

Indirect Questions Reap Most Information in Oral *Voir Dire*

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In my last column, I discussed many of the advantages of using a supplemental juror questionnaire as part of jury selection – the primary advantage being that jurors tend to be more truthful in their responses on a written form than they are when questioned orally in open court.

But the written form – at least in courts that allow traditional voir dire – should only be seen as a supplement to oral questioning conducted in both a group and an individualized setting.

Group voir dire

By necessity, group voir dire questions are typically framed as “yes or no” inquiries. Jurors are asked to raise their hands if they answer any question in the affirmative. Each party notes who raised a hand in response to each question and then follows up with questions either in open court, at sidebar or in the judge’s chambers, depending on the court’s prevailing practices.

My first word of advice is not to expect to learn very much from group voir dire. The need to ask “yes or no” questions, coupled with the public setting, conspire to limit how much information you can get from potential jurors. The studies cited in my last column all reveal that jurors lie during group voir dire – a lot. Most of these lies stem from an unwillingness to volunteer information about private and/or sensitive subjects.

My second bit of advice is to treat group voir dire as an entrée into individualized voir dire. The more often a juror raises her hand, the more individual questions she will have to answer. Since these follow-up questions are where the action is, craft your group voir dire questions in a way that prompts as many people to respond as possible. Instead of asking whether “you or a loved-one has ever been a party in a law suit,” ask whether “you know anyone who has participated in a lawsuit.” Many panel members will construe a question as narrowly as possible in order to avoid raising their hand and setting themselves up for additional questions.

Ask each juror whether he or she has ever been in a courthouse before. Almost everyone has been at some point or another. Whether it concerns traffic

court, small claims court or family court, you should try to learn something about each juror's experience with the legal system.

Try to keep your list of group voir dire questions short. The jurors don't want to raise their hands anyway. The longer the process lasts, the less inclined anyone will be to volunteer information.

I recently consulted on a trial for which the group voir dire lasted 1½ hours. For the last 10 minutes, not a single juror raised his or her hand. Fortunately, the questions from my team had been asked at the beginning.

Some jurors are forthcoming, while others won't raise their hands unless they absolutely have to. These jurors can slip through voir dire because questions are almost always phrased so that it is the jurors who raise their hands who are asked additional questions. To avoid this, I recommend that you phrase some of your questions so that it is the jurors who don't raise their hands who are subject to individualized voir dire. So instead of asking, "Who has a relative who works in the health field?" ask "Who *doesn't* have a relative who works in the health field?" Even if the voir dire will be conducted entirely by the judge, try requesting that the judge mix it up in this way.

Finally, it is a complete waste of time to ask jurors directly whether there is anything that would prevent them from being impartial in the case. Most people who answer affirmatively are just trying to get out of jury duty. The people whose biases are really a source of concern are rarely self-aware enough to recognize the problem. Finally, such questions are usually so poorly worded, and cluttered with negatives and dependant clauses, that jurors can't decipher them in time to volunteer a response.

Individual voir dire

A good question in a written juror questionnaire typically does not make a good voir dire question. The main reason is that while people hate to write, they love to talk. An open-ended question on a written questionnaire is an invitation to leave a blank space. As I discuss in my last column, multiple-choice and sliding-scale questions are preferable on a written form.

But in oral voir dire, open-ended questions provide an opportunity for jurors to tell you who they really are. The goal is to get potential jurors to want to tell you about themselves in their own words.

Don't ask leading or challenging questions. If you try to put words in jurors' mouths, they will either repeat them back to you or clam up, depending on whether they like what you are saying on their behalf. So, if you ask a juror what she thinks about the "torts crisis" in America, she will either tell you that she thinks it is a "crisis" or that she doesn't have much of an opinion about it. Such a question will not get her to tell you about her own experience (or those of her friends and family) with the civil justice system, which is what you really want to learn about.

Instead, ask the juror about the most interesting court case she has ever heard about. What case she chooses, along with her take on the outcome, will be much more informative than some canned response about “fairness” or “justice.”

Prospective jurors will instinctively try to figure out why a lawyer is asking a particular question. The more sensitive the topic – and the more the question reflects the fundamental controversy of the case – the more likely a juror is to try to “game” the process. One way to avoid this is to ask jurors to tell stories about themselves, as I mention above. Another is to ask questions about topics that proxy well for what you are really interested in.

For example, I recently worked on a case involving the purchase of a firearm by someone who was mentally ill. We wanted to learn whether jurors were sensitive to the plight of people facing mental challenges and whether they believed society is responsible for keeping such people safe.

To get at these attitudes, we asked a very open-ended question about each juror’s recollection of the Columbine tragedy. If a juror did not offer an opinion on her own about who was responsible, we followed up with a question about the juror’s initial thoughts about who was to blame.

Some jurors blamed only the shooters. Others expressed frustration with the parents. A few articulated the position that everyone (parents, school, government, media, etc.) has a responsibility to look out for the well-being of our children. The jurors were generally willing to talk about Columbine because it did not have a direct bearing on our case.

Another ripe area to explore is people’s relations with those close to them. People love to talk about their children. Rather than ask prospective jurors about religious preferences, ask where their kids go to school. To get a sense of how a juror feels about people in different professions, ask what their children want to be when they grow up. If one answers, “Joey, my 6-year-old, wants to be a policeman,” you can follow up with, “How do you and your wife feel about that?” A person whose son is on the debate team or who plays in the orchestra is likely to have different attitudes than one whose son plays on the football team and has joined ROTC. A person who is self-conscious about their own life can still be expansive about her children; use this to your advantage.

There is another advantage to “asking around the topic.” If the other side has not thought through the voir dire process as thoroughly, the jurors’ responses will be more useful to you than they will be to your opponents.

Be Prepared for any jury

I have devoted the last two columns to jury selection strategies. I don’t want you to get the idea, however, that choosing a jury is the only, or even the most important, opportunity for you to improve your chances of winning at trial. As I always tell my clients, in terms of impact on verdict choice, who the jurors are is almost always swamped by what the jurors see. By all means, do all you can to identify and strike jurors who really will be unfair to your client; but, make sure to

concentrate your energy and resources on *presenting* your case in its most favorable light.