Avoiding Voir Dire Pitfalls

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The age-old maxim that there is never a second chance to give a good first impression rings true in *voir dire*.

The Military Judge finishes the preliminary instructions and her *voir dire* and asks, "Do counsel for either side desire to question the court members?" What happens next often sets the tone for the remainder of the court-martial. The age-old maxim that there is never a second chance to give a good first impression rings true in *voir dire*. Will you and your team come off as polished, professional attorneys who have put in countless hours to prepare your case? Or will this phase of the trial leave the members questioning your capabilities, credibility, and preparedness? A large part of the answer depends on the work you put into your *voir dire* on every case.

Preparation for and effective execution of *voir dire* in the military courtroom must include an examination of the applicable rules and controlling case law, development of a coherent strategy, and practical preparation for the delivery to the members. This article will provide guidance and some best practices you can employ in your next case.

MANUAL FOR COURTS-MARTIAL (M.C.M.)

As with every endeavor at court-martial, an examination of the *voir dire* process must begin with the M.C.M. In particular, you should be aware of the impanelment procedures as detailed in Rules for Courts-Martial (R.C.M.) 912 and 912A as well as the implications those rules have on *voir dire* practice. As for the art of *voir dire*, R.C.M. 912(d) and the discussion thereto provide the purpose for *voir dire* at courts-martial: to obtain information for the intelligent exercise of challenges. Deciding what this means for your case and your presentation of *voir dire* is subject to the interpretation of the military judge, who maintains relatively unfettered control over the *voir dire* process.[1] For example, more permissive military judges may allow you to weave case theme and theory into *voir dire*, while less lenient military judges may require direct correlation to a grounds for challenge under R.C.M. 912(f)(1). There are also military judges who may not allow you to ask any questions at all. A best practice to determine your military judge's preference is to address this issue during the initial R.C.M. 802 scheduling session.

LEGAL FRAMEWORK

In addition to the guidance found in the M.C.M., you must have an understanding of the legal standards to evaluate and sustain challenges as well as the limits on using peremptory challenges. In terms of the overarching purpose of *voir dire*, the **Court of Appeals for the Armed Forces** has consistently held that members must be excused for cause when it appears that their service would raise substantial doubt as to the legality, fairness and impartiality of the court-martial proceedings.[2] The Court has further held that substantial doubt arises when, in the eyes of the public, the challenged member's circumstances do injury to the perception or appearance of fairness in the military justice system.[3]

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Challenges for cause using the tests for actual and implied bias are the mechanisms to ensure legality, fairness, and impartiality in the member selection process.[4] The test for actual bias is subjective and considers whether a member's bias will not yield to the evidence presented or the military judge's instructions.[5] In practice, actual bias is often readily apparent; typically the member will affirm she or he is unwilling or unable to set aside a belief or past experience, even if called upon to do so by the military judge. The test for implied bias is objective and considers the public's perception or the appearance of fairness in having a particular member serve as part of the panel.[6] To effectively build challenges for cause based upon implied bias, you should ask open-ended questions that elicit sufficient testimony on which the military judge can base a decision. You should also take detailed notes of the challenged member's demeanor during the questioning to highlight during subsequent argument. Finally, you must be aware that the military judge is required to apply the liberal grant mandate to challenges by the defense.[7] The liberal grant mandate, which has been in effect since the promulgation of the M.C.M., enables military judges to fulfill their responsibility of preventing both the reality and the appearance of bias involving potential court members.[8] You should be able to argue for and against the application of the mandate by providing the military judge information and advocacy focusing on the appearance, expressions, and attitude of the challenged member.

As a best practice in exercising challenges for cause, you should: (1) know the difference between actual and implied bias and how the tests for each impact your ability to advocate for the retention or challenge of a member; (2) understand how the liberal grant mandate impacts your argument; and, (3) not pursue challenges on actual bias when there is no supporting evidence.

In light of the legislative changes, a noteworthy change to the impanelment process comes after the exercise of challenges for cause. Once challenges for cause have been exhausted, the remaining members are now assigned random numbers by inputting their rank and names into the random number generator.[9] The generator assigns a random number to each member starting at one and continuing until all members have a number. After being numbered, the decision as to the exercise or non-exercise of the peremptory challenge is undertaken.[10] Under the old rules peremptory challenges would be used immediately after challenges for cause were decided and the panel that remained would be seated, so long as quorum was maintained. Now, you are no longer required to play the "numbers game" with the new rules and can now establish new parameters for the optimal use of challenges.[11] Nevertheless, the new rules do require some additional thought regarding the use of peremptory challenges. In practice, this means that the potential member you have targeted for the use of your peremptory challenge could be assigned a high number, and thus not selected for service on the panel. Given this new wrinkle, you should be contemplating a primary and alternate peremptory selection based upon the outcome of the random number assignment.

The use of the peremptory challenge, however, is not without restriction. You must be prepared to justify your use of a peremptory challenge if the military judge or opposing party questions whether the challenge was made on the basis of the challenged member's race or gender.[12] Importantly though, simply providing a race or gender neutral justification alone is not sufficient to meet this threshold and you need to be prepared to cite the challenged member's responses to *voir dire* questions, their demeanor or physical reactions in the courtroom, and other pertinent information.[13] Finally, defense counsel have an additional burden in that they must consider whether the use of a peremptory challenge on a previously challenged for cause member is worth waiving review of the denial of the challenge.[14]

Your *voir dire* as a whole, as well as each question, should be strategically aimed at an outcome that furthers your case.

STRATEGIC DEVELOPMENT

After reviewing the rules and relevant case law you should then start developing your *voir dire* by asking "why?". Your *voir dire* as a whole, as well as each question, should be strategically aimed at an outcome that furthers your case. More basically, understanding why you are asking a particular question might ultimately lead to the realization that the question is not useful or, in some cases, counter-productive to your aims. Using "why?" as your barometer should eliminate unnecessary questions and fine-tune ambiguous questions, both outcomes that will build credibility with the panel.

The concept of bias, as discussed above, should also be built into the strategic development of your *voir dire*. If you believe a certain issue is likely to shape the case, for example a personal opinion as to the recreational use of illicit drugs; this issue should be the highlight of your *voir dire*. When you have made the decision to highlight an important issue you should then develop questions intended to elicit evidence of bias by members to best suit the needs of your case. Sticking with the example above, savvy counsel would have the entire panel affirm that recreational drug use has no place in the Air Force, but would follow-up with questions regarding potential views on changing drug laws in civilian society and whether members believe these changes should impact the military. An effective advocate, whether trial counsel or defense, should be able to build a challenge for cause or rehabilitate a member, depending on your strategy, who answers the follow-up question affirmatively.

A well-developed *voir dire* question can both elicit information for the intelligent exercise of a challenge and also serve as a foot-stomping reminder during a findings argument.

The strategic use of theme and theory in presenting your case is effective throughout all phases of the trial and *voir dire* is no exception. A well-developed *voir dire* question can both elicit information for the intelligent exercise of a challenge and also serve as a foot-stomping reminder during a findings argument.[15] Weaving your theme and theory into *voir dire*, however, must conform in some manner with the requirements of R.C.M. 912(d). Put simply, asking a question that highlights your theme and theory, but that does not attempt to elicit a basis for a challenge should not be asked.

HOW TO START

In terms of putting pen to paper, many of you will begin by searching the "shared drive" for old submissions you or your peers have used in similar cases. While there is nothing wrong with using tried and true *voir dire* questions, you should treat each question in a recycled document as if you were creating it for the first time for use in your current case.

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One recycled, but more reliable, document that counsel often forget to reference is the Military Judges' Benchbook.[16] The questions therein are guaranteed to be asked every trial, yet counsel submit, with regularity, exact copies of the military judge's questions or questions that very closely replicate them. A better practice is to review the military judge's questions first and then more thoroughly develop lines of questions. If there are questions you want to ask that are similar to those the military judge asks, then ask the military judge to adjust the questions to capture the additional aspect you are looking to discover. One good example of this practice would be if you want to know if a member of the venire has a close friend who was charged with an offense similar to that charged at the court-martial. Counsel often ask, "I know the military judge just asked you 'if anyone or any member of your family has ever been charged with an offense similar to any of those charged in this case,' but now I would like to ask if any *friend or close acquaintance* has ever been charged with a similar offense?" Instead of this line of inquiry, simply ask the military judge to add the terms "friend or close acquaintance" to your question. This bit of foresight will reduce the potential for confusion and the likelihood the members might hold such a small difference in the questions against you and your team.

FOLLOW-UP QUESTIONS

As you develop your questions you will likely have a desired answer for a member you would want to retain and, similarly, an answer for a member you would want to challenge. Much of the time, however, counsel fail to prepare necessary follow-up questions to ask after drafted *voir dire* questions elicit the anticipated responses. You need to have the follow-up questions thought out and ready in order to rehabilitate the member or to build your case for challenge. Rarely do members' answers to initial questions from counsel form the basis for challenge, which is why previously developed follow-up questions are so important. Additionally, the follow-up questions should be tailored to apply in a group setting or in individual *voir dire* depending on the nature of the question. Successful attempts to rehabilitate a member will always include, at a minimum, whether the member will follow the military judge's instructions, whether the member will make their decision based on the evidence in court and not their personal experience or opinion, and whether the member will give the accused a full, fair, and impartial hearing. A best practice is to have the follow-up questions on the same document you are delivering your *voir dire* from as it will be obvious to the members and the military judge if you are trying to improvise follow-up rehabilitation questions and thus, potentially impact your credibility.

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For sensitive follow-up questions you should be prepared to ask the military judge to bring individual members back without calling attention to the individual member's answer while sitting in general *voir dire*. Understanding the military judge's preference for the manner in which questioning is curtailed during general *voir dire* is a good discussion point for the R.C.M. 802 conference the morning of trial. In regard to follow-up questioning during individual *voir dire*, you should consider and develop a reasonable position as to whether the member should serve on the panel before asking rehabilitative questions. Often counsel expose potential members to unduly embarrassing follow-up questions when it is clear to all parties that the member should not serve on the panel. Many military judges will signal a member will not be recalled for individual *voir dire* and also will not serve on the panel by saying they intend on recalling members X, Y, and Z but that they do not believe there is any need to question members A and B. Counsel should be aware if

A and B have given information that indicates a bias then the military judge is signaling that A and B are likely off the panel. If the military judge does not make such a signal, then counsel may push for it by saying, "I do not believe there is any reason to further question A and B. However, if the Court believes additional questions are required, I would follow up with a few additional questions." In either event, you should not lose the opportunity to shape your panel by losing a challenge for failing to ask questions in individual *voir dire*. You should also considering conferring with opposing counsel to determine whether they will object to a potential challenge on your part.

A best practice for all questions, whether newly drafted or used in the past, is to read them out loud more than once…. Another helpful technique in assessing whether questions are too long, confusing, or inconsistent with your goals is to ask someone who is not involved in the case to answer them.

DELIVERY

One common pitfall during *voir dire* is when counsel reads a long or confusing question and it becomes clear that is the first time they have read the question aloud. Often, when drafting new or uniquely tailored questions, the written intent doesn't always come through in the oral delivery. A best practice for all questions, whether newly drafted or used in the past, is to read them out loud more than once. Another helpful technique in assessing whether questions are too long, confusing, or inconsistent with your goals is to ask someone who is not involved in the case to answer them. This practice can be conducted using friends or family members who don't know a lot about the case. You should ask them both for their answer to your question as well as how they thought the question sounded when you read it. Having a layperson's perspective is often more helpful than that of your co-counsel or expert consultant.

After you have completed the development of your substantive questions you should consider the manner and method in which you will introduce your team and, additionally for defense counsel, your client. Many military judges will limit your introductions and you should always be wary of bolstering your reputation and needlessly testifying. A simple introduction of who you and your co-counsel are as well as where you are assigned is often sufficient, there is no need to provide a detailed description of your professional qualifications or information about your family.

Additionally, your physical delivery and demeanor are often overlooked aspects of *voir dire* delivery.

Additionally, your physical delivery and demeanor are often overlooked aspects of *voir dire* delivery. Your body language, tone, and tenor are all characteristics of delivery that can be developed and evaluated by your team to enhance your *voir dire* performance. Many civilian practitioners opt for a non-traditional, relaxed delivery, often asking questions of the venire while standing away from the podium and close to the box. Proponents of this technique argue it allows the lawyer to build a connection to the panel member. While this technique has many advocates in civilian jurisdictions, Air Force counsel should carefully examine whether such a delivery would serve to build a connection, or rather, be viewed as a breach of military etiquette by the members. A best practice before leaving the podium and engaging in non-traditional *voir dire* delivery is to discuss it first with your military judge, she or he may have particularly strong feelings on the practice.

Finally, presenting *voir dire* can feel unnatural for many counsel. If you cannot pull off taking detailed notes while at the podium handling the questioning, have your co-counsel

or paralegal in the courtroom in charge of taking detailed notes. Then before deciding on individual *voir dire* or challenges request a break to discuss the matter with your co-counsel or paralegal.

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CONCLUSION

Along with the resources contained within your respective litigation communities, there are external resources which should guide *voir dire* development. Lexis Advance offers several primers on *voir dire*, most notably the Criminal Law Advocacy[17] as well as Criminal Defense Techniques[18] chapters on *voir dire*. Additionally, you should leverage memberships within their professional organizations, including the National District Attorneys Association or the National Association of Criminal Defense Lawyers, to further develop their general litigation acumen.

Voir dire is a first chance to make an impression with the panel. Well prepared and professionally asked questions based on the rules, grounded in case strategy, and effectively practiced can establish rapport with the panel members who will decide the fate of your case, it's simply up to you to put in the work.

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ENDNOTES

[1] Manual for Courts-Martial, United States, R.C.M. 801(a)(3); R.C.M. 802(a), Discussion; and R.C.M 912(d), Discussion (2019) [hereinafter MCM].

[2] United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017).

[3] *Id.*

[4] United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007).

[5] United States v. Warden, 51 M.J. 78, 81 (C.A.A.F. 1999).

[6] United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015).

[7] United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005).

[8] *Clay*, 64 M.J. at 277.

[9] **https://www.jagcnet.army.mil/RandomNumberGenerator/index.html**

[10] MCM, *supra* note 1, R.C.M. 912(f)(5).

[11] United States v. Newson, 29 M.J. 17 (C.M.A. 1989) (A good discussion of the "numbers game.").

[12] United States v. Powell, 55 M.J. 633, 641 (A.F. Ct. Crim. App. 2001).

[13] United States v. Hurn, 55 M.J. 446, 448 (C.A.A.F. 2001).

[14] MCM, *supra* note 1, R.C.M. 912(f)(4).

[15] A practice tip is to consult your military judge before citing your *voir dire* questions in subsequent argument as military judges may differ on acceptance.

[16] U.S. Dep't of Army, Pam 27-9, Legal Services: Military Judges' Benchbook (9 Aug 2019).

[17] 3 Criminal Law Advocacy, Chapters 50 through 58, (2019).

[18] 1A Criminal Defense Techniques § 21.16 (2019).