

A View from the Bench: The Overlooked Art of Conducting *Voir Dire*

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Introduction

The accused elects trial by an enlisted panel. As the defense counsel on the case, you think “Too easy. The convening authority has already selected the members, so all I need to do is get my witnesses ready for trial and practice my best Tom Cruise-inspired findings argument.”¹ If this is your approach to preparing for a members’ case, you have missed a critical advocacy opportunity. New counsel frequently overlook the importance of *voir dire* in selecting fair and impartial jurors, and making favorable first impressions, because of an often misguided belief there are more pressing concerns. As with all endeavors, trial advocates will not get a second chance to make a good first impression. Investing even a small amount of time preparing for *voir dire* can yield big dividends for your case.

Court members begin to form their opinions about a court-martial immediately upon entering the courtroom. Therefore, the advocate and her client, whether the government or the accused, are always “on.”² In a court-martial, an advocate’s first opportunity to persuade the court members and make a favorable impression comes during *voir dire*.³ The advocate who fails to recognize this truism does so at her own peril. This note provides an overview of the *voir dire* process by emphasizing some basic advocacy considerations.

The purpose of *voir dire* at both a court-martial and a jury trial is the same: to gain information in order to intelligently exercise challenges and, ultimately, seat a fair and impartial panel.⁴ Although the Sixth Amendment right to trial by jury does not apply to courts-martial,⁵ Soldiers do have a statutory right to be tried by members.⁶ This right to members in a court-martial, like its jury trial corollary, includes a right to be tried by a “fair and impartial” panel.⁷ *Voir dire* is a necessary extension of an accused’s Fifth Amendment due process right to exercise informed challenges for cause and peremptory challenges of members in order to ensure an impartial panel and a fair trial.⁸

While the primary purpose of *voir dire* is the selection of a fair and impartial panel, the experienced trial advocate recognizes another goal. The selection of a panel which is “favorably disposed” to an advocate’s case is a legitimate objective.⁹ In our adversarial military justice system, one hopes that counsels’ vested interest in the best possible outcome for their client, on both sides of the aisle, will ultimately empanel impartial members to consider the case. The military appellate courts have recognized this secondary purpose of conducting *voir dire*.¹⁰

¹ The reference is to Tom Cruise’s portrayal of Lieutenant Daniel Kaffee, a Navy defense counsel, defending two Marines on trial for the death of a fellow Marine. *A FEW GOOD MEN* (Castle Rock Entertainment 1992).

² “Surveys of jurors have shown that the most favorable impressions are created by lawyers who act and look well prepared and knowledgeable, have effective verbal abilities, and demonstrate dedication to their client within the bounds of fairness. The least liked qualities are unnecessary theatrics and lack of preparation, particularly when it wastes time.” THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 21 (2d ed. 1988).

³ *Voir dire*, which literally means “to speak the truth,” is “[a] preliminary examination of a prospective juror by a judge or a lawyer to decide whether the prospect is qualified and suitable to serve on a jury.” BLACK’S LAW DICTIONARY 1569 (7th ed. 1999).

⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(d) discussion (2008) [hereinafter MCM] (“The opportunity for *voir dire* should be used to obtain information for the intelligent exercise of challenges.”); *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) (“The purpose of *voir dire* and challenges is, in part, to ferret out facts, to make conclusions about the member’s sincerity, and to adjudicate the member’s ability to sit as part of a fair and impartial panel.”).

⁵ *Ex parte Quirin*, 317 U.S. 1, 39-45 (1942); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001).

⁶ *United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) (citing UCMJ art. 16 (2008)).

⁷ “An accused ‘has a constitutional right, as well as a regulatory right, to a fair and impartial panel.’” *United States v. Bragg*, 66 M.J. 325, 326 (C.A.A.F. 2008) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (2001)). The constitutional right referenced in *Bragg* is rooted in the Fifth Amendment’s due process clause.

⁸ *Witham*, 47 M.J. at 301 (citing UCMJ arts. 16 and 41).

⁹ As an advocate “you want to select a jury that will be fair, is favorably disposed to you, your client, and your case, and will ultimately return a favorable verdict.” MAUET, *supra* note 2, at 29-30.

¹⁰ *E.g.*, *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996) (In addition to empanelling impartial members, *voir dire* “is used by counsel as a means of developing a rapport with members, indoctrinating them to the facts and the law, and determining how to exercise peremptory challenges and challenges for cause.”) (citation omitted).

Conducting *Voir Dire* in a Court-Martial

A successful *voir dire*, like all other aspects of a trial, requires preparation. Success can be defined by three specific goals:

1. Present yourself and your client in a favorable light to the [panel]
2. Learn about the [members'] backgrounds and attitudes, so that you can exercise your challenges intelligently, and
3. Familiarize the [panel] with certain legal and factual concepts, if permitted by the court.¹¹

Of these three goals, only the second relates to the primary purpose of selecting impartial members. The other two goals are designed to achieve the secondary purpose of selecting a “favorably disposed” panel. Goals one and three are designed to build rapport with the members and to educate members about your theory of the case.¹² The successful advocate will prepare for *voir dire* with all three goals in mind. Achieving them, however, is easier said than done.

As provided in Rule for Courts-Martial (RCM) 912(d),¹³ the military judge has broad discretion in controlling *voir dire*. The permissive language of the rule allows the judge considerable leeway in both deciding which questions will be asked of the members and whether the judge or the trial advocates will ask them.¹⁴ For example, an accused does not have a right to individually question the members.¹⁵ Furthermore, in deciding which questions will be asked either by the judge or by counsel, many judges require advocates to obtain advanced approval of group *voir dire* questions by submitting proposed questions prior to trial.¹⁶

¹¹ MAUET, *supra* note 2, at 30.

¹² See CRIMINAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, at C-1-2 (2008) [hereinafter THE ADVOCACY TRAINER].

¹³ MCM, *supra* note 4, R.C.M. 912(d). The rule states that “[t]he military judge may permit the parties to conduct the examination of the members or may personally conduct the examination.” The discussion to this rule further states that “[t]he nature and scope of the examination of members is within the discretion of the military judge.” See also *id.* R.C.M. 801(a)(3) and its discussion (stating that the judge “exercise[s] reasonable control over the proceedings,” which includes “the manner in which *voir dire* will be conducted and challenges made”).

¹⁴ United States v. Belflower, 50 M.J. 306 (C.A.A.F. 1999)

¹⁵ United States v. Dewrell, 55 M.J. 131 (C.A.A.F. 2001).

¹⁶ The U.S. Army Trial Judiciary rules recognize the judge's authority to “require counsel to submit *voir dire* questions to the judge in advance of trial.” U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL R. 13.1 (15 Sept. 2009) [hereinafter RULES OF PRACTICE], <https://www.jagcnet.army.mil/JAGCNET/USATJ>. This same

Given the judge's considerable discretion in controlling *voir dire*, advocates should learn the preferences of the military judge detailed to the court-martial before preparing for this aspect of the trial.¹⁷

Judges understandably exercise their discretion over the conduct of *voir dire* by ensuring that the primary purpose of *voir dire* is satisfied. The art of *voir dire* requires the advocate to keep both the primary and secondary purposes in mind when formulating questions and preparing for group *voir dire*. As a general rule, all questions must be couched in terms that legitimately explore the potential impartiality or disqualification of the members.¹⁸ Otherwise, counsel risk the possibility that the military judge will disallow the question.

Voir Dire Practice Tips¹⁹

Know Your Judge

A thorough understanding of the judge's *modus operandi* in conducting *voir dire* is essential to your case preparation. If you do not regularly practice before the judge, ask local counsel what the judge prefers. Or better yet, ask the judge. To truly be an effective advocate, you must know what procedures the judge will follow and what types of questions the judge will allow.

Know the Questions the Judge Will Ask

Prior to allowing questions by counsel, most judges ask the preliminary *voir dire* questions listed in the *Military Judges' Benchbook*.²⁰ Some judges also ask additional

rule acknowledges the judge's authority to allow only those questions which “are deemed reasonable and proper by the judge.”

¹⁷ Ordinarily, the judge should allow the parties adequate opportunity to personally conduct *voir dire*. See United States v. Smith, 27 M.J. 25, 27 (C.M.A. 1988) (quoting United States v. Parker, 19 C.M.R. 400, 405 (1955) with emphasis added) (“The accused should be allowed considerable latitude in examining members so as to be in a position to intelligently and wisely exercise a challenge for cause or a peremptory challenge.”); MCM, *supra* note 4, R.C.M. 912(d) discussion (“Ordinarily, the military judge should permit counsel to personally question the members.”) (emphasis added). See also David Court, *Voir Dire: It's Not Just What's Asked, But Who's Asking and How*, ARMY LAW., Sept. 2003, at 32 (advocating that military judges allow counsel to personally conduct *voir dire*).

¹⁸ See 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURES § 15-53.00 at 28 (2d ed. 1999) (“Although *voir dire* can be used for many other purposes, such as highlighting various issues, educating the court members, or building rapport between counsel [and] members, such uses are improper unless done in the otherwise proper process of *voir dire*.”).

¹⁹ *The Advocacy Trainer* is an excellent source for preparing and conducting *voir dire* in a court-martial. THE ADVOCACY TRAINER, *supra* note 12, at tab C, module 1. Many of the tips in this article highlight those contained in this comprehensive advocacy manual.

²⁰ U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 2-5-1 (1 Jan. 2010). See also RULES OF PRACTICE, *supra*

questions, which may or may not be tailored to the individual case. Counsel should know the questions that the judge will ask, in order to not repeat them. Asking the members questions which the judge has already asked will not help in making a favorable impression on the panel. Counsel should, however, be attentive to member answers to the judge's questions and be prepared to follow up, if necessary, with individual *voir dire*.

Know the Members

The more information you can gather about the members before trial, the better prepared you will be as counsel. Members frequently will have completed questionnaires prior to trial.²¹ You should review them all before *voir dire* begins. The members expect this. If you repeat questions which the members have already answered, it may result in a negative perception of your advocacy skills. Although you should not repeat questions which have already been asked on a questionnaire, you can and should follow up on those responses during individual *voir dire*. Counsel should also consider past experiences as a court member. Due to the prevalence of standing panels in Army courts-martial, a good advocate will research the impressions that other litigants may have gleaned about a particular member during a previous court-martial. Members are generally unknown entities, but previous experience with a member can be helpful in determining whether to exercise a challenge.

Get the Members Talking

During *voir dire*, you want to get the members talking with you, not to you. Leading questions that elicit “yes” or “no” answers are usually not the most effective means of discovering a potential bias.²² To get the members talking, direct your question to an individual instead of the entire panel, and ask “open-ended direct-examination type questions that forces the [member] to talk.”²³ For example, don’t ask “Does anyone have a problem with people who drink alcohol?” This question calls for a “yes” or “no” answer and is a negative way of determining someone’s beliefs about alcohol. Instead, pick one member and ask her

note 15, R. 13.1 (“The judge will ordinarily initiate *voir dire* examination by asking preliminary questions.”).

²¹ The Rules for Courts-Martial allow trial counsel to submit questionnaires to the members prior to trial. Questionnaires are mandatory if requested by the defense. In addition to the standard information listed in the rule, counsel can request additional information from the members with the approval of the military judge. MCM, *supra* note 4, R.C.M. 912(a)(1).

²² This is not to say that all leading questions are inappropriate during *voir dire*. For example, leading questions can be valuable in highlighting a certain aspect of the law. See generally THE ADVOCACY TRAINER, *supra* note 12, at C-1-7.

²³ MAUET, *supra* note 2, at 35.

“Major Jones, how do you feel about people who may drink a little too much alcohol at a retirement party?” This allows the member to explain her thoughts without the negative inference of the previous question. After the member answers the question, you can follow up with other members to obtain their views. Once one member begins to talk, others will feel more comfortable in doing so.

Do Not Alienate or Embarrass the Members

Avoid asking complicated or compound questions. Speak in plain English, not legalese. Members do not appreciate being asked convoluted questions to which they probably do not know the correct answer. For example an ineffective question might be phrased as follows: “Colonel Jones, what do you think reasonable doubt means?” Such a question puts a member on the spot and is invariably interpreted as a “trick” question. The inexperienced counsel may think that he is developing grounds for challenge, but what he is really accomplishing is making a bad first impression on all the members. As an advocate, you want the members to trust you, not be skeptical of you. For the same reason, you should wait until individual *voir dire* to inquire about a potentially embarrassing or uncomfortable issue. For example, in a rape case, if a member answers “yes” to a question about whether any family member or anyone close to them personally has been a victim of an offense similar to that charged in this case, counsel should wait until individual *voir dire* to follow up. Not only does this avoid potentially tainting other members, it will likely be appreciated by the member being questioned.

Avoid Improper Questions

Although empanelling a “favorably disposed” panel is a legitimate goal, there are some questions which simply go too far and will be disallowed by the judge. Counsel should keep in mind the primary purpose of *voir dire*, which is to gain information to intelligently exercise challenges. “Commitment” questions are one example of improper questioning. Specifically, counsel should be wary of asking hypothetical questions, based upon case-specific facts, in an attempt to get the members to commit to certain findings or a particular sentence before the presentation of any evidence.²⁴ Likewise, questions motivated by “jury nullification” are improper.²⁵

²⁴ See United States v. Nieto, 66 M.J. 146 (C.A.A.F. 2008). Nieto also demonstrates the importance of objecting to improper *voir dire*, since the presumably improper questions asked in this case were upheld under a plain error analysis for lack of defense objection during trial.

²⁵ See United States v. Smith, 27 M.J. 25 (C.M.A. 1988) (Military judge properly disallowed *voir dire* question “Are you aware that a conviction for premeditated murder carries a mandatory life sentence?” where question was motivated by jury nullification).

Rehabilitating Members

Counsel should be aware of the standard the judge will use in deciding whether to grant challenges for cause. With that standard in mind, counsel can attempt to rehabilitate members who provide answers that could serve as a basis for a challenge. However, all counsel, and especially trial counsel, should recognize that the potential for implied bias may make some attempts at rehabilitation fruitless.²⁶

Presenting Evidence of Impartiality

Counsel should be aware that volunteered answers from members are not the only way to establish a lack of impartiality. The RCMs allow any party to “present evidence relating to whether grounds for challenge exist against a member.”²⁷ Therefore, if you have other information about a member which might raise a question as to the member’s impartiality, then that evidence may be produced during the *voir dire* process without actually asking the member about it. For example, in a case involving charges of drunk driving, a letter of reprimand for drunk driving previously issued to a panel member would be admissible to establish a potential challenge for cause.

Have a Note Taker

Finally, one very practical tip is to have someone available to record member responses while you conduct the

voir dire. Ideally, you will have a co-counsel to assist with this. However, if you are the only counsel on the case, consider having a paralegal or the accused help with recording the answers. It is much more difficult to both conduct the *voir dire* and record the answers simultaneously. Additionally, individual *voir dire*, based largely upon answers obtained during group *voir dire*, can be helpful in developing potential biases and disqualifications. Therefore, you will need a good system for recording the group *voir dire* answers. The ability to recall those answers is critical given that the party requesting individual *voir dire* bears the burden of establishing the necessity for it.²⁸

Conclusion

Understanding the *voir dire* process is critical to empanelling fair and impartial members for a court-martial. A well-prepared *voir dire* also creates a favorable impression with the members and, hopefully, a favorably disposed panel for your client. Know the rules, prepare for *voir dire*, and you will undoubtedly become a better advocate.

²⁶ See *United States v. Townsend*, 65 M.J. 460, 465 (C.A.A.F. 2008) (“[T]here is a point at which numerous efforts to rehabilitate a member will themselves create a perception of unfairness in the mind of a reasonable observer.”).

²⁷ MCM, *supra* note 4, R.C.M. 912(e).

²⁸ *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999) (citing *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996)).