

The Art of Trial Advocacy

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Voir Dire: Making Your First Impression Count

Introduction

Voir dire is an essential, but frequently overlooked, aspect of trial advocacy.¹ Voir dire is your first opportunity to make an impression on the panel.² If it is done correctly, voir dire can give you a head start on educating, persuading, and building rapport with the panel.³ If you do voir dire poorly, however, you will spend the rest of the trial trying to overcome the damage.

Like every other aspect of trial work, success during voir dire is directly proportional to pretrial preparation. No counsel can orchestrate an adequate voir dire without having already established both the theory and theme for the case. No counsel can develop a workable theory or theme without a complete understanding of the facts and applicable law.

As a framework for preparing for voir dire, try this three-step process. First, develop your theme and theory for the case. Second, as parts of your theme and theory, identify the general topics you want to address on voir dire. Finally, from these general topics, draft your specific voir dire questions.

The next two sections are "Do's" and "Don'ts" for voir dire. These sections suggest methods that will help you make the most of this advocacy opportunity:

DO: Look at the Forrest, Then the Trees

Establish your Theory and Theme for the Case FIRST

You cannot know where you need to go during voir dire unless you know your ultimate destination.

Decide Whether You Will need Voir Dire

Ask yourself, is this a panel case? Deciding this issue is a function of knowing your case, the military judge, and the panel to which your case has been referred. You already know your case and, if you are experienced in your jurisdiction, you probably have a good idea of how your military judge or panel would react to your type of case. If you are unfamiliar with either the panel or the military judge, check old reports of results of trial (some jurisdictions keep special trial reports as a tracking tool), talk to local counsel and other counsel who have practiced before your panel or military judge, and read the panel member questionnaires.

Know Your Players

Both the government and the defense need to know who is supposed to be in the panel box. The only way to do this is to check the referral on the back of the charge sheet, get the appropriate convening order (with all amendments) and "scrub" them (that is, confirm who is supposed to be present).

Have a Purpose for Your Questions

Once you have established your theory and your theme, you can tailor your questions to the specific aspects of your case. For example: "How do you feel about the reliability of eyewitness identifications"; "What do you think about soldiers who drink"; "How do you feel about the right to remain silent"; "How would you feel if Sergeant ____ chose to remain silent in this case?"

1. THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS (Supp. 1998) (containing an excellent module on voir dire). Any counsel who is involved in trial work should get his supervisor to use this resource.

2. Do not forget about your ability to voir dire the military judge. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 902(d)(2) (1995) [hereinafter MCM]. This is particularly important in co-accused cases or in cases in which the military judge may have a particular predisposition (for example, carnal knowledge case with a military judge who has a teenage daughter at home, or a barracks larceny case when the military judge's home was recently burglarized).

3. Counsel need to be constantly aware that while voir dire may have these collateral effects, the point of voir dire is to gain information for the intelligent exercise of challenges against members. See MCM, *supra* note 2, R.C.M. 912(d) discussion. See also United States v. Smith, 24 M.J. 859 (A.C.M.R. 1987), *aff'd*, 27 M.J. 25 (C.M.A. 1988). In *Smith* the court stated that "we believe the standard for measuring the legitimacy of voir dire is a question's relevance in the context of laying a foundation for possible challenges." *Smith*, 24 M.J. at 861. *The Advocacy Trainer* lists fourteen bases for disqualification of panel members. See THE ADVOCACY TRAINER, *supra* note 1, voir dire module.

The same holds true for voir dire of the military judge. See United States v. Small, 21 M.J. 218 (C.M.A. 1986). See also MCM, *supra* note 2, R.C.M. 912(f). Regarding disqualification of the military judge, R.C.M. 902(a) states that: "[a military judge] shall disqualify himself or herself . . . [when the] military judge's impartiality might reasonably be questioned." *Id.* Rule for Courts-Martial 902(b) has the five specific (but not exclusive) grounds for disqualification of the military judge. MCM, *supra* note 2, R.C.M. 902(b). Counsel should always be prepared to tell the military judge why a particular question will help counsel when it comes time to make challenges.

Remember Primacy and Recency

We have all heard about this concept in relation to closing argument. The same concept applies to voir dire. Hit your best and most important points first and last (ending with the strongest). Bury the less favorable specific aspects of the case in the middle.

DO: Be Creative

Ask the Military Judge to Allow Additional Questions in the Panel Member Questionnaires⁴ and READ THEM When They Come Back

Panel member questionnaires contain a wealth of information that will help you focus your questions (panel members and some military judges get anxious with lengthy voir dire). With the permission of the military judge, you can customize the questionnaire to your particular case to narrow your focus further.

Know the Preliminary Questions the Military Judge Will Ask

You may want to build or expand on a question the military judge just asked. For example, you could say: "I want to expand on the military judge's question about _____." If you think the question may have more impact or is better suited coming from the judge, ask the military judge to present your submitted question to the panel.

DO: Keep it Simple and Listen

Ask Simple, Open-Ended, Straightforward Questions

For example, you could ask: "How does it make you feel that the victim of the assault is now blind in one eye?" You could also ask: "If the decision was yours, what would the Army's policy be on adultery?"

LISTEN to the Answers

Write out the questions, but remain flexible; do not be wedded to the questions you have prepared. They may become

4. MCM, *supra* note 2, R.C.M. 912(a)(1).

5. See U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHMARK, at 55, 75 (30 Sept. 1996) (containing tables listing the number of members required for a decision in courts-martial).

6. See MCM, *supra* note 2, R.C.M. 912(f)(4). See also *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990); *United States v. Ingham*, 36 M.J. 990 (A.C.M.R. 1993) (setting out the requirements for preserving denied challenges for cause).

moot, based on the answers provided. If not, you can come back later. Exploit opportunities for follow-up questions. For example, should a panel member tell you he believes a life sentence is "inappropriate" in your homicide case, you should ask: "What do you mean when you say that a life sentence is not appropriate in a homicide case?"

Record the Responses

Make it Clear how the Members are to Respond

If the military judge does not do so, tell the members they should raise their hands to indicate a positive response. Head nods sometimes get missed. Remember, you need to indicate for the record which panel member responded which way, for example: "Positive responses from Major Jones and Captain Harvey"; "Negative responses from all members."

Have Someone Help You

You are focused on the questions and the answers (from the perspective of follow-up questions). An assistant (either at counsel table or behind the rail) can record the answers to use in deciding whom to individually voir dire and who to challenge. Your assistant can also note body language and nonverbal cues (these are sometimes more telling than verbal answers).

DO: Think About Your Challenges

Be Aware of the Numbers

Because the military normally does not require unanimous decisions (on findings or sentence, except in capital cases), the number of members on the panel is an important consideration for each side.⁵ You may decide you do not want to make a challenge, even though you have one.

Preserve your Denied Causal Challenges

Know the rules so that you will not waive your objection to a denied challenge.⁶

DON'T: Waste Your First Chance to Make a Good Impression

If You are Going to Do It, Do It Well

No rule says you must conduct voir dire. Even though not doing it wastes an advocacy opportunity, doing it poorly is worse than not doing it at all. Conversely, taking the time to do it right is better than not doing it at all.

Don't Plow Old Ground

Listen to what the military judge asks, as well as the questions from the other side. You also may get the answer to one question through another question. Be particularly careful to not ask questions that the members have already answered in their questionnaires. You appear unprepared and apathetic to the value of the members' time if you plow the same ground twice.

Will You Taint the Entire Panel?

During group voir dire, be careful not to ask a question which may generate an answer that could taint the entire panel. For example, if a panel member says he has prior knowledge of the case, ask him about that knowledge on individual voir dire. The military judge may stop you if you ask such a question on group voir dire, but having the military judge stop you certainly does not help your rapport with the panel.

DON'T: Forget that Panel Members are Human

Avoid Leading or Confusing the Members

Leading questions suggest an answer. As counsel, you normally want to know what the panel member thinks and feels about a subject; you do not want them to just adopt what you think.⁷ Confusing and conclusory questions do not help; you are not able to elicit their thoughts and feelings if the panel members do not understand your question. Try transition comments when moving from one general topic to another: "Now I'd like to turn your attention to _____."

Stay Away from Legalese

Do not ask: "Do you understand that a soldier, when he reasonably believes that bodily harm is about to be wrongfully inflicted on him, is entitled to offer, but not actually apply or attempt to apply, a means or force that would be likely to cause death or grievous bodily harm?" (Let the record reflect blank stares from all panel members). It would be better to ask the military judge to read the instruction on self-defense. Then ask the panel: "How do you feel about a soldier's right to defend himself when he is threatened?"

Embarrassing Panel Members is Bad

Many panel members are already uncomfortable about being involved in a process they probably do not fully understand. Now you are asking them potentially personal and invasive questions. If you are unable to avoid the probing question, save it for individual voir dire. At a minimum, preface it with a question such as: "I know that this may be difficult, but in order to make sure (the government)(my client) gets a fair trial, I really need to ask you about _____." Asking condescending questions ("Do you understand that . . . ?") or calling them by the wrong or mispronounced name also will not help put them at ease.

Talk to the Panel like People

Voir dire is your chance to "connect" with the panel. Get out from behind the podium or your table, get into the well (without notes, if possible), make eye contact with the members, and "talk" with them. Strive for a conversation, not an inquisition.

Conclusion

Voir dire is an important, but little used, advocacy tool.⁸ Because it is not required, many judge advocates take the easy way out by completely avoiding it, thus wasting an advocacy opportunity. Hopefully, these "Do's and Don'ts" will encourage you to make use of this advocacy tool. Voir dire is your first chance to make an impression on the panel; make it count. Major Hargis.

7. Leading questions would be appropriate if you are trying to get the panel to adopt your theory or theme for the case, or to get them to make a promise or commitment (for example, hold the government to the burden of proof). Leading questions would also be appropriate if you are trying to "lock in" a response to support a challenge.

8. Advocacy opportunities are everywhere, even in seemingly bland areas like the "boilerplate" and preliminary witness matters. Make sure you have the nature of the charges. Memorizing and confidently announcing the nature of the charges, in your best command voice, shows your mastery of the case. You can also demonstrate your control of the courtroom by firmly taking charge of a witness when the witness first comes into the courtroom ("Sergeant _____, stand on the green X in front of the witness chair, turn, face me, and raise your right hand," all in your best command voice).