2012

Rethinking Voir Dire

Eric R. Carpenter
Chair and Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, ercarpen@fiu.edu

Rethinking *Voir Dire*

Lieutenant Colonel Eric R. Carpenter[*]

Basics

Before we decide what we should do during this first phase of the trial, we should define it and give it a proper label. *Voir dire* is a terrible label for this phase (no one can even agree on how to pronounce it). It is a French phrase that literally means "to speak the truth." Well, that should apply to everyone who takes an oath to tell the truth at trial. Generally speaking, though, *voir dire* means a preliminary examination to test the suitability of a potential juror or the competence of a potential witness. So, if we were to use English rather than French to describe the first phase, maybe we could call it "Preliminary Panel Member Examination."

However, that title would fit only one part of this phase of trial. There are really three parts to *voir dire*: individual written examination, individual oral examination, and group oral examination. For the individual written examination, the title "Preliminary Panel Member Examination" is probably appropriate. In these questionnaires, we ask the panel members questions in a sterile, test-like, examination fashion. But for the other part of this phase—the in-court, oral exchange between you and the individual, or between you and the group—that is not a good label. That part should be called "Conversations with Panel Members" because that is what you want to achieve: a conversation with your panel members.

For simplicity's sake we will use the term *voir dire* to describe the entire phase, but distinguish between individual written examination, individual oral examination, and group oral examination. We need to be precise about these distinctions because once we understand the overall goals of *voir dire*, we will see that some of these goals should be accomplished in individual written and oral examination, and some in group oral examination. By the end of this note, you will have a simple system that you can use to approach *voir dire* that is built around achieving the goals for each of the three subcomponents of the larger *voir dire* process.[1]

Goals and How to Reach Them

Everything you do in trial advocacy needs to be goal-oriented. You must have a clearly defined reason for doing what you are about to do, and then you only do what you need to do to achieve that goal—nothing more. The corollary of that is if don't have a reason for doing something, don't do it. In fact, you should start with the presumption that you are *not* going to do something (call this witness, ask this question, do a cross examination, object to this question, etc.) because that forces you to think through why you need to take that action. *Voir dire* is no exception. So, let's start with the presumption that we are not going to *voir dire* again, ever. That will force us to think through the goals of *voir dire* in general. Start with that presumption before your next trial, and that will force you to think through the goals of *voir dire* in your individual case.

The generally recognized goals of *voir dire* are information gathering, education, rapport, and persuasion.[2]

Information Gathering

The first goal (and the only one explicitly mentioned by the Rules for Courts-Martial (RCM))[3] is information gathering. Panel members may not sit unless they can be fair and impartial; therefore, you need to be able to gather information on fairness and impartiality to make meaningful use of challenges.

In civilian trials, the prospective juror pool is very large and ostensibly represents a cross-section of society. Civilian trial attorneys have a bigger information gathering challenge than you do. They really know nothing about these people and one of their primary goals is simply to get rid of the jerks and weirdos. We don't have that problem. The Army does a pretty good job of screening our population for those with bizarre beliefs or socialization problems. Therefore, you can refine your information gathering goals.

You need to focus on the panel members' experiences, biases, and beliefs that could affect how your panel members will solve the problem in your case. If your case involves homosexual conduct, or pornography, or cross-racial sexual relationships or violence, or a sexual assault victim who has behaved in ways that are contrary to traditional sex role expectations, or [add a controversial fact pattern here], then

---

[*] Judge Advocate, U.S. Army. Currently assigned as Chair and Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] This framework is derived from Lin S. Lilley's excellent article, *Techniques for Targeting Juror Bias*, TRIAL, Nov. 1994, at 74. For further reading on *voir dire*, see James McElhaney, *Making Limited Time for Voir Dire Count*, A.B.A. J., Dec. 1998, at 66; James McElhaney, *Listen, Don't Talk*, ABA J., Nov. 2009, at 20; Amy Singer, *Selecting Jurors: What to Do About Bias*, TRIAL, Apr. 1996, at 29; James McElhaney, *Rejiggering Jury Selection*, ABA J., Apr. 2008, at 30. Warning! If you are going to defend a capital case, then you need to learn a particular form of *voir dire* called the Colorado method. *See* Lieutenant Colonel Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, ARMY LAW., May 2011, at 6, 22.

[2] JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION (3d ed. 2011).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(d), (f) (2008) [hereinafter MCM].

you need to explore the members' belief patterns that will shape how they approach the difficult task that you are about to give them.

The problem is that panel members, like most human beings, will not say socially unacceptable or embarrassing things in public. Sociological studies have shown that when people are put in group settings, they say what they think the group expects them to say.[4] If you ask panel members who are on the record and sitting there in their formal uniforms and who might themselves be a field-grade officers and who may be sitting next to their bosses, "Do you look at pornography?" – don't expect a lot of hands to go up. If you ask, "Would you be concerned if your daughter dated outside of your race?": don't expect a lot of hands to go up.

To get responses that will accurately reveal a bias or belief that will affect your case, you need to ask those questions in a safe place—individual written examination.

Your panel members will already have completed a written questionnaire that gets at some of the other RCM 912 concerns,[5] but that questionnaire contains plain vanilla questions. You want the panel members to complete a supplemental questionnaire[6] where you give them ways to expose their beliefs and experiences without any associated public embarrassment. Put yourself in the position of a panel member who knows that his or her truthful answer will be socially unacceptable, and then ask the question in a way that gives him or her some "outs"—for example, that gives them a way to shift the belief or behavior to someone else. Here, you are much more likely to get reflective and accurate answers.

In a case involving pornography or non-traditional sexual behavior, you might ask:

- "Have you or someone you are close to (a college roommate, brother or sister, close friend) ever regularly looked at pornography?" If they disclose that someone close to them does look at pornography, then have the following question ready for them: "If someone else did, did your opinion of him or her change after you found out? Explain how it changed."

In a case involving cross-racial sexual relationships, you might ask:

- "If your son or daughter became romantically involved with someone from another race, how much would that concern you?" And then have a scale from "0" (not concern me at all) to "10" (concern me greatly).

You can ask similar questions about homosexuality ("If your son or daughter told you he or she was gay, how much would that concern you?" and then a scale). Or, the validity of the mental health field as a real science ("In your opinion, are psychology and psychiatry valid sciences or psycho-babble?" with a scale). Or, whether they associate a stigma with seeking help for mental health problems ("Have your or has someone close to you been to a mental health professional? If someone else, did your opinion of him or her change? How?").

Take a look back at those sample questions. If they were asked in a group setting, what would the answers have been? The socially acceptable answers. Reduce these questions to something that is close to an anonymous survey (the written supplemental) and see if you can get accurate replies. You might even consider having a psychologist or psychiatrist help you to draft the questions. An added benefit of asking the questions via a supplemental questionnaire is that the members won't know which party is seeking the information.

You should also ask about life experiences that might impact how the panel member will approach the complex problem that you are about to give her. The military judge will ask some of these questions in front of everybody. For example, the military judge will ask, "Have you, or any member of your family, or anyone close to you personally ever been the victim of an offense similar to the offense charged?" Now suppose your case involves a sexual assault on a child. If a panel member was molested as a child but has not told anyone to this point in her life, do you really think she will raise her hand and say so in front of all of these strangers? Would you want to answer that question that way? The better place to ask that question is in individual written examination.

---

[4] S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments, in* GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS 177 (Harold Guetzkow ed. 1951); SOLOMON E. ASCH, SOCIAL PSYCHOLOGY (1952); Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1956).

[5] MCM, *supra* note 3, R.C.M. 912(a)(1), (f). For Army practitioners, that questionnaire is found in U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, 26 Mar. 2012, at app. E. Generally, the military justice department of the Office of the Staff Judge Advocate will circulate this questionnaire to the members shortly after the panel is selected by the convening authority, will serve a copy on the local Trial Defense Service office, and these questionnaires will remain on file with those offices for review.

[6] The use of supplemental questionnaires "may be requested with the approval of the military judge." MCM, *supra* note 3, R.C.M. 912(a)(1). Further, "Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges." *Id.* discussion. *See also id.* R.C.M. 912 analysis, at A21-61. In practice, you will file a motion for appropriate relief in accordance with the military judge's docketing order in which you list the proposed questions for a supplemental questionnaire. The proposed supplemental questionnaire might have only a few questions. After the parties have litigated this motion and the military judge has ruled, the trial counsel will be responsible for submitting the approved supplemental questionnaire to the members and then for gathering them back up.

And you might look for the ways that they learn:

> [O]ne of the most important things to look for is how the different jurors learn. Are they more creative or more logical? Would they rather look at a graph or read a book? What magazines do they read? What kind of entertainment do they enjoy? What kinds of games do they like to play?[7]

After all, your primary job in trial is to teach them how to solve the complex problems you are giving them. Wouldn't it be nice to know how learn?

As with anything else in trial work, the decision to submit an additional questionnaire needs to be goal oriented. If you don't need to gather information via a supplemental questionnaire in your particular case, don't.

If you do need a written individual examination, you need to start working on it early. You need to identify belief-patterns, structure arguments around them, and then draft written individual questions—during the trial preparation process, not on the day before trial. Generally, to do a written supplemental questionnaire, you will need to distribute the questionnaires a week or two before trial so that they can be sent to the members, the members can complete them, and the questionnaires can be collected and reviewed by the attorneys. Using this process forces you to get your thoughts together well before trial.

This discussion of individual written examination points us to the goal for individual oral examination. Use individual oral examination to follow up on your written individual examination. If the panel member has responded to a written question in a way that causes you concern, consider challenging him based solely on that written response. However, if the military judge wants more, bring the issue up in individual oral examination. Don't bring it up in group oral examination. Give the prospective panel member as much anonymity as you can.

Note how using written questionnaires and individual oral examination greatly simplifies the process of *voir dire*. If you gather information this way, you don't have to come up with complex charts and try to keep up with whose hands went up in response to your last question. Instead, you get the answers you need ahead of time, on paper, or later when just one person is in the panel box. *Voir dire* can be pretty easy.

The bottom line is that if you want to learn particular information about a panel member, use individual written examination to discover that information and then use individual oral examination to follow up. Don't waste your group oral *voir dire* time doing information gathering. You won't get accurate answers in any event. Again, only do individual written examination or individual oral examination if you need to. If you don't have a good reason for doing it, don't do it.

Education

The next goal is education: education on certain beliefs that the panel members will have to deal with, *not* education on your theory or theme of your case.

When you theory-shop or theme-shop with your panel, you might think you are doing what lawyers should be doing, and other lawyers might be impressed—but your panel members won't. First, you risk coming across as a used-car salesman or as a lawyer pulling a lawyer trick. According to James McElhaney, "Arguing your case before the jury panel members even know what it's about triggers genuine sales resistance. So does trying to push the jurors into making commitments about how they are going to decide the case."[8]

And when you ask questions that you think are related to your case, like, "Would you agree that cops sometimes lie?", you are insulting their intelligence. Of course they know that cops sometimes lie. What they want to know is, did a cop lie in *this* case. And they want to wait until they hear the case to deal with that issue. They don't want to feel you are pressuring them to agree with you before they know the facts. Look at these questions:

- Do you believe that, under certain circumstances, eyewitnesses' memory might not be accurate?
- How do you feel about witnesses who testify after receiving special treatment from the government?
- Do you think criminals might lie in order to get a better deal from the government?
- Do you agree that many words of the English language have various meanings?
- Do you agree that the mere presence at the scene of the crime does not establish guilt?

Each of these questions only has one answer. The panel members know that so they wonder why you are asking them a question that obviously has only one answer, and then why you want them to say that obvious answer out loud. The whole thing is unnatural. You might think you are doing something clever, but they are wondering why you are wasting their time and insulting their intelligence with questions like these.

---

[7] James McElhaney, *Making Limited Time for* Voir Dire *Count*, A.B.A. J., Dec. 1998, at 66.

[8] *Id.* at 66–67.

As a good rule of thumb, if what you intend to ask is really a request for them to make an inference or to use a generalization, then don't ask the question. For all of the questions above, you can just argue the inference or generalization. And guess what? The panel members will generally agree with those inferences and generalizations (although they may disagree about whether they apply in your particular case). Instead of asking those questions, do what the panel members want you to do: put on the evidence, and then argue the inferences and generalizations. They will appreciate that.

So, if we aren't going to theory-test and theme-test, what are we going to educate the panel members about?

Educate them on the counter-intuitive aspects of the law or of your case and on generally held beliefs that run counter to your case. The judge is going to ask some perfunctory questions that address some of these issues, particularly system bias that runs against the accused. However, all of these questions only elicit the socially acceptable responses. There is only one way to answer, "The accused has pled not guilty to all charges and specifications and is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?" No panel member is going to raise her hand while wearing her formal uniform and while on the record and say, "You know what, your honor? I cannot abide by that fundamental principle of American law. In fact, I'm really a fascist." The panel members will only respond with the socially acceptable answer, but you need to be aware that they will still likely solve the complex problem you have given them by relying on deeply-embedded generalizations about human behavior.

We need to find a way to make them aware of their underlying beliefs so that they will not act on them. To do this, you want them to describe the 800-pound gorilla in the room (the belief they would otherwise use to solve the problem). You want them to gain insight on how their "intuitive" solution contains error.[9]

For the defense counsel, there are several places where the law runs counter to our intuitive problem-solving processes. For example, if the accused does not testify, we all draw negative inferences from that (he must have something to hide; if I were falsely accused, I would testify to set the record straight, and so should he—he didn't; therefore, he is guilty). Because normal people draw an inference that runs counter to constitutional protections (here, the right not to testify), the law says, "Don't do that." The same goes for the prohibition against drawing a negative inference if the defense does not put on a case (if evidence that said he didn't do it were available, of course he would put it on—so it must not exist), or the prohibition against drawing a negative inference that because the accused is in court at all, he must have done something wrong (he has been through transmittals from commanders, an Article 32 hearing, and the commanding general's referral—all those people think he did something wrong, or else he would not be sitting at that table).

These inferences draw from a person's lifelong experiences and the way she solves problems outside of a courtroom. The judge gives a simple instruction not to use those lifelong-held generalizations to solve the problem. This does not mean that she will not. It just means she will not talk out loud about them.

So, in group oral examination, ask this simple question: "What is the first thing that comes to your mind when you hear that the accused will not testify?" Wait a few moments. There may be some silence. Eventually, someone will say, "He is guilty." Now, resist the urge to challenge that person. Instead, say, "Thank you, Colonel Jones." And then ask, "Did anyone else think that?" Then say, "Thank you, [Names]." Then, have them describe the gorilla. Ask, "Okay, Major Smith, why do you think that?" Do not be judgmental with the answers. Instead, validate them. Say, "Thank you, Major Smith, I see your point," or some variation on that. Continue asking questions until the 800-pound gorilla is fully described.

And then kill the gorilla.

Ask, "Okay, why would someone who is innocent not take the stand?" Again, wait a few moments. There may be some silence. But then somebody will find an answer—a "sword," if you will—that will help you to kill the gorilla: "He might not be a good public speaker." "His attorney might have told him not to." "He may have some embarrassing skeletons in his closet." "He might be afraid that a trained prosecutor will twist his words." "He might be really nervous, particularly when this much is at stake." (If no one comes up with a reason after several moments have gone by, then toss them a sword to get them talking.) The key is to have them list all of the reasons that *no one* ever wants to testify. Then ask, "Does everyone now see why the military judge told you not to hold it against Sergeant Adams if he doesn't testify? Please raise your hand if you can see that. The members all raised their hands. Thank you."

For the presumption of innocence, you might ask, "What is the first thing you think when you see that the government has gone through all this trouble to bring the accused to trial?" The answer will probably be, "He did something wrong." Then you respond with, "Why could it be that innocent people are brought in to court?" Let them grab some swords. ("He was framed." "He was the best of several suspects." "He was in the wrong place at the wrong

[9] For a good discussion of the neurological reasons why you should explore these beliefs with the panel members, read JONAH LEHRER, HOW WE DECIDE (2009) (reviewed by Major Keith A. Petty, ARMY LAW., Nov. 2011, at 33).

time." "Someone misidentified him."). If they can't find any, ask them, "Well, have any of you ever been accused of doing something you didn't do? Either recently, or even as a kid?" Have them describe the situations. Then ask, "Now, does everyone see the reason why we have this presumption of innocence? Please raise your hand if you see that. Everyone's hands went up. Thank you."

You killed the gorilla. Now, the members are much less likely to rely on long-held generalizations that work against your client. Note that the goal is to kill the gorilla, to make them aware of their beliefs so they might not act on them. The goal is not to challenge the panel member. (You are not going to win most challenges for cause in this area anyway because the other party or the military judge will be able to ask questions that will rehabilitate the panel member).

Some members will show that they have beliefs that run counter to your case. That is okay. You are not going to be able to get them to fully reject these iceberg beliefs. (If you could, you should have become a clinical psychologist, not a lawyer.) You are simply going to make them aware of their beliefs so that they will be more receptive to counterarguments and other belief structures. As James McElhaney states, "A sermonette and long strings of questions will not change how anybody feels about basic issues. Even if they seem to go along with you, they will not reject their personal opinions. They will keep their personal opinions and reject you."[10]

For the trial counsel prosecuting a non-stranger sex assault case where the victim has behaved in ways prior to the assault that are outside of traditional sex-role expectations, you will run into two beliefs that will hurt your case: first, she asked for it (or shares blame), and second, she assumed the risk that this would happen. If slightly more than one-third of your panel members has one of these beliefs (and research shows that these are commonly-held beliefs),[11] and you don't deal with these beliefs, then you may have an acquittal coming.

If your victim did something like drink with the accused ahead of time and then consensually engage in kissing or oral sex, but claims that the accused forced sexual intercourse on her, then some panel members might think that she asked for it. Essentially, they will think that she shares culpability for what happened next ("if she had not done all of those things, then this guy would not have lost control of his libido").

You can counter that by asking, "Are there circumstances where a woman can get a man so worked up that, even if she says no later, it is too late to say no?" Wait. Someone may raise their hand. Ask why they think that way. Have them describe the 800-pound gorilla and see if other people agree using the same technique as above. Then, give them a sword. Ask them, "Okay, well, if someone comes up to you and asks to borrow $50, and you say, 'I won't loan you $50, but I will loan you $25,' can that person then go ahead and forcibly take the other $25? Who thinks that person cannot? Everybody raised their hands."

If your victim placed herself in a risky situation, particularly by her own voluntary drinking, then you need to address this assumption of risk. You might first ask, "If a woman does X, Y, and Z, do you think she assumes some risk in what might happen to her?" Wait. You will probably get several people who agree. Ask why they think that way. Describe the 800-pound gorilla. The next step is to see if they think that because she assumed some risk, the offender might be less culpable. Ask, "Well, if someone gets really drunk and stumbles out of a bar, they have placed themselves at risk of getting mugged. If someone does mug them, do we let the mugger go because the victim was drunk?" Or you might ask, "If a well-dressed businessman goes to an ATM late at night in a crime-ridden part of town and gets mugged, do we let the mugger go because the victim put himself in a dangerous situation?"

Again, you need to have a good reason for doing group oral examination. If you do not have a good reason for doing it, don't do it. You only need to do this when a damaging bias or generalization might exist in your case. If your client is going to testify or put on evidence, then you don't need to explore those system biases. If your victim did not behave in a way that invokes those beliefs, then you don't need to explore those generalizations about human behavior. Only describe the 800-pound gorillas that need killing.

The bottom line is: describe those belief systems (describe the 800-pound gorilla), and then have the panel members find reasons why those belief systems are sometimes unreliable (have them find some swords) so they can kill the gorilla. Again, you need to have a good reason for doing group oral examination. If you do not have a good reason for doing it, don't do it.

Rapport and Persuasion

The third and fourth goals of *voir dire*, rapport and persuasion, are really byproducts of what you have accomplished in individual written examination and both individual and group oral examination. You have established rapport with the panel by not wasting their time, by asking questions that matter, and by showing them that you are prepared. In individual and group oral examination, don't ask test-like questions. Show an interest in what they are

[10] McElhaney, *supra* note 7, , at 67.

[11] HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966); GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989).

saying. Don't ask judgmental questions, and don't judge their answers. Validate all of their responses.

Finally, by addressing the biases and beliefs that run counter to your case, you have made them more open to the case you are about to present. You will be more persuasive later.

Questioning Techniques

Remember, in individual oral examination and group oral examination, your goal is to have a conversation. In fact, this is the only two-way conversation you get to have with the panel members during the whole trial. Don't waste it by talking the whole time. You should ask simple, open-ended questions, and then allow the panel members to talk about their beliefs or experiences. Have your co-counsel give you a cue if you are doing what lawyers love to do—monopolizing the conversation. Once you get people talking, you will be amazed by what they will say. Here are some tips:

- Be comfortable with silence. Three, four, or five seconds may go by—or even more—before someone answers. That is okay. Wait for them to talk.
- Make eye contact.
- Listen to and observe the verbal and non-verbal responses of panel members. Watch for changes in facial expressions, body movements, avoidance of eye contact, hesitancy to respond, and other indications that a member is uncomfortable or insincere in his or her response.
- Direct your questions to every panel member, not just the president.
- Relax and ask questions in a conversational tone.
- Use simple language; avoid legalese.
- Don't say things like, "Affirmative response from all members." Instead, say, "Everyone raised their hands."
- Each time you speak to someone, use his or her name: "Sergeant First Class Jones, your hand is up. What do you think?" That will keep the record straight as to who is saying what.

Know Your Judge

The nature and scope of *voir dire* is within the discretion of the military judge,[12] but most military judges will allow you to ask questions. Some military judges will require you to submit questions beforehand. This is a response to having seen many bad *voir dire* sessions—particularly ones with unabashed theme and theory testing. Be prepared to tell your judge why your client (either the government or the accused) may not be able to get a fair trial without your having the ability to ask that particular question. You need to be able to explain why your questions (written or oral) directly relate to the panel member's ability to sit fairly and impartially.

The judge will ask preliminary questions similar to those in the *Military Judges' Benchbook.*[13] Listen to the members' responses. Don't repeat those questions. But remember that most of these questions will only receive the socially acceptable responses and so will not uncover the members' true beliefs. If you need to explore these areas, be prepared to tell the judge why you need additional questions.

Pulling It All Together

Now that we have discussed the four goals of *voir dire* (information gathering, education, rapport, and persuasion) and how they relate to the three parts of voir dire (individual written examination, individual oral examination, and group oral examination), we can build an easy framework for deciding how to conduct *voir dire*, when we decide to do it at all. The appendix provides the three parts of *voir dire* and how to use them.

---

[12] MCM, *supra* note 3, R.C.M. 912(d).

[13] U.S. DEP'T OF ARMY, REG. 27-9 MILITARY JUDGES' BENCHBOOK paras. 2-5-1, 2-6-2, and 8-3-1 (1 Jan. 2010).

Appendix

The Three Parts of *Voir Dire* and How to Use Them

	Individual Written Examination	**Individual Oral Examination**	**Group Oral Examination**
Purpose	Gather information for challenges	Follow-up on individual written examination; gather information for challenges	Educate on counter-intuitive aspects of the case and generalizations that hurt your case—this is not the place to gather information for challenges
Method	Written questions; reinforce semi-anonymous nature of questions; provide the panel member with "outs"	Open-ended questions; listen more than you talk	Open-ended questions; listen more than you talk; develop the counter-intuitive belief; then "kill the gorilla"
For All of These, Ask: Do I Have a Good Reason for Doing This?			