The defense will want to point out that the prosecution does not have all of the facts and “because CID did not do X, we will never know the answers to these important questions.” The prosecution, on the other hand, will want to show that an experienced and educated CID agent did a thorough investigation and that all of the evidence points to the accused.

Conclusion

Voir dire is your first opportunity to make an impression on the panel. Make the most of it. If you remember why you are asking the question, keeping in mind the four points, you will be asking effective voir dire questions which ultimately will help you decide who you want to sit on your case. Major Hasdorff, U.S. Army Reserve.⁸

6. The Supreme Court held in *Powers v. Ohio*, 499 U.S. 400 (1991), that voir dire is “the juror’s first introduction to the substantive factual and legal issues in a case.”

7. If you hide a problem or the panel perceives that you were not honest with them, it could resurface during deliberations when you will have no input. It is much better to bring out such an issue in voir dire, where you can control the discussion and know the concerns of the members. If the problem is too much for a member to be fair and objective to your theory of the case, you will know he should not sit on the panel and you will be able to do something about it.

8. The author is an individually mobilized augmentee assigned to The Judge Advocate General’s School, U.S. Army.