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Practice Notes

Bridging the Voir Dire Gap

A Practitioner's Guide to Winning Voir Dire

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Part I—The Status Quo and the Basics

Counsel Perspective

You are, by your own estimation, a relatively-seasoned trial counsel. Your panel case is a week away. You double-check the military judge's pre-trial order and peer over one of the last items on the list: Provide the judge copies of proposed voir dire questions no later than three business days before trial. You spend all night coming up with twenty-five well thought-out questions and submit them to the judge just before the deadline. Two days later, you receive a response: "Government, you may ask questions 7, 14, and 21." There is no explanation. You feel defeated. You now consider all your voir dire training and effort to be a waste. Is it even worth asking these three questions? You wonder if the panel will think you are lazy, or that you mailed it in.

Now, imagine you are speaking to the panel for the first time. Your heart is in your throat as you prepare to make your first impression. You worry about generating credibility and building rapport. You stare at the members and then down at your list of three questions. The members stare back blankly. You complete your three questions, awkwardly acknowledging the members' affirmative or negative responses, and sit down. You feel you achieved nothing more than hearing yourself read aloud for a couple of minutes. You wonder what you accomplished and whether you even have enough information to justify speaking to each member individually. You blame the judge for limiting the scope of your questions. You blame yourself for not coming across more naturally. You curse all your advocacy training that encouraged creative and advanced advocacy techniques that your judge would never allow. You think, "I hate voir dire; this case is off to a bad start." And then you move on to opening statements.

Judicial Perspective

You are, by your own estimation, a relatively-seasoned judge. It is a week before trial and you have yet to see the government's requested voir dire questions, even though you repeatedly tell them in training it is one of the two most important parts of a contested case. You wait, not that you are expecting much. True to form, the questions come in right at the deadline. While it at least appears these questions are actually related to the current case, not the last case tried in this jurisdiction, none of them seem to be intended to elicit bias. Instead, they all seem bent on establishing the government's theory, and most are compound, complex, and confusing. You work to find three that are marginally acceptable and return them to the counsel, wishing they had provided them sooner in the hopes they might take another shot at it. A few days later, as they stumble through reading their three questions, you wish you would have struck them all. It is clear the panel does not understand the first question, but when one hand shoots up the other eleven timidly follow and the trial counsel mutters "affirmative response from all members." It only gets worse from there.

Bridging the Gap

The voir dire process does not need to feel like this for litigators or for judges. Counsel that proactively draft coherent and intelligible voir dire questions aimed at eliciting articulable bias are far more likely to have questions approved. More importantly, panel members are much more likely to comprehend well-crafted questions. It is only after members comprehend the questions that counsel can hope to gain useful information. When judges are confident that the design of the question will elicit an appropriate response, they are more likely to allow reasonable follow-up. Within that well-constructed framework, give-and-take between counsel and members can be both informative and productive. This inevitably leads to more intelligent challenges by counsel and more informed rulings by the judge. The worst thing that can come from more open-ended questioning of members, and the additional excusals that may follow, is that courts-martial may need more members detailed to appear for assembly to limit the inefficiency of "busted panels."[1] However, the benefits of achieving reliably unbiased panels, and thus more just outcomes, far outweighs this cost to efficiency.

Despite this lofty hope, the practical truth is that voir dire and the art of panel selection is often a frustrating practice throughout the military justice system for both litigators and judges. It is frustrating because the practice varies widely among the different jurisdictions. In one jurisdiction, voir dire may be a strict, verbatim question-and-answer session approved by the military judge in which the judge limits the counsel to simple yes or no questions. In another jurisdiction, or in front of a different judge, it may be a more permissive and engaging conversation where counsel are able to ask more open-ended questions. This inconsistency can frustrate less-confident practitioners who are unwilling to push the advocacy envelope.

For many years, practitioners and a vocal minority within the judiciary have been urging for a more robust voir dire. There has been a concerted effort by some to promote wider latitude for counsel to engage in effective advocacy techniques.[2] Various training events, to include the course to train and certify all Department of Defense military judges, continue to recognize and emphasize advanced advocacy concepts related to panel selection. However, despite these efforts, a common complaint from litigators continues to be "that's nice and all, but my judge won't let me do that." Meanwhile, a common complaint from judges is "my counsel cannot even construct a grammatically correct and easily comprehensible question. Why would I let them start asking unscripted questions, especially when the Staff Judge Advocate is only sending me twelve members to start with?" These judicial concerns are not unfounded, but they should not overcome the advantages of allowing counsel to pursue more accurate information from the trier of fact. This is especially true in light of the judicial requirement to liberally grant defense challenges for cause or to disqualify themselves if appropriate.[3]

This article is intended to help litigators effectively use, and encourage judges to permit, advocacy tools that capitalize on all aspects of the voir dire process. This article was written in hopes that it can bridge the gap between the judiciary and the litigators who are attempting to become more effective. In "Understanding the Basics of Voir Dire," this article explains the voir dire process.[4] The next part of the article presents legally permissible tools that, when approved and effectively used, can transform the litigator's case, panel, and practice.[5] Several of these suggestions can be implemented outside the courtroom. Last, this article suggests methods for the litigator to persuade the military judge to be open to the utilization of these tools in court, while also addressing the potential fears and criticisms of transforming our practice of panel selection.[6]

Understanding the Basics of Voir Dire

To fully appreciate the value of robust voir dire, it is necessary to fully understand the basics of what voir dire is and what it looks like in the military justice system. Voir Dire is a French term that means "to speak the truth."[7] Truth-seeking is the hallmark of a legitimate justice system. It is uniquely important when deciding who should—and more importantly, who should not—sit in judgment of another person's conduct. The most important purpose of panel selection is discovering the truth with respect to the members. This truth is often hidden or unspoken due to the ineffective way voir dire is generally conducted in the military justice system. All parties to the trial want the panel members to speak truth in response to voir dire questions. These truths, obtained through questions and answers, reveal underlying biases. These biases may illegally affect or taint a member's judgement of the case. The ultimate objective is for the eventual voting members, those not excused after voir dire and challenges, to speak truth in their ultimate verdict.

This truth-seeking goal of voir dire is accomplished through the following general process. Understanding this process is crucial for appreciating how to implement the tools discussed below. First, the members are selected by the convening authority and asked to complete a questionnaire. These questionnaires are completed and provided to the Office of the Staff Judge Advocate. Counsel for the accused are given access to these questionnaires for use in developing voir dire questions. In accordance with the *Rules of Practice*, the military judge sets a

deadline for counsel to submit proposed questions in the judge's pre-trial order.[8] The judge determines which proposed questions may be asked and informs government and defense counsel. Next, on the day of trial, the judge assembles the members at the courthouse.[9] At this stage, all members detailed to the court-martial are present.[10] The number of members present for assembly varies by jurisdiction.

Regardless of how many members are present for assembly, all are subject to voir dire. The judge provides initial instructions to the members and then reads twenty-nine preliminary voir dire questions. These twenty-nine questions come from the script in the *Military Judge's Benchbook* and are common to all contested panel cases, although the judge has discretion to add or subtract questions.[11] Then, judges may, in their discretion, permit counsel to ask their previously-approved questions.[12] This is referred to as group voir dire. Following group voir dire, the judge may permit counsel to supplement the group voir dire questions by asking individual members follow-up questions outside the presence of the other members. This is referred to as individual voir dire. Counsel's ability to engage in individual voir dire is also within the judge's discretion.[13] Following all of these steps, the judge will have a discussion with counsel about which members, if any, each side believes should be removed for cause.

Following the decision of the judge regarding challenges for cause, each remaining member is assigned a random number and each side is then given the opportunity to exercise its single peremptory challenge.[14] Assuming there are still enough members present to assemble the court-martial under Article 16, Uniform Code of Military Justice, the judge dismisses any excess members, impanels the court-martial, and the trial begins.[15]

The Goals of Voir Dire

In addition to knowing the procedural steps, counsel must appreciate the basic goals and objectives of voir dire. Three primary goals have been stated many ways, but they can be summarized as follows: 1) elicit information for the informed exercise of challenges, 2) establish a positive rapport with the members, and 3) educate the members about the complex facts or legal issues in the case.[16] In contrast, the military judge is only concerned about one thing: the solicitation of information to inform the exercise of challenges. The counsel's goals of building rapport and educating the members are of little concern to the judge. Therefore, the savvy counsel must accomplish the last two goals with the shared objective of satisfying the first.

Knowing the goals is one thing. Understanding how to accomplish them is another. Determining how to convince the judge to let counsel try to accomplish them is yet another. This is where the tools outlined below become essential. Unfortunately, voir dire in the military has become defined by rote, inflexible, and verbatim questioning of the panel. Judges often limit the scope of questions counsel are permitted to ask. This limitation is often unexplained, especially when counsel submit questions on the eve of the deadline. These drastic limitations can often turn voir dire into an "empty ritual."[17] While the judge's goal may be to protect the record from reversible error, such restriction can also hamper counsel development, and, more importantly, it can limit the discovery of biased panel members. Effective advocacy during voir dire promotes counsel's ability to accomplish the above goals, while ineffectiveness hinders the accomplishment of those goals.

Selecting a fair and impartial panel is an art and not a science. Counsel are charged with getting into the minds and thought processes of prospective jurors. Counsel must discover both their open and hidden biases and, if possible, get them to adopt (or at least accept) a certain view of the facts. This must all be done while trying to develop credibility and rapport. The uniqueness of the military panel, often composed of the most senior and seasoned Soldiers, pressurizes these already monumental goals. To accomplish these hard-to-achieve goals, counsel would be wise to use all available tools. Moreover, it would be helpful for judges to permit counsel to use these tools. The tools discussed or referenced below are necessary and largely missing from our current practice.

In addition to achieving these goals within the panel selection process, counsel must keep in mind that the information elicited and themes discussed in voir dire should echo throughout trial. Capitalize on voir dire questions and answers throughout the trial, especially in closing argument. Voir dire presents a unique and powerful time in a trial where counsel have the opportunity to connect with the members. It is the only time when counsel are permitted to have a direct conversation with members. If counsel receive powerful answers during voir dire, these answers should be reiterated during witness examinations and closing argument. For example, in a sexual assault case involving a delayed report by the victim, counsel may ask the panel members to articulate reasons why a crime victim may not report immediately. If a member suggests in response that "fear of retaliation" is a reason for delayed reporting, counsel should reiterate this answer during closing argument if relevant and helpful. Employing the tools discussed below can assist counsel in eliciting powerful answers, which in turn can be used throughout the rest of the trial to best advocate for their respective client.

Part II—The Tools

Counsel Perspective

You just got back from the Intermediate Trial Advocacy Course. You learned a bunch of advocacy tools, including some about voir dire. But when faced with the reality of utilizing them, you can't help but think, "I barely have time to get my uniform ready for trial, how can you expect me to implement all these fancy advocacy tools?"

Judicial Perspective

You were just recertified at the Military Judge Course and are beginning your second tour as a military judge. You're feeling much more comfortable in the role this time around and are excited to see if the field has improved in the world of advocacy. The Chief Judges all encouraged providing flexibility to deserving counsel to use more advocacy tools during voir dire. Your last experience as a judge doesn't give you much faith in the field's ability to pull them off. However, you acknowledge the value in the use of these tools and plan to encourage counsel to use them—if they can show competence in the area of panel selection.

Introducing the Tools

Conducting voir dire with the use of the tools discussed below has the potential to transform counsel's trial practice and advocacy skills. These tools, largely missing from military justice practice, are instrumental to a better and more informed forum and panel selection. The tools are discussed in the sequence counsel have the opportunity to utilize them throughout trial. The section begins with voir dire of the military judge prior to forum selection. Next, it discusses the use of supplemental written questionnaires prior to assembly. Finally, it lays out the novel concept of the mini-opening statement before group voir dire and reiterates the value of individually questioning panel members during group voir dire.

Voir Dire: The Military Judge

The first, but least utilized tool, is voir dire of the military judge. A frequent frustration of new judges, and a continuing focus of judiciary-led training, is the dearth of case information available to judges prior to trial. Judges remind the panel members in their preliminary instructions that "counsel know much more about the case than we do."[18] Counsel often forget this. As previously stated, one of the goals of voir dire is to educate the fact-finder. If the accused elects to be tried by the military judge alone, it is imperative to also educate the military judge.

In addition to educating the military judge, there is an even more critical reason for voir dire of the military judge. Just like the panel members, the military judge may have potential biases that should be explored; and, just like the panel members, the judge can be challenged for cause. Simple math would suggest that it is up to eight times more important to voir dire the military judge in a general court-martial than to voir dire each individual panel member. This is true even in a contested panel case. The judge may still be the person imposing the sentence. Therefore, it is surprising that so few defense counsel fail to explore whether the judge possesses underlying biases before allowing their client to elect to waive their statutory right to a panel.

Imagine a defense counsel in a case involving an alleged assault upon a child. The client, the accused, is the father of four and the alleged victim is his seven-year-old son. The case may hinge on the parental discipline instruction. If this were a panel case, the defense counsel would certainly know the marital status of the members, who had children, and how many. The defense counsel would also have likely submitted a request for a case-specific questionnaire and a litany of voir dire questions regarding their views on parental discipline. For example, counsel would want to know whether the members spank their children, whether they ever used a belt, and how they were disciplined as children. It is just as important to know this information about the military judge.

It should be safe to assume that judges will be better able to set aside personal biases and attitudes toward a particular behavior than panel members. However, as explained above, counsel should treat a judge-alone case no differently when it comes to voir dire. Counsel should not feel uncomfortable or reluctant to ask the judge voir dire questions. Judges understand they have a duty to answer questions designed to elicit bias.

Conducting voir dire of the judge at the first available opportunity is imperative. Doing so allows defense counsel to ensure their client is well-informed about forum selection and improves relations between counsel and the accused. The client will likely trust counsel's advice regarding forum selection even more after witnessing their counsel's voir dire of the military judge. Do not wait until the day of trial to voir dire the judge. Plan ahead and ask questions at arraignment when the judge discloses any grounds for challenge and provides counsel an opportunity to question or challenge him or her. It is far better to address these issues prior to forum selection and trial on the merits than during the trial or on appeal.

While voir dire of the judge is important, counsel should not approach voir dire of the military judge as an opportunity to put the judge on trial. Voir dire of the judge is not a fishing expedition into the judge's personal life.[19] If the counsel has reason to suspect the judge may have an impermissible bias, or simply does not know the judge's feelings on a certain relevant topic, they should prepare relevant questions. For example, whether the judge used appropriate corporal punishment to discipline their children may be an appropriate question in a child abuse case. It would not be relevant or appropriate in a traditional assault and battery case between adults. Bottom line, counsel should use common sense and formulate questions in the same way they would for a panel.

In addition to educating the judge and identifying bias, a judge's views on punishment can also be explored. This is especially true considering the judge is now the default sentencing authority for all cases. When approaching a decision to voir dire the military judge, counsel should examine possible punishments available should the accused be convicted of any offense. Counsel rightly assume that a judge will keep an open mind when it comes to sentencing. However, it could be important for the accused to hear the judge articulate that understanding prior to making the forum election. If a judge had made an injudicious comment about the charged offense being incompatible with military service, even in another context or off the record, that comment is ripe for questioning. While sentences imposed in other cases are generally not relevant, whether the judge has a particular bias toward or against a particular crime or punishment is fair game for questioning. However, much like with any question, counsel must always be prepared to provide an articulable justification for their questions and inquire respectfully.

When articulating the justification for the questions, it is necessary for counsel to understand the standards related to judicial disqualification. While removal for cause is the end result of identifying actual or apparent bias in a panel member, judicial disqualification is the end result of uncovering bias when questioning the judge. The grounds for judicial disqualification and recusal are found in Rule for Courts-Martial (RCM) 902.[20] The grounds for disqualification listed in RCM 902 are nearly identical to the grounds for disqualification listed in 28 U.S.C. § 455, which controls disqualification for federal judges.[21] There are some minor differences. For example, disqualifying fiduciary interests rarely come into play in a court-martial and are not specifically contained in RCM 902.[22] However, given the historical framework of military jurisprudence, which harkens back to a time where the military judge was a member of the

convening authority's command, the fundamental requirement for impartiality is no less important in a military context.[23] According to RCM 902(a), a judge is required to disqualify himself or herself in any proceeding in which the judge's impartiality "might reasonably be questioned."[24] This is a broad obligation all military judges must follow.

In addition to this broad obligation, the rule also contains specific grounds requiring disqualification that counsel should be aware of when formulating questions.[25] Counsel must move to disqualify the judge if they uncover actual bias or something that reasonably calls into question the judge's impartiality.[26] Similarly, judges have a duty to disqualify themselves sua sponte for any of the specific grounds if no motion is made.[27] If disqualification is raised sua sponte, military judges must permit the parties to question them prior to making a decision.[28] If judges find that they are disqualified, judges are required to recuse themselves.[29] Counsel should be aware of certain recurring situations in which a judge's impartiality might reasonably be questioned. These situations include prior relationships between the judge and counsel or the judge and witnesses, whether positive or negative. Even if judges are confident they harbor no actual bias against a party based on prior relationships, some conduct by the parties may be so egregious as to require disqualification under the reasonable person standard of RCM 902(a).[30] Therefore, voir dire of the judge to determine if disqualification is necessary is an essential practice, one which both parties should more rigorously exercise.[31]

Counsel should not be concerned about the judge's reaction to well-formulated and relevant questions. Because of the infrequency of this practice, some judges may be surprised by what they perceive as personal questions; but, if handled appropriately by counsel, this should not be a significant fear. A suggested approach for counsel is to alert the judge in an RCM 802 session that they intend to voir dire the judge in a particular area, explaining their basis.[32] This gives the judge an opportunity to reflect on both the need to answer the question and to formulate a response. The goal should be to ensure the judge can, and will, be impartial—not to trip them up by putting them on the spot in a confrontational or embarrassing manner. This technique can be employed when using the other recommended tools as well, as discussed below.

Supplemental Written Questionnaires

The first panel-related tool at counsel's disposal is to expand the panel questionnaire. Panel questionnaires are the first touch point with new members. They represent the first opportunity to learn valuable information to inform the exercise of challenges—the first goal of voir dire. Rule for Courts-Martial 912(a)(1) provides authority for the use of panel questionnaires. The rule highlights how this tool "may expedite voir dire and may permit more informed use of challenges."[33] Therefore, in cases where a trial with members is still possible, counsel should focus initial attention here, and treat the questionnaire as the first phase of voir dire.

While the rule points to how this tool can be helpful, the way it is most often utilized in our system is not. The rule says that "trial counsel may, and shall upon request of defense counsel, submit to each member written questions . . . ."[34] This normally occurs following the members' selection by the convening authority. The problem is that members are too often only asked to provide broad or boilerplate information articulated in the rule.[35] This boilerplate information is not unique to any case, it is very general in nature, and adds little value to the group voir dire questions or to the justification for individual questioning of members. A much more effective tool is the case-specific panel questionnaire.

Case-specific panel questionnaires are simple to implement, but widely underutilized. To highlight counsel's ability to augment the standard questions, RCM 912 provides that "[a]dditional information may be requested with the approval of the military judge."[36] This additional information can and should be tailored to the facts and issues in each case. Case-specific panel questionnaires are especially effective tools in jurisdictions where judges significantly limit the questions counsel are permitted to ask during group voir dire.

The value of expanding the questionnaire and making it specific for each case is two-fold. First, it improves judicial efficiency and the quality of challenges. Second, it is the best and most anonymous way to obtain sensitive information from members to justify requests for individual voir dire.

Improving Judicial Efficiency and Challenges

Regarding judicial efficiency, the discussion to RCM 912(a)(1) supports this claim by saying that "[the use of] questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges."[37] This should be the opening line in any motion for expanding the standard questionnaire. This assertion also seems obvious. An expansive and honestly answered questionnaire tailored to the facts of the case could ostensibly eliminate the need for group questions as it relates to identifying bias. At a minimum, counsel are receiving more information that will educate the questions they ultimately decide to ask.

Well-thought-out augmentations to the standard questionnaire also make evident the need for individual voir dire. Note, the court will require counsel from either side to have some basis for questioning the panel member individually.[38] This justification may come from information elicited during group questioning. However, and more importantly at this point, it may also stem from responses to questions in the questionnaire. If counsel know that their judge will significantly limit the scope of in-person questions, then the questionnaire offers the best alternative way to justify speaking to the members one on one. The value to this strategy is that, given the impromptu nature of individual voir dire, judges do not traditionally limit individual questioning in the same manner they do group questions. Therefore, counsel are able to get into more detail with that panel member and often do not need explicit pre-approval of the questions asked during individual voir dire. This is because counsel have already articulated a basis for speaking to the member outside the presence of the other members, and it is therefore necessary to have conversational back and forth with the specific member to resolve whatever concern was raised.

Obtaining Accurate Answers to Sensitive Questions

The second benefit to expanding the questionnaire with case-specific questions is that it gives counsel a chance to probe topics

that members may be less inclined to address openly and candidly in person and in a group. The value of including sensitive questions in the questionnaire provides anonymity for the questioner and the respondent, minimizes embarrassment, and minimizes inaccurate but socially acceptable responses.

There are many questions that need to be asked, but many are hard to inquire about in public. For example, it is difficult to ask members their thoughts on certain types of sexual behaviors, especially ones that raise social stigmas. These social stigmas highlight the absolute necessity of obtaining truthful answers on the topic. However, it also presents a conundrum for the counsel inquiring. On one hand, it is necessary to know whether someone holds some biased preconceived notions about people who engage in those sexual behaviors. But, on the other hand, these questions have the potential to make the members uncomfortable at best, and (at worst) encourages them to provide what they believe to be a socially acceptable answer. Counter to the truth-seeking function of voir dire, these answers may not be in-line with the member's actual feelings. Social pressure is an actual phenomenon that impacts human responses to sensitive questions. Litigators and judges cannot ignore the real possibility that this will impact the veracity of information elicited during voir dire.

Compounding the problem of normal social pressure is the concept of military social pressure. An example of this stems from the general consensus surrounding the treatment of victims of sexual assault. Through various training programs, the military has indoctrinated its officers and enlisted Soldiers to believe individuals who make allegations of sexual assault. Another example is the inaccurate belief that a victim of sexual assault is legally incapable of consent if they have consumed even one drink of alcohol. These beliefs, if genuinely held and left unidentified, inevitably carry over into the panel's deliberations. Questions in a group setting about sensitive things, the answers to which are collectively consistent within military culture, is not the best way to seek the truth on these topics. A confidential questionnaire, however, is more likely to result in more honest and individualized responses.

The Mini-Opening Statement

What Is It?

The next tool is the mini-opening statement and is intended to be used at the beginning of either party's group voir dire. The mini-opening statement is a novel tool that is even less utilized or understood than the case-specific questionnaire. A mini-opening statement is a very brief non-argumentative statement made by each party to the panel before voir dire begins. It provides background information and describes the underlying facts and issues to the prospective panel members so that the follow-on voir dire questions are presented in context.[39] In other words, it is an introduction to voir dire aimed at making voir dire more effective. While brief, it can be an important tool in the pursuit of identifying bias and educating the members. It follows the basic premise that panel members should be introduced to the subject matter of the case before exploring their personal biases. The mini-opening statement is increasingly being used as an important trial advocacy tool across civilian jurisdictions, both criminal and civil, in the United States.[40] However, until recently, mini-opening statements have been absent in military courts-martial.[41]

Compare to Opening Statements

A mini-opening statement is an advocacy tool for voir dire; it is not a shorter version of an opening statement. It is an entirely different tool from the opening statement with the goals of aiding in the exposure of potential bias and educating the panel.[42] The objective of the mini-opening is to inform potential voting members of why they are there and why it is critical that they carefully consider—and honestly answer—the questions that will follow. The advocate should accomplish this objective in a matter of three-to-five minutes. Unlike the opening statement, this is not an opportunity to tell the most persuasive story and preview the best facts.[43]

Although the mini-opening statement is very different from the opening statement, there are critical similarities. First and foremost, both offer the earliest opportunity to build credibility, a trial attorney's most important asset in court.[44] Being brutally honest and demonstrating care about one's client or the case helps build credibility in the eyes of the panel. This is also an opportunity for the litigator to make a good first impression and establish a human connection with the prospective panel members. Just like every single piece of the trial, the theme and theory should be woven in. However, argument is inappropriate. In fact, the very same prohibitions of an opening statement also apply to the mini-opening statement: no argument, no personal opinion, no vouching for witness credibility, and there must be a good-faith basis that the evidence will be presented.

Best Practices: How to Do It

The litigator should first strike the right tone and the right balance. The tenor of the mini-opening statement should be more calm and matter-of-fact. This tool should be informative to the panel and not argumentative, emotional, or intense.[45] The mini-opening statement should not be too minimal in substance and not too strong in advocacy. This balance must be struck to inform and introduce the case to the panel and not alienate them. In other words, this is a slightly livelier (but neutral) statement of the case. In that respect, it should include few adjectives and zero adverbs; they should also lose the legalese.[46] The mini-opening is a neutral introduction and preview to the significant issues in the case, so that the advocate can open up the dialogue with the panel and explore bias in context.

Not only should counsel limit persuasive adjectives, but it may be worthwhile to undersell the case in the mini-opening statement. This is not the time to introduce the best and most critical facts.[47] Again, the purpose of the mini-opening statement is to inform the panel and explore their biases up front. The advantage to underselling at this early juncture is that counsel are more likely to convince the judge to allow it and will eventually be able to present the strongest version of the case during trial to the panel members.

In that same vein, counsel should consider previewing the case weaknesses to the panel. It may seem counterintuitive to do so at the first opportunity, but it is important for counsel to invoke and then explore biases against their case. This is the

perfect opportunity to present the worst facts, discover what panel members think about those facts, and how much those facts could influence their decisions.[48] For example, after introducing the key facts of the case, counsel may introduce an alleged motive to fabricate that will likely be a key issue in the case. Including topics that are likely to invoke bias is a deliberate technique. As such, do not be afraid of panel member responses. These responses are ultimately what the advocate is seeking. The mini-opening is supposed to identify bias so the advocate can exercise more informed causal challenges.

It is important to keep it three-to-five minutes or less. Litigators should economize the words used. Get right to the point or the issue. What follows is an informed questioning and discussion with the panel. Like any piece of trial advocacy, this is not one done on the fly. Advocates should rehearse it, know it, and not be wedded to notes or a script. It should appear natural and genuine, allowing the panel to open up. Last, the trial attorney must be on their game! This is literally the first opportunity the panel will hear counsel advocate. Panel members will form opinions about the litigators based on how they present, how their uniform appears, and how articulate they are. When presenting the mini-opening statement, it is absolutely important that advocates are prepared, have appropriate body language, and address the panel articulately.

Advantages and Disadvantages

The mini-opening statement, when done correctly, presents several advantages. First, it can serve as an effective ice-breaker. All too often, in front of more restrictive judges, the litigator approaches the podium only to ask a pointed yes or no question to the panel. This is the first thing the panel hears. A pointed question that requires only a yes or no response is not the best introduction to the panel. Breaking the ice with a brief statement allows the panel to be acquainted with the counsel and the case. This opportunity allows counsel to make a good first impression and establish credibility at the outset. The panel will just have heard the military judge's standard questions, also requiring a yes or no answer. The litigator's mini-opening statement, by contrast, is different and naturally interesting to the panel. It is the first taste of what they showed up to hear.

The mini-opening statement provides clarity on the issues before questioning begins. The mini-opening coupled with a seamless transition to questioning elicits better and more revealing answers from the panel members. Moreover, a mini-opening statement can eliminate the need for hypotheticals.[49] The use of hypotheticals in voir dire can be confusing and disjointed. Instead of building rapport with the panel, hypotheticals may alienate and confuse the panel. Presenting the actual issue up front can eliminate the need for these confusing questions. Most importantly, the mini-opening statement provides the advocates valuable insight into the panel to better exercise challenges.

While a mini-opening statement can be an effective tool for counsel, it can also be a trap.[50] Counsel may be tempted to become argumentative at the earliest opportunity. This trap is amplified in military justice practice, widely known for having fairly junior litigators in both rank and experience. Avoiding argument in the mini-opening is even more crucial than in traditional opening statements. An argumentative mini-opening statement is legally impermissible,[51] and can have a negative effect during voir dire. First, if the panel senses the counsel has a clear perspective on the issues or stake in the outcome, it can cause panel members to be guarded in their responses and not entirely open about their biases.[52] Second, it can alienate the panel members. Panel members will form opinions based on the mini-opening statement. An argumentative mini-opening may not coincide with a particular panel member's biases; therefore, it is less likely that the member will vocalize their differing opinions publicly. This could cause the panel member—who would otherwise be challenged for cause—to remain and be impaneled. Worse, their undiscovered biases may contribute to a negative outcome for the client.[53] Finally, it could invoke a rebuke from the military judge, which is not the ideal way to be introduced to the panel or to encourage the judge to permit future flexibility during voir dire. It is imperative that the litigator not fall into the argumentative trap. Understanding there are confines of mini-opening statements, the tool nevertheless has the benefit of exploring biases most relevant to the case. As such, the mini-opening statement is a tool that enables the parties to select a more fair and impartial panel.

A word of caution, however, from the judge's perspective. The easiest way to guarantee that a judge will not allow you to conduct a mini-opening is by not tying it to the purpose of identifying bias. The government counsel would do well to inform the judge that the mini-opening includes, for example, information about the delayed report by the victim. Counsel should explain how this uncontroverted fact is necessary to provide the context for the voir dire questions that will follow. Similarly, from the defense perspective, a brief introduction that discusses the mixed signals that can occur during a sexual encounter can make questions regarding the ability to accept a defense of mistake of fact much easier for the panel member to both comprehend and truthfully answer. Failing to tie the mini-opening to the biases counsel are attempting to uncover is likely to result in denial.

Individual Questioning During Group Voir Dire

Another excellent but underutilized tool is to question members one-on-one—but in front of the group. Group voir dire is far more effective if counsel craft their questions to stimulate a conversation with the members, rather than simply asking yes or no questions. Unfortunately, far too often military justice practitioners and judges resort to the latter. The discussion for individual questioning during group voir dire is not a novel recommendation.[54] The following will highlight some effective group voir dire techniques with an application to a typical sexual assault scenario.

Imagine a sexual assault case involving an alleged victim who reported the crime seven days after the incident. The trial counsel wants to know the members' opinions on delayed reporting. However, instead of asking the members their thoughts, counsel typically ask something like the following: "Are you open to the proposition

that victims may delay before reporting a sexual assault?" This will guarantee everyone will agree with that statement, either because they truly believe it or because the members know it is the socially and professionally acceptable answer. Or, even worse, because everyone else seems to be agreeing. Nonetheless, there may be a few panel members who believe that if someone was truly assaulted, she would immediately report. As a result, the trial counsel wasted a question and did nothing to determine whether any members possess a bias toward delayed reporting.

A much more effective technique is to simply ask the members their thoughts on delayed reporting. Counsel can approach this in one of two ways: pose the question to the group or select an individual panel member. The benefit of asking the group for a volunteer is that counsel can determine who may be the stronger voices in the deliberation room while avoiding putting someone on the spot. A volunteer in this setting probably has little reservations about voicing their opinion when it matters most. On the other hand, there is a chance no one will volunteer to respond. In that event, revert to the second approach and select a member to answer the question. Whichever method counsel adopts, once one or two members begin to talk, others will typically feel more comfortable providing their own views thus creating a more robust and effective means of voir dire.[55] Also, counsel should ensure each response is correctly attributed for the record. This has the added benefit of helping counsel learn the panel members' names and allows them to feel more comfortable talking to them.

Once counsel determines how to direct the question, the next step is to ask it in a meaningful way. Instead of asking a yes or no question, ask an open-ended question.[56] For example, "What is the first thing that comes to mind when you hear that a victim waited a week before reporting?" This is where things will get interesting. Counsel may receive answers showing an understanding of typical victim behavior, such as "She was scared," or "She decided she did not want it to happen to someone else." There is also a strong possibility counsel may receive answers that show a bias or at least skepticism, such as "She was trying to protect a relationship after a boyfriend found out," or "She was about to get in trouble." Irrespective of the answers, counsel should resist the urge to challenge any member based on their responses.[57] Treat that member with respect and say thank you; they have done exactly what you asked them to do: be truthful. Counsel can then ask the group if anyone else feels that way, which will further the goal of uncovering bias.

If counsel initially receives answers exhibiting bias, they should ask other members, "Can anyone think of other reasons why someone might delay reporting a sexual assault?" The goal here is to draw out as many responses as possible and, hopefully, the one that will align with the victim's explanation. After this line of questioning, counsel may consider asking the typical question, "Is everyone (now) open to the proposition that victims may delay before reporting a sexual assault?" This ultimate question will help ensure everyone is now in agreement, including those who initially exhibited hesitation or bias. Alternatively, if they intend to challenge some of the members based on initial answers and would prefer not to rehabilitate the specific members, counsel may desire not to ask the final question. Either way, counsel will have exposed bias and effectively provided members with other viewpoints to hopefully overcome that bias or ultimately challenge them for cause. Trial counsel should consider using this technique when dealing with other counterintuitive behavior, such as when victims do not physically resist, engage in consensual sexual acts subsequent to the assault, or have changes in their stories over time. Similarly, defense counsel should use this technique to explore the victim's possible motives to fabricate, such as protecting a pre-existing relationship, fear of punishment, or simple regret.

Part III—How to Win Over the Judge

Counsel Perspective

You mean I can ask the military judge questions? She is a full-bird Colonel, and I just graduated from the Officer Basic Course. I've never done voir dire, let alone know how to pronounce it correctly. I just submitted voir dire questions at exactly 1659, one minute before the deadline. Fortunately, I found an old voir dire document on the share drive from a contested panel case years ago. I hope the judge will approve these questions. I put in there that I'd like to give a mini-opening statement—it won't hurt if I am able to talk to the panel more about my theme and theory. Hopefully, the judge gives me the rope to have a discussion with individual members in front of the other members. I heard judges are strict when it comes to voir dire, so I doubt the judge will let me say anything. We'll see.

Judicial Perspective

I just received a list of questions from counsel right at the deadline. The questions are inartfully crafted and clearly cut and pasted from a prior trial. They don't even have the right name of the accused in the questions. As it stands right now, I can only approve three questions. The rest of the questions will just confuse the panel. It's no help that counsel misstates the law in several of the questions. Additionally, I don't see how most of these questions are aimed at discovering bias. Instead, it appears that counsel is solely focused on arguing his theme and theory during panel selection. Counsel also requested to give a mini-opening statement, yet he provided no detail or summary of what he wishes to do in the mini-opening statement. Given the argumentative nature of his voir dire questions, I cannot trust that counsel will not argue during his mini-opening statement. Frankly, I can't trust this counsel to speak to the panel more than it takes to deliver these three questions.

Persuading the Military Judge

Winning over the military judge requires preparation on behalf of counsel. Why would any military judge allow a more permissive voir dire if counsel continue to submit cut and pasted questions right at the deadline? In order for the military judge to grant more leeway, counsel must demonstrate their level of preparation and competence. Just as credibility is important before the panel, it is just as important before the judge. Accordingly, it is imperative that counsel demonstrate what they want to do with voir dire, why they want to do it, and why it should be permitted. This must be done well ahead of the deadline set in the judge's pre-trial order. Providing it in advance will afford counsel adequate leeway

to engage with the military judge to permit the tools discussed above.

As previously mentioned, the military judge controls voir dire. Rule for Courts-Martial 912(d) provides the military judge massive discretion over the panel selection process.[58] Considering the judge faces significant appellate scrutiny when it comes to challenges for cause, it is not hard to imagine why a judge might take a safer, more structured approach to voir dire. Therefore, counsel must be able to persuade the military judge to allow them to use the aforementioned tools during panel selection. This section will guide counsel in their effort to assuage these concerns and win over the military judge to permit them to use these tools.

First, counsel must know their judge.[59] As previously discussed, military judges vary widely in how they exercise their discretion. There is a sliding scale as to what judges allow during panel selection. Where a judge falls on this scale often evolves over time based on their experiences and counsel competence. On the most conservative side of the scale, military judges, if they even allow voir dire at all,[60] will require a verbatim recitation of pre-approved questions to the panel without room for deviation. On the most liberal side of the scale, military judges will give advocates free reign over their voir dire, assuming it is conducted in accordance with the rules. Since military judges vary in what they allow during voir dire, it is imperative that counsel take every opportunity to understand the judge's boundaries. This starts with asking the judge's panel selection preferences in court-provided feedback sessions, such as gateway sessions or regular training sessions, or in RCM 802 sessions.[61] Simply ask the judge to articulate the left and right limits of voir dire in advance of trial. If still vague, ask local or previous practitioners what the military judge prefers.

The need to win over the judge arises primarily when the military judge falls on the conservative side of the scale. This is when counsel need to persuade the military judge to broaden their allowable voir dire practice. In an effort to encourage more permissive and liberal voir dire, it is critical to solicit precise feedback from the court. Oftentimes, the military judge's pre-trial order requires a submission of proposed voir dire questions in advance of trial.[62] Counsel should use this opportunity to outline exactly what they wish to do during voir dire. Do not simply submit a list of questions. Instead, submit a motion for appropriate relief requesting permission to use the tools discussed above, whether it be supplemental written questionnaires, a mini-opening statement, or individual questioning of members following the use of open-ended questions. Counsel should articulate a defensible basis for objectionable questions and submit them early to allow time for requests for reconsideration.

Soliciting feedback from the court also encourages clarity amongst all parties. Oftentimes, the military judge will line out or edit questions based on the form of the question and not the subject-matter. Seek clarification from the court asking whether the judge takes issue with the form or the substance of the question. If it is a form issue, go back to the drawing board and modify the question or find a better way to ask it. For example, some judges are hesitant to allow counsel to ask "do you agree" questions rather than "are you open to the proposition that" questions. As a result, instead of asking, "Do you agree when an individual recounts events of a traumatic nature, there may be slight variations in the recounting over time," ask, "Are you open to the proposition that when an individual recounts events of a traumatic nature, there may be slight variations in the recounting over time?" And even better, if the judge permits open-ended questions, ask, "What are some reasons why someone's recollection of a traumatic event may change over time?"

The point is to not give up when first faced with opposition and seek these types of clarifications. Military judges, understandably, want to ensure advocates are not confusing the panel or wasting time by re-asking questions or asking confusing questions. Given their wide discretion over voir dire, military judges want to ensure that the questions work toward impaneling an impartial panel. To that end, counsel must prepare and demonstrate how their requested tools would help achieve that goal.

Last, counsel must use the law to their advantage. There is no better way to persuade the judge to broaden voir dire than by using the law to support the position. Rule for Courts-Martial 912(f) provides several grounds for challenges and removal for cause.[63] Of particular note is the last listed factor which states that someone "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[64] Counsel using broader tools to uncover panel members' biases and prejudices during voir dire would allow the court to impanel a more impartial jury. Further, these voir dire tools make the panel selection process more complete and efficient.[65] Supplemental questionnaires and mini-opening statements focus the panel on the relevant issues and provides necessary context. It streamlines the questioning, both in a group and in an individual setting, allowing for more informed and candid answers.[66] Counsel should use these arguments in the motion requesting permission to use the tools. Remind the judge that these practices help the counsel, and the court, uncover biases and prejudices more quickly; this leads to a more intelligent exercise of peremptory and causal challenges. As an additional selling point, using the tools increases judicial efficiency and contributes to the development of counsel. If the goal is to discover true bias and impanel a fair jury, there are more effective ways of doing so than our current practice.

Addressing Potential Criticisms and Fears

Busted Panel

Adopting and utilizing advocacy tools to enhance the voir dire process is not without its risks. A common fear among trial counsel and judges conducting voir dire is "busting the panel." As is well-known, panel cases are a huge logistical endeavor and no one wants to be responsible for a delay. However, do not let this fear override the purpose and process of voir dire. Voir dire is too important to be curtailed or rendered ineffective due to a fear of busting a panel. To combat the chances of busting a panel, convening authorities should detail as many panel members as will fit in the courtroom. Do this by asking the Staff Judge Advocate to advise the convening authority to amend the convening order in subsequent versions to expand the number of members required

to be present for assembly. For example, instead of convening a court-martial with fourteen primary members, increase that number to twenty. Explain that, in the long run, this promotes efficiency and will likely encourage the trial judge to be less restrictive. In addition, have more substitute members on a one-hour recall to quickly backfill members if removed for cause. Ensuring there is an abundant pool of potential members will enable judges to confidently address each challenge without regard to concerns about trial delays. Counsel should then inform the judge in their motion that a primary benefit of expanding the number of detailed members was to encourage more robust voir dire.

In addition to bringing more members to the courthouse, consider exercising temporary or permanent excusals after one trial and before a subsequent panel selection. There will be times when panel members share personal feelings or experiences that counsel know will preclude them from being on the panel for certain types of cases. Perhaps they have an inelastic view on sentencing when it comes to certain crimes or they have a close family member who was a victim of sexual assault. Rather than have that panel member continuously take up a seat only to have them inevitably removed for cause, consider recommending to the convening authority that the member be excused from all future courts-martial—or at least all future courts-martial—relevant to why they were challenged before. Generally, the defense counsel is even more willing to excuse these members than the government and will likely join in any recommendation, thus avoiding any appellate concerns.

During panel selection, judges should address challenges one by one without knowing how many challenges exist. If the judge asks counsel to list *all* of their challenges at the outset, counsel should respectfully argue that they would prefer to take each challenge individually to protect the record. Since listing them all alerts the judge to how many potential challenges exist, it could subconsciously alter the judge's ruling on a particular challenge as the judge is trying to ensure there are enough to impanel—or, at the very least, give that appearance. Judges should consider each challenge individually, and they should not alter their rulings based on number crunching just to avoid a busted panel. Doing so could create appellate issues down the road. Moreover, counsel should exercise their challenges to have the most fair and unbiased panel. The exercise of challenges, and the rulings on these challenges, should be the primary goal. Any inconvenience that might result from "busting the panel" should not be the prevailing consideration.[67] In other words, not satisfying quorum or "busting the panel" is always better than seating a biased panel.

Appellate Issues

Another common fear for judges during voir dire and panel selection is the risk of creating issues on appeal. Over time, this appellate fear has led to more constrained exercise of voir dire in military courts. The military appellate courts have made clear that an accused has a "constitutional right, as well as a regulatory right, to a fair and impartial panel."[68] Since the primary concern is to have a fair and impartial panel, a more permissive voir dire is the best way to discover biases and issues that may taint the fairness of the proceeding.[69] Accordingly, the fear should not be that allowing a more permissive voir dire may create issues on appeal. Rather, it should be the fear that not discovering bias through voir dire will impede the constitutional rights of the accused. It is this latter issue that is more likely to create issues on appeal. Worse yet, allowing a robust questioning of the panel, discovering bias, and not exercising and/or not granting founded casual challenges will certainly create issues on appeal.

And, while not the focus of this article, it is important to discuss the two types of bias (actual and implied bias) and how appellate courts have treated both. Allowing a more permissive voir dire only enables counsel to better exercise causal challenges based on actual and/or implied bias. As previously discussed, RCM 912 directs excusal for cause whenever it appears that the member should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[70] This rule contemplates both actual and implied bias.[71] While both actual and implied bias provide cause to be excused from the court-martial, depending on when the challenge was raised, the appellate courts provided different tests in evaluating actual and implied bias.[72]

Actual bias is "bias in fact" and "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality."[73] Actual bias is a question of fact to be decided by the military judge based on the evidence presented at the court-martial.[74] Implied bias is conclusively presumed as a "matter of law."[75] The implied bias test considers "the public's perception of fairness in having a particular member as part of the court-martial panel."[76] Most common causal challenges in military courts are based on implied bias grounds.

The degree of deference afforded to a military judge's decision varies. An actual bias decision is entitled to great deference while an implied bias ruling is afforded less deference.[77] The varying degree of deference that appellate courts have afforded to military judges regarding implied bias rulings have caused confusion for practitioners.[78] However, it is clear that courts will grant more deference the more thorough the military judge's analysis is on the record.[79] Additionally, the liberal grant mandate makes clear that military judges should grant the defense's challenge in close cases.[80] Last, military appellate courts have articulated that "[r]eversal will 'indeed be rare' when a military judge 'considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges and places his reasoning on the record.'"[81]

The fear of creating appellate issues by granting more permissive voir dire should be dispelled. Quite the contrary, more robust questioning of panel members allows for a more intelligent exercise of challenges. Appellate issues arise if the liberal grant mandate is not followed. In close cases, the challenge should be liberally granted in the defense's favor. Appellate issues also arise if the parties discover actual bias and that member is not excused. Last, in implied bias cases, appellate issues follow if the military judge does not comprehensively articulate the ruling and analysis on the record. Therefore, counsel should not be shy about requesting such articulation.

A more permissive voir dire only enables greater discovery of bias, leading to a more fair and impartial panel. As such, practitioners should not fear a more permissive nature of voir dire. Rather, parties should fear the failure to exercise and grant causal challenges based on the evidence gathered from permissive voir dire.

Conclusion

Counsel should confidently pursue utilization of the voir dire advocacy tools discussed in this article and others.[82] In approaching this pursuit, the focus needs to be on three things: 1) counsel improving at voir dire so that its ultimate purpose may be achieved; 2) counsel convincing the judge of their competence in this area of advocacy for the same reason; and 3) judges rewarding that effort by providing more latitude to identify and challenge biases. A more permissive voir dire can be accomplished through well-thought-out articulation of the reasons behind the use of these tools and advance warning to the judge that will allow a reasonable time for a back and forth about the form and substance of what counsel propose. This level of preparation will allow the judge to trust counsel and to potentially permit greater latitude during voir dire.

Accomplishing the goal of robust voir dire requires more than judges simply giving more latitude to counsel who have yet to prove themselves capable of handling it. This approach fails to yield dividends and perpetuates the currently ineffective stalemate where judges use their discretion to greatly limit what counsel say and do. Instead, it is imperative that counsel demonstrate their level of preparation and competence to use the aforementioned tools. Utilizing these tools has the potential to transform counsel's advocacy, thus facilitating a more robust panel selection and improving military justice. However, this transformation is only possible if counsel and military judges finally bridge the gap between what counsel want to do and what the judge determines they are capable of doing. Nothing less than a fair trial is at stake. **TAL**

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Notes

1. A "busted panel" is a colloquial term that refers to the scenario when judicially-granted challenges for cause and/or preemptory challenges made by counsel results in the number of panel members dropping below what is required under Articles 16 and 29 of the UCMJ. *See infra* Busted Panel. *See* UCMJ art. 16 (2017); UCMJ art. 29 (2016).

2. This article focuses on encouraging the use of under-utilized techniques in order to transform the current practice of voir dire. *See generally* Colonel Mark A. Bridges, *A View from the Bench: The Overlooked Art of Conducting Voir Dire*, Army Law., Mar. 2011, at 35 (highlighting a critical framework for voir dire and providing essential advocacy tips that remain useful to our practice today); Lieutenant Colonel Eric R. Carpenter, *Rethinking Voir Dire*, Army Law., Feb. 2012, at 5 (also highlighting a critical framework for voir dire and providing essential advocacy tips that remain useful to our practice today). The authors highly recommend these articles to all military justice practitioners desiring to improve their advocacy with respect to panel selection.

3. *See* United States v. Peters, 74 M.J. 31, 35 (C.A.A.F. 2015); United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007); United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998).

4. *See infra* Part I—The Status Quo and the Basics.

5. *See infra* Part II—The Tools.

6. *See infra* Part III—How to Win Over the Judge.

7. *Voir dire*, Black's Law Dictionary (11th ed. 2019).

8. U.S. Army Trial Judiciary, Rules of Practice Before Army Courts-Martial r. 3.2, 15.1 (1 Dec. 2020) [hereinafter Rules of Practice].

9. Manual for Courts-Martial, United States, R.C.M. 911 (2019) [hereinafter MCM].

10. *Id.* R.C.M. 805.

11. U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook para. 2-5-1 (29 Feb. 2020) [hereinafter Military Judges' Benchbook].

12. Rules of Practice, *supra* note 8, r. 15.1.

13. MCM, *supra* note 9, R.C.M. 912(d).

14. *Id.* R.C.M. 912(f)(5), R.C.M. 912A. The court-martial procedural rules changed following the implementation of the Military Justice Act of 2016, so this is only applicable to charges referred on or after 1 January 2019. *See also* Rules of Practice, *supra* note 8, r. 15.5.

15. Article 16, Uniform Code of Military Justice (UCMJ), requires twelve members for capital cases, eight for non-capital general courts-martial, and four for special courts-martial. UCMJ art. 16 (2017). Article 29 requires impanelment of alternatives if the convening authority has authorized them. UCMJ art. 29 (2016).

16. *See* Peter K. Odom et al., Off. of the Judge Advocate Gen., The 2019 Advocacy Trainer: A Manual for Military Justice Practitioners in the US Army Judge Advocate General's Corps ch. 2, at 4. *See also* United States v. Jefferson, 44 M.J. 312, 318 (C.A.A.F. 1996) (voir dire can be used "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").

17. Telephone Interview with Colonel Timothy Hayes, Chief Judge, U.S. Army Trial Judiciary (Sept. 25, 2020).

18. Military Judges' Benchbook, *supra* note 11, para. 2-5.

19. For a cautionary tale on the dangers of independent investigation into the judge's personal life, see United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013).

20. *See* MCM, *supra* note 9, R.C.M. 902.

21. *Id. See also* 28 U.S.C. § 455.

22. *See* MCM, *supra* note 9, R.C.M. 902.

23. For a fuller treatment of judicial disqualification in federal courts, see Charles Gardner Geyh, Judicial Disqualification: An Analysis of Federal Law (3d ed. 2020).

24. MCM, *supra* note 9, R.C.M. 902(a).

25. Per RCM 902(b), a judge must also be disqualified if they possess "a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts"; previously acted on the case in some other capacity; are required to serve as a witness in the case or previously expressed an opinion on the case concerning the accused's guilt or innocence. *Id.* R.C.M. 902(1)-(3). If a judge is not qualified or detailed to the case, they are ineligible to preside. *Id.* R.C.M. 902(4). Disqualification is also necessary if the judge or their spouse, or a third degree relative of either, is a party or known to have an interest in the proceeding, or is known to be a material witness. *Id.* R.C.M. 902(b)(5).

26. While the actual grounds for disqualification in RCM 902(b) are easy to identify and articulate (and cannot be waived), apparent grounds under RCM 902(a) are more nuanced and require the application of the reasonable person standard. Remember, this standard is that "a judge is required to disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned." *Id.* R.C.M. 902(a). Waivers are not permitted for the specific grounds delineated in RCM 902(b). However, the parties may waive disqualification under RCM 902(a), provided that a full disclosure of the basis for disqualification is placed on the record. *Id.* R.C.M. 902(e). *See also* United States v. Springer, 79 M.J. 756, 759-60 (A. Ct. Crim. App. 2020) (quoting United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982)) (appellate courts review the appearance of impartiality

objectively under the standard of "any conduct that would leave a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned").

27. MCM, *supra* note 9, R.C.M. 902(d)(1).

28. *Id.* R.C.M. 902(d)(2).

29. *Id.* R.C.M. 902(d)(3).

30. *See* United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013).

31. For a fuller treatment and outsider's perspective on the necessity for voir dire of a military judge, see Michel Paradis, *Judicial Disclosure and the Judicial Mystique*, 49 Hofstra L. Rev. 125 (2020). Mr. Paradis was the counsel for the petitioner in a case in which a military judge appointed to the military commissions was disqualified by the U.S. Court of Appeals for the D.C. Circuit for a failure to disclose employment negotiations. *See In re* Al-Nashiri, 921 F.3d 224 (D.C. Cir. 2019).

32. *See* MCM, *supra* note 9, R.C.M. 802.

33. *See* MCM, *supra* note 9, R.C.M. 912 discussion.

34. *Id.* R.C.M. 912(a)(1).

35. The standard questions include:

> (A) Date of birth; (B) Sex; (C) Race; (D) Marital status and sex, age, and number of dependents; (E) Home of record; (F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received; (G) Current unit to which assigned; (H) Past duty assignments; (I) Awards and decorations received; (J) Date of rank; and (K) Whether the member has acted as accuser, counsel, preliminary hearing officer, investigating officer, convening authority, or judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Id. R.C.M. 912(a)(1)(A)-(K).

36. *Id.*

37. *Id.* R.C.M. 912(a)(1) discussion.

38. Rules of Practice, *supra* note 8, r. 15.2.

39. Julie Brook, *Mini Opening for Voir Dire*, CEBblog (Apr. 11, 2014), https://cebca.wordpress.com/2014/04/11/mini-opening-for-voir-dire/.

40. California law was recently amended as of 1 January 2018: "Upon the request of a party, the trial judge shall allow a brief opening statement for counsel by each party prior to the commencement of the oral questioning phase of the voir dire process." Cal. Civ. Pro. Code § 222.5(d) (2017) (effective January 1, 2018).

41. As a military judge, COL Robert Shuck has recently introduced and encouraged the practice of mini-opening statements by litigators in his courtroom. Colonel Shuck's introduction of this "new" tool of mini-opening statements generated the idea for this article and formed its foundation. The authors thank Judge Shuck for continuing to push the envelope of advocacy and for encouraging counsel to be creative trial advocates.

42. Rich Matthews, *The Mini-Opening Before Oral Questioning: Upgrade Your Voir Dire*, Juryology (Aug. 21, 2013), https://juryology.com/2013/08/21/mini-opening-before-oral-questioning-upgrade-voir-dire/.

43. *See generally* Boone Callaway, *Using Your Mini Opening to Out Unfavorable Jurors*, Trial Law., Winter 2020, at 32.

44. *See* Kenneth J. Melilli, *Personal Credibility and Trial Advocacy*, 40 Am. J. Trial Advoc. 227 (2016).

45. Matthews, *supra* note 42.

46. *Id.*

47. Callaway, *supra* note 43.

48. *Id.*

49. Brook, *supra* note 39.

50. Stephen M. Duffy, *Tips for Avoiding the Mini-Opening Trap: Why Putting on a "Good" Mini-Opening is the Last Thing You Should Do*, Am. Bar Ass'n (July 31, 2018), https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2018/summer2018-tips-for-avoiding-the-mini-opening-trap/.

51. *See* Francis A. Gilligan & Fredric I. Lederer, Court-Martial Procedure § 15-53.00, at 15-34 (4th ed. 2015) ("Using voir dire for purposes such as arguing one's case or exposing the members to inadmissible evidence is unethical and improper, and likely to elicit a mistrial motion."). *See also* MCM, *supra* note 9, R.C.M. 912(d) (discussing how "counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case").

52. Callaway, *supra* note 43.

53. Stephen Duffy, *Mini-Opening—It's a Trap!*, Trial Behav. Consulting (June 27, 2018), https://trialbehavior.com/mini-opening-trap/.

54. *See* Bridges, *supra* note 2; Carpenter, *supra* note 2. Note that the accused does not have a right to individually question members during voir dire. *See* United States v. Dewrell, 55 M.J. 131 (C.A.A.F. 2001).

55. Bridges, *supra* note 2, at 37.

56. *Id.*

57. Carpenter, *supra* note 2, at 10.

58. MCM, *supra* note 9, R.C.M. 912(d). Rule for Courts-Martial 912(d) states that "[t]he military judge may permit the parties to conduct examination of members or may personally conduct examination." *Id.* Further, the discussion of the rule provides that "[t]he nature and scope of the examination of members is within the discretion of the military judge." *Id.* R.C.M. 912(d) discussion.

59. Bridges, *supra* note 2, at 36.

60. United States v. Fulton, 55 M.J. 88 (C.A.A.F. 2001) (parties do not have right to individually voir dire the members). *See also* United States v. Jefferson, 44 M.J. 312, 322 (C.A.A.F. 1996).

61. In the U.S. Army, these are referred to as "gateway" and "bridging the gap" sessions.

62. Rules of Practice, *supra* note 8, r. 3.2, 15.1.

63. MCM, *supra* note 9, R.C.M. 912(f)(1).

64. *Id.* R.C.M. 912(f)(1)(N).

65. Carpenter, *supra* note 2, at 7.

66. *The Importance of Mini-Opening Statements for the Trial Lawyer*, LORONA MEAD (May 31, 2017), https://loronamead.com/importance-mini-opening-statements-trial-lawyer.

67. *See* United States v. Leathorn, No. 20180037, 2020 CCA LEXIS 450, n.11 (A. Ct. Crim. App. Dec. 11, 2020) ("We remind military judges and practitioners that concern about inconvenience resulting from the need to halt court-martial proceedings in order to add additional panel members to satisfy quorum requirements 'is not an adequate ground to deny a challenge for cause.'" (quoting United States v. Smart, 21 M.J. 15, 20-21 (C.M.A. 1985)).

68. *Id.* at *16 (citing United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017)). *See also* United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) ("Indeed, 'impartial court-members are a *sine qua non* for a fair court-martial.'" (quoting United States v. Modesto, 43 M.J. 315, 318 (C.A.A.F. 1995))).

69. An obligation exists to question sufficiently to expose the grounds for challenge. *See* Bridges, *supra* note 2, at 36 (quoting United States v. Smith, 27 M.J. 25, 27 (C.M.A. 1988); United States v. Parker, 19 C.M.R. 400, 405 (1955)) ("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.").

70. MCM, *supra* note 9, R.C.M. 912(f)(1)(N).

71. *See* United States v. Miles, 58 M.J. 192, 194 (C.A.A.F. 2003).

72. *Leathorn*, 2020 CCA LEXIS 450, at *18 (The appellate courts have prescribed specific standards of review based on the timing of the raised challenge. If there is a new ground for challenge not previously raised at trial, the appellate court will review the post-trial challenge for "plain or obvious error"). *See also* United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011) ("Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." However, if a causal challenge is raised during trial, appellate courts will review the military judge's ruling for an abuse of discretion.). *Leathorn*, 2020 CCA LEXIS 450, at *21 (quoting United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002)).

73. United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020).

74. United States v. Velez, 48 M.J. 220, 224 (C.A.A.F. 1998).

75. *Hennis*, 79 M.J. at 385.

76. *Leathorn*, 2020 CCA LEXIS 450, at *18 (quoting United States v. Rogers, 75 M.J. 270, 271 (C.A.A.F. 2016)).

77. Specifically, implied bias rulings are afforded less deference than abuse of discretion but greater than de novo. *Id.* at *20.

78. *See* Major Philip Staten, *Clarifying the Implied Bias Doctrine: Bringing Greater Certainty to the Voir Dire Process in the Military Justice System*, Army Law., Mar. 2011, at 17.

79. *Leathorn*, 2020 CCA LEXIS 450, at *20-22 ("Regarding the deference afforded a military judge's ruling on implied bias challenge, it exists on a sliding scale dependent on whether, and to what extent, the military judge places his analysis on the record. Thorough, well-reasoned analysis places the ruling on the end closest to abuse of discretion review. The absence of any analysis places the judge's ruling at the end closest to de novo review.").

80. *See* United States v. Peters, 74 M.J. 31, 35 (C.A.A.F. 2015).

81. *Leathorn*, 220 CCA LEXIS 450, at *21 (quoting United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007)).

82. *See* Bridges, *supra* note 2; Carpenter, *supra* note 2.