

EFFECTIVE 30-MINUTE VOIR DIRE IN A CRIMINAL CASE: THE GOOD, THE BAD, AND THE UGLY

BY LISA BLUE, DICK DEGUERIN, AND ROBERT B. HIRSCHHORN

Often, the process of Texas jury selection is akin to making sausage — the process is ugly but the finished product is a thing of beauty. Witness a recent aggravated assault with a deadly weapon prosecution: An argument in a bar escalated into a serious confrontation involving deadly weapons outside. A jury was left to sort out criminal culpability or lack thereof.

Prior to trial, the defense was under the impression the judge normally gave the parties to a non-capital felony criminal case about an hour for *voir dire*, and that the judge only used juror questionnaires in capital murder cases. The defense wanted the judge to use a questionnaire because jurors are hesitant to convey their true thoughts, feelings, and opinions in the courtroom.¹ The defense enlisted the assistance of the authors, who prepared a specialized one-page questionnaire² on triplicate carbonless paper with a cardboard backing.³ This methodology was employed for its efficiency.⁴ It takes a prospective juror 15 minutes or less to fill out the one-page questionnaire, and the triplicate carbonless paper eliminates the need for copies to be made.

Before presenting the questionnaire to the judge, the defense sent a copy to the prosecutor. After changes were made, the questionnaire was sent to a copier service.⁵ The judge approved its use and allowed the jurors to fill out the questionnaire. The panel was asked to return the next day for jury selection. The authors believe that giving the attorney the night to review a questionnaire has benefits that far outweigh the detriments. The detriments are immediate but limited: The start of the trial is delayed and the entire jury panel is required to return the following day. However, the benefits maximize efficiency: (1) the lawyers have the opportunity to review the information contained in the questionnaire; (2) the lawyers have the time to carefully prepare the substance of their *voir dire* and prepare relevant and meaningful follow-up questions to individual panel members; (3) the lawyers may reach an agreement on jurors that should be excused based on their questionnaire answers because of a hardship or clear cause; (4) the parties may review the questionnaires and decide to settle the case, thereby saving valuable court time and resources; (5) the additional time allows the court to hear and resolve any outstanding pre-trial matters relating to the case; and (6) the court can utilize the time to deal with other matters on the docket.

In this case, Author DeGeurin mirrored what each juror did: He filled out the questionnaire and showed it to the jury on the Elmo document display system. At the very least, he demonstrated he was willing to go public on what a juror might believe to be intrusive questions.⁶

The defense did not ask any questions about the burden of proof, except to the extent that when self defense is raised, the prosecution has the burden of disproving self-defense beyond a reasonable doubt. We asked not a single question about punishment.⁷ The authors believe that a not guilty/guilty⁸ jury and a punishment jury do not look the same. Depending on the facts of your case, the lawyer should decide if they have a realistic chance of a “not guilty” verdict. If you do, you should ask limited or no questions on punishment.⁹

Author DeGuerin focused on a series of specific, non-commitment questions, the answers to which he would either “loop”¹⁰ to other jurors or use to find out who on the panel had a different point of view. The different point of view approach was used when the juror gave an answer that was favorable to the defense. Finding out who had a different point of view would yield important information with respect to potential challenges for cause or peremptory strikes.

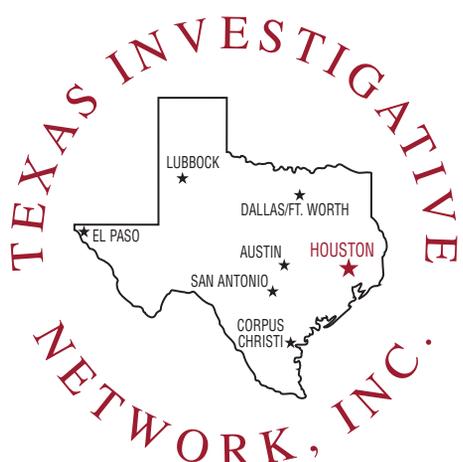
The key to an effective *voir dire* is to minimize your expectations and maximize your time. To accomplish this, it is essential that you know what your judge will expect, tolerate and allow. You need to find out before trial a number of key considerations: How your judge conducts *voir dire*; how much time will be given for *voir dire*; will the judge allow a questionnaire; how the judge handles challenges for cause (that is, does the judge take up cause issues as they arise or will the judge take up cause at the end of *voir dire*), does the judge want challenges for cause fully developed during *voir dire* or will the jurors be

brought back at the conclusion of *voir dire* for further questioning, does the judge conduct the questioning of the cause jurors or does the judge allow the lawyers to ask the additional questions; and does the judge handle hardship, if at all, at the beginning of *voir dire* or at the end. To conduct an effective *voir dire*, it is imperative that the lawyer learns how the judge handles *voir dire* and what the judge will allow and will not allow.

Once you have this critical information, there is a very simple five-step method for effectively using the time allotted: (1) break the ice; (2) primacy — start strong; (3) elimination questions — designed to identify unfavorable jurors; (4) catch-all questions; and (5) recency — end strong.

BREAKING THE ICE

By the time the jury panel arrives in the courtroom, they have been inconvenienced, herded like cattle, and feel frustrated at the apparent inefficiencies of the criminal justice system. By the time you stand up to start the *voir dire* process, the range of emotions felt by the panel range from disinterest to outright contempt. Your job is to disarm and bond with this hostile group of strangers in a matter of seconds. Before launching into your remarks, we recommend you break the ice by saying “Good morning/afternoon, ladies and gentlemen.” A simple “hello” works well, too.



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PRIMACY — START STRONG

Research has shown that jurors will remember the first thing and the last thing you talk to them about.¹¹ Therefore, start strong with your power statement. This is a simple one-sentence reason for why the jury should find in your favor. From the prosecutor's perspective, the power statement can be as simple as, "This is a case about a man who intentionally chose to ..." The power statement for the defense is often a reflection on the theory of defense. If you have an affirmative defense, the power statement must reflect that — e.g., "When (name of client) believed his life was threatened, he did what the law allows him and what his instincts told him: Fire that gun to protect yourself." In many criminal cases in Texas, the trial is about "reasonable doubt" and not an affirmative defense. In that situation, the lawyer needs to frame "reasonable doubt" in terms of "could, would, and should." That is, the power statement needs to be along the lines of what the police could have done, should have done, or would have done.¹² This type of power statement gives the jury food for thought and reasons to look for reasonable doubt.

After the power statement, you should ask your first question.¹³ As a general rule, this question should be an open-ended education question.¹⁴ The purpose of the education question is to make the jury aware of some important aspect of your case. For example, in a case where the basis of the charge is the conduct of the defendant, a prosecutor might want to ask the jury panel why it is important for people to be held accountable for their conduct. If you do not like the answer, ask another juror. If you like the answer that the juror gives, you will want to ask the remaining panel members to raise their hands or number cards¹⁵ if they agree with the answer that the juror just gave (Note: You should repeat the exact answer just given by the juror).¹⁶ You should ask the jurors who disagree to please raise their cards. In a truncated *voir dire*, you will not have the time to find out why the juror disagrees — just note the fact that they disagree.

The defense might want to ask a question about a time when a juror's actions were misunderstood or misinterpreted. The defense should then ask the remaining jurors to raise their cards if they have had a similar experience when their actions were also misunderstood or misinterpreted. Like the prosecutor, you should ask the jurors to raise their cards if they have never had this happen to them.

ELIMINATION QUESTIONS

The bulk of your time in a 30- or 45-minute *voir dire* should be spent asking questions designed to identify unfavorable jurors. We refer to these types of questions as "elimination questions." The purpose of asking elimination questions is to make sure a person's belief system is not in conflict with your theory of the case. For example, from the prosecution's perspective, there are some jurors whose value system does not allow them to pass judgment upon others. Another example is that there are some jurors who believe that if a defendant raises self-defense, it must have merit. From the defense perspective,

an example is the belief that if a person has been charged with a crime, they are most likely guilty. Additionally, some jurors have a strong belief or value system that the only people who should carry guns are the police.

The effective use of elimination questions is the true art of a 30-minute *voir dire*. This is where time management is crucial for the lawyer. As we said earlier, you need to limit your expectations. By that we mean it is unrealistic to expect that you can cover 10 or 15 topics in a 30-minute *voir dire*. We believe that you can effectively cover four to six topics and that you should allot approximately five minutes per topic. Your job is to determine what the most important topics are for you to cover. In advance of the trial, you need to list your *voir dire* topics and rank them in order of importance.

In most criminal cases, when deciding what questions to ask, the prosecution should consider the following areas: Distrust of the police or government, motive need not be proved, the defendant looks innocent, and burden of proof. From the defense perspective, you should consider questions that relate to publicity, nature of the charge, prior conviction for same or similar crime, punishment,¹⁷ and the defendant not testifying. Because of the limitations placed on attorneys by virtue of *Standefer*,¹⁸ it is improper for lawyers to ask commitment questions. Therefore, you must think in terms of global issues and not case-specific facts. Ask yourself, "What will cause me to lose this case?" Think conceptually, not factually. By sticking to this agenda, you will have the time to ask the proper and important questions. How you ask these questions is equally important.

Open-ended questions are the best vehicle for quality information, but a 30-minute *voir dire* does not afford you the luxury of time you need when asking this type of question. Our rule of thumb is for every 15 minutes of *voir dire*, you can ask one open-ended question. Thus, you only have time to ask a couple of open-ended questions. With this limitation, you need to think carefully about the two areas that you really need to hear jurors express their views about. When you ask an open-ended question, follow the same protocol that we outlined earlier. Pick a juror and ask the open-ended question. If the juror does not have an opinion or if you do not like the answer, pick another juror and ask the same question. If you do not like that answer either, pick a third juror and try the question one last time. If this juror does not give a favorable answer, then you should give the answer you are looking for, and ask a fourth juror what their reaction or opinion is. Once the favorable answer is out there, you should "loop" the answer and ask the jurors to raise their cards if they agree. Finish this topic by requesting that the jurors raise their cards if they disagree.¹⁹

Close-ended questions are most often used by trial lawyers, but this type of question does not give you the crucial information needed to exercise cause challenges and peremptory strikes. This type of question is typically asked in a "yes" or "no" format. There is value in asking close-ended questions, but we suggest making a few changes. First, when you ask a close-ended question, ask the jurors to raise their cards if their

answer to the question would be “yes.” Then ask the jurors to raise their card if their answer is “no.” Keep track of this information to find out which jurors did not raise their hand at all. These are usually the jurors who end up serving on the jury, and yet you know virtually nothing about them. We suggest that you find out which jurors did not raise their hands and ask them whether they would answer the question “yes,” “no,” or “I just don’t know.” Second, we suggest that the question should be framed as one in which the juror has to agree or disagree (as opposed to a yes or no answer). Finally, ask the jurors if they have “ever had an experience with ...” or “ever felt or believed that ...” No more than one-third of your time and questions should be of the close-ended variety.

Finally, we come to what the authors call “scaled” questions. We believe that these are the most efficient and helpful questions in a short *voir dire*. The premise behind the scaled question is that on any given topic there are a variety of opinions that will be harbored by the jury pool. Ask each of the jurors their opinion. An example of a scaled question is, “On a scale of 0 (very negative) to 10 (very positive), what is your opinion of the police?” You should plan on using two or three scaled questions during the *voir dire*.

Here are a few words of advice regarding scaled questions. First, sprinkle them throughout the *voir dire*. Do not ask them in succession because there is a tendency for the jurors to give the same answer each time without giving much thought to the question or their answers. Second, tell the panel to please tell you the number that reflects their honest and true beliefs and not worry about how the other jurors answered the same question. Third, we would recommend putting your scaled questions in a PowerPoint presentation. In the past we have used poster board and flip charts, but we have found that the jurors in the back rows can’t read the question or the scaled answers. We have also found that verbally stating the scaled question is counterproductive because the jurors will ask you to repeat the questions or the scaled options and that takes away from the efficiency and flow. Fourth, repeat the answer given by each juror. This will serve the purpose of making sure you have written down the correct information given by the juror. Fifth, if a juror asks if he or she can explain their answer, you need to politely tell them that you would love to hear their reasons, but the judge has only given you a limited amount of time, and you have a few more matters that you need to cover before your time is up. Assure the juror that if you have any time left over, you will come back to this issue. Finally, if you have substantially more jurors than you realistically expect to reach, tell the panel that you are not going to visit with the remaining jurors because it is unlikely you will reach them. In a typical felony case, you will be exercising your strikes to the first 32 qualified jurors. Add to that number any alternates that will be empaneled. Many judges will empanel one or two alternates. Therefore, your qualified pool will be 35 or 36 members of the panel.²⁰ We would recommend obtaining the scaled answers to 40 jurors, plus the number of jurors you expect to lose for hardship or cause.

CATCH-ALL

The last substantive area of your *voir dire* requires you to end with a “catch-all question” that is designed to find out if there is any other important information for the jurors to share with you, and if there are any other reasons why a juror could not be a fair and impartial. We recommend asking the following questions: “Is there anyone sitting out there saying to themselves, if only the lawyer had asked me this question, he would have learned something very important about me?” and “Other than those jurors who have already told us that they would have a problem serving as a juror in this case, is there anyone else on the jury panel, for whatever reason, who feels they can not be a completely fair and impartial juror?” Your goal is to give the jury every possible opportunity to inform the lawyers and the court that this is not the right case for them.

RECENCY — END STRONG

Finally, you always want to end strong. In most instances, this means that you should either repeat the power statement that you used to start the *voir dire*, or, if a juror has said something profoundly helpful during the *voir dire*, you should consider reminding the panel of what their fellow juror has said. The power that a jury possesses is enormous. You may want to consider leaving the jury with this thought: Texas juries have



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the profound power and responsibility to decide if a child should be taken from a parent, if a person should be sentenced to death, and, in this case, you will have the power and responsibility to decide if (name of client) had the right to defend himself or herself.

NOTES

1. The authors believe there are several reasons that motivate jurors not to disclose their true beliefs: (a) the fear of public speaking; (b) an unwillingness to publicly express private thoughts; (c) the desire not to be judged by their peer group; (d) their discomfort that they would not want to disclose such thoughts to people on the panel that they might know from their neighborhood, work, school, civic organizations, church, etc.; and, (e) jurors have the mistaken belief that if they speak up they are likely to be chosen to serve on the jury.
2. A copy of the actual questionnaire used in this case is available at www.texasbar.com/tbj.
3. The purpose of the cardboard backing is to provide the jurors a hard surface for filling out their questionnaire. Thus, the need for a clipboard is eliminated.
4. Time is spent filling out the questionnaire, copying the instrument, and then giving the lawyers a reasonable amount of time to review the completed questionnaires.
5. The triplicate carbonless form with a cardboard backing costs approximately 50 cents per questionnaire.
6. Caveat: Be careful of controversial answers. One of the questions on the questionnaire asked the jurors to name three people they do not admire. One of the people on DeGuerin's list was Dick Cheney. This case was tried in McLennan County, the location of Crawford. Many of the jurors admired George W. Bush and did not share this negative opinion of Cheney.
7. Asking questions about range of punishment is a fertile ground for developing challenges for cause. However, unless it is set up properly, there are jurors who believe that as soon as you talk about punishment, you are admitting that your client is guilty. We recommend that a defense lawyer should equate talking about punishment with putting your seatbelt on. That is, ask a juror if they put their seatbelt on before they start driving. If jurors say yes, ask them why. Jurors will often say they do so just in case there is an accident and because the law requires them to wear seatbelts. Use such a response to say in cases where guilt is highly contested, that is exactly why we need to talk about the next area of questions — e.g. "I don't think the jury will find my client guilty, just like you don't think you will have an accident and besides — the law requires me to talk about punishment."
8. Typically referred to as the guilt/innocence phase of the trial, the authors believe that this characterization runs counter to the presumption of innocence and it places an artificially high burden on a defendant. This type of

- language conditions the jury to believe that a defendant in a criminal case needs to prove he or she is innocent, despite the clear instructions that the judge will give them. Thus, we recommend that this first phase of the trial should be referred to as not guilty/guilty phase.
9. There is substantial risk in not asking any punishment questions. If you intend to pursue this approach, discuss this issue with your client, make sure he or she understands the risks, and have the client sign a document stating that he or she understands the risks and potential benefits to not discussing punishment and that he or she consents to this strategy.
 10. This is a term coined by one of the authors whereby a lawyer asks an open-ended question to one of the jurors and then "loops," or repeats, that answer to another juror and asks for their response. This technique of looping is remarkably effective at stimulating a discussion among the jurors, but it is also extremely time consuming and can only be effectively used when the lawyer has an hour or more to conduct *voir dire*.
 11. This concept is referred to as primacy and recency.
 12. You will notice that this power statement contains a trilogy. The power of trilogies is well established: "Friends, Romans, countrymen."
 13. In most courts, the judge will introduce the prosecutors and defense attorneys. If that does not occur, then at this point, you should make the introductions before starting with your first question.
 14. *Voir dire* questions are designed to either educate or eliminate prospective jurors.
 15. We strongly believe in using numbered cards. In fact, most district courts throughout Texas now have them. The numbered cards correspond to each juror's number. These cards are put on laminated, letter-size-paper. These cards are extremely helpful to the court, the court reporter, and the parties to determine who is responding to a question.
 16. This is the concept known as "looping."
 17. It is our belief that a criminal defense lawyer should never end *voir dire* on a discussion of punishment unless you are trying a punishment case. As noted above, jurors believe that once you start talking about punishment, you are admitting that your client is guilty.
 18. *Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001).
 19. You need to keep track of the jurors who disagree. What works best is if you have someone keep track of the numbers of the jurors who have raised their cards. Even if you do not have someone that can assist you with this task (and in cases of violent crimes, it is *never* a good idea to have your client keep track of this information — it will scare some of the jurors), you should always slowly and loudly call out the numbers. This way, there is no confusion on your team as to whether a certain juror raised their card. It will also assist the court reporter and the trial judge. This will be important if the question goes to the issue of a challenge for cause.
 20. The Texas Government Code states that each side is entitled to one peremptory strike if one or two alternates will be empaneled. Texas Govt. Code § 62.02.

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