

Ten Dynamite Tips to Improve Your Results From Group Voir Dire

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In the [last edition of TJE](#), Charli Morris shared some [thoughts on voir dire and jury selection](#). I would like to extend that discussion, focusing on the challenges faced in questioning jurors in a group setting. While individual, attorney-conducted questioning has been shown to be superior to group questioning,ⁱ the norm is usually some form of group-conducted voir dire questioning, either solely group questioning or group questioning with limited individual questioning based on topic areas, e.g., pretrial publicity, death penalty views, or potentially sensitive topics areas. Given the prevalence of some form of group questioning, our challenge is to employ methods that increase juror participation and disclosure in this setting. What follows are ten tips to meeting this challenge.ⁱⁱ Some or all of these approaches may be applied in your jurisdiction depending on the rules of the court and the trial judge.

Tip One: It's a Conversation

Whether you are questioning a few jurors or a group of 30-40 potential jurors, your demeanor and questioning style will affect how jurors respond to you and the value of the information they provide. Approaching voir dire questioning as a "conversation" with jurors where you are interested in listening to them and discovering who they are in a nonjudgmental manner is paramount. Avoiding the pitfalls of treating voir dire as a job interview or, worse yet, an interrogation will promote candor and participation and minimize "good job candidate" answers and defensiveness and guarded answers, respectively.

Tip Two: Get Jurors Involved Early

We need to have jurors participate in the questioning process from the start. Unfortunately, jurors often have a natural reluctance to participate in this novel experience. Our goal is to break down this resistance by encouraging participation through giving jurors the experience of participating. Participation in group voir dire often takes two



forms, hand-raising (to indicate an affirmative response to the inquiry) and the actual verbal responses to questions. Two nonmutually exclusive approaches can help encourage jurors to participate now and later in voir dire.

Initial hand raising. Jurors often are reluctant to raise their hands in a group setting, particularly at the outset. You can break down this barrier by providing jurors with a safe opportunity to do so by structuring a question that forces all the jurors to raise their hands. One way is to acknowledge the problem and provide a solution. For example, tell jurors that they will be required to raise their hands in response to some questions and that previous jurors have said that the most difficult time they had with the questioning process was with raising their hands for the first time, after that, it was fairly easy. Encourage them to help out their fellow jurors by everyone raising their hands. This approach serves the purpose of getting everyone to raise their hands and tends to break the ice by acknowledging the elephant in the room. A second approach is to ask the group of jurors a question based on jury qualifications, such as length of residence in the jurisdiction or citizenship. All jurors should raise their hands. Those who don't are not qualified to begin with.

Initial background summary. By the same token, it is also possible to increase jurors' comfort level with speaking (and participating) in group voir dire by letting them gain experience in doing so at the beginning of voir dire. This can be accomplished by having each member of the panel or group provide a brief summary of their backgrounds. Asking each juror to answer a few nonsensitive, background questions, e.g., name, marital status, educational background, occupation/work in home, and spare-time interests/hobbies, gives them experience with speaking in this new environment. With a few gentle prompts, jurors quickly get the idea and participate readily. If you have to wait for the opposing side to finish voir dire and jurors need a little warming up to the situation, asking one question, such as, "What do you like most about your work either on the job or at home?" can put them back on the road to participation.

Tip Three: Keep Jurors Participating

Now that you have jurors participating, the challenge is to keep them doing so. Fortunately, several tools are available. These tools include using: (a) majority response questioning; (b) the springboard method; and (c) positive reinforcement and attention.

Majority response questioning. Group questioning often involves a series of questions where affirmative responses tend to come from a minority of jurors. During the course of any lengthy questioning jurors soon become accustomed to not raising their hands. Unfortunately, when the time eventually comes when a juror should raise his or her hand, a resistance has built up and the juror may not do so. To counteract this situation, insert a few majority response questions throughout your questioning (or be prepared to employ them when needed) to minimize this negative response set. For example, you could revisit qualifications for jury service such as, "I forgot to ask something earlier, how many of you have lived in this area for at least ___ years?" Everyone should raise their hands. Or you could change a minority response question, e.g., "How many of you have been a victim of a crime?" into a majority response question, i.e., "How many of you have not been a victim of a crime?" An interesting by-product of this later approach is that you still can follow up with those jurors who don't raise their hands. Thus, again, everyone participates in one form or another.

Springboard method. A second way to foster continued participation is to use the springboard method. This method involves directing a question to one juror in the group (often an open-ended

question such as “Tell me about your views on . . .” or “How do you feel about . . .?”) and using the juror’s answer as a springboard to begin discussions with the other jurors. You can either ask questions of the remaining jurors in light of the answer or continue with the original question for these jurors. Questioning using this approach continues until you have asked all panel members for their opinions or you ask the key exit question of the entire panel. If you haven’t asked each juror for their opinion, it is imperative that you take a final vote or poll on the issue (e.g., How many of you agree with Ms. Smith that . . .? Or How many of you believe . . .?). Otherwise, there is a risk that a juror who holds an unfavorable opinion in this area may make it on the jury unbeknownst to the questioner. Varying which juror acts as the initial springboard across topics will keep jurors engaged and facilitate greater overall participation.

Positive reinforcement and attention. Positive reinforcement increases the probability that the positively reinforced behavior will occur in the future. Positive verbal reinforcement can be as simple as saying “uh-huh”, “thank you”, or “I appreciate your candor” in response to the juror’s answer. Such simple reinforcers will increase juror participation and disclosure. In a similar way, positive attention paid to jurors also can foster greater engagement and participation during questioning. Noting similarities among jurors, calling them by name, and making a positive comment promotes continued participation. For example, consider the following situation where there is more than one teacher in the group.

Attorney: Ms. Wilson, what is your occupation?

Juror Wilson: I’m a teacher at New Horizons elementary school.
 <Juror is encouraged to discuss her duties and responsibilities.>

Attorney: Thank you. I see you and Mr. Jones <a teacher questioned earlier> put in long days educating our young children.

Juror Wilson: Yes, we do.

Attorney: Mr. Jones, isn’t that correct?

Juror Jones: (nods) That’s for sure.

Care should be taken with this approach to avoid a misstep resulting from a mischaracterization or other mistake. However, if one occurs, treat it as an opportunity to learn more about the juror, with the juror taking the role of educator.

Tip Four: Create an Expectation of Participation

The best voir dire questioning creates an expectation that jurors will participate. This can be done in (a) the phrasing of questions; (b) the treatment of non-responding jurors; and (c) giving jurors a second chance.

Phrasing of questions. The manner in which a question is phrased can affect the expectation that a response will be forthcoming. The difference can be as subtle as starting the question with the phrase “how many of you” versus “do any of you.” The “how many” phrase communicates an expectation of

a number of potential affirmative responses while the “do any” phrase communicates an expectation of few, if any, potential responses. Fostering the expectation of many participants promotes overall participation.

Treatment of non-responders. As pointed out above, some jurors may be reluctant to participate in voir dire. However, their reluctance to participate does not guarantee favorable views or opinions. As such, you can’t let jurors hide. Particularly in combination with the majority response question approach, direct questions to those who do not raise their hands. Not only will you get answers from these jurors, but you will show all the jurors that keeping their hands in their laps will not enable them to avoid participation.

Giving jurors a second chance. When questions require the raising of hands, oftentimes the relatively few jurors who raise their hands are quickly examined and attention turns to the next topic/question without considering that other jurors still might be eligible. Some jurors may not raise their hands because they are unsure if the question applies to them. Other jurors are reluctant to respond for fear of how they will be treated if they were to raise their hands. A second chance needs to be offered so that any additional eligible jurors have an opportunity to respond. After follow-up questioning of the original juror(s), empower other jurors to respond, using such follow-up questions as “How many of you (agree with/have had a similar experience as) Mr. Jones?” Such an invitation for participation should be repeated until no additional jurors raise their hands.

Tip Five: Normalize Responses

Jurors are often reluctant to voice support for critical and/or controversial opinions, particularly when such opinions may be in a minority. One approach to increasing the jurors’ willingness to be honest and candid is to normalize the critical position. Selecting phrases that communicate the endorsement of a position by others serve to increase the likelihood of a juror revealing his or her true position. Phrases such as, “Many people believe . . .”, “A number of jurors have told me . . .”, or “I was talking with a neighbor/sheriff/business owner/doctor, who said . . .” serve this purpose. When these phrases are followed by the potentially controversial/critical opinion of interest, jurors are more likely to be honest and candid.

Tip Six: Contrast Critical Views

Another way of uncovering jurors’ views on critical opinions is to contrast positions on critical issues.ⁱⁱⁱ Key to this approach is to provide a clearly defined choice between two positions. Neither position should be so extreme as to produce no agreement whatsoever. The following illustrates this approach.

In talking with jurors, I have found that in awarding money damages to an injured party, some jurors feel that it would be worse to award too little money to an injured party. Other jurors say it would be worse to award too much to an injured party. BY A SHOW OF HANDS, of these two considerations, which do you think would be worse?

- (a) How many of you feel that it would be worse to award too little money to an injured party? (PLEASE raise your hands)

- (b) How many of you feel that it would be worse to award too much money to an injured party? (PLEASE raise your hands)

If it is unclear whether an option is too extreme to elicit any support, provide a less extreme response option, leaving yourself the ability to further pursue a critical opinion with an open-ended follow-up question (e.g., Tell me a little about your feelings about this?) or a further refined contrast question.

Tip Seven: Consider All Sides of the Issue

As we saw earlier, jurors may try to hide or be reluctant to raise their hands. When questions are phrased so as to focus on agreement with one position, other important positions may be ignored. Oftentimes when jurors don't respond affirmatively, their lack of agreement is inferred to be the holding of the opposite position or at least the failure to agree with the stated position. This simply may not be the case. You can avoid this pitfall by phrasing the question so it includes the key positions on the topic. Consider the following example.

I would like to ask you to raise your hand to indicate whether you feel that the criminal justice system treats criminals too leniently, about right, or too harshly.

- (a) How many of you feel that the criminal justice system treats criminals too leniently?
- (b) How many of you feel that the criminal justice system treats criminals about right?
- (c) How many of you feel that the criminal justice system treats criminals too harshly?

Obviously, those who raise their hands may be subject to follow-up as would those jurors who do not raise their hands for any option.

Tip Eight: Flip the Key Question

While it is possible to consider all sides of an issue within one question, as we saw earlier with the springboard method, the same concept applies when jurors are given only one option, e.g., agreement or disagreement with a particular position. Get the full picture (and full disclosure) by flipping the question in a follow-up question. When a critical agreement/disagreement question is asked, follow it with another question addressing the opposite position on the issue, e.g., "How many of you agree with the view that . . .?" followed by "How many of you disagree with this view?" In this manner, you have an opportunity to uncover (a) those who support the follow-up position; (b) those who are undecided; and (c) of critical interest, those who should have responded to the first question (and are likely to not respond to the second question and, hence, be subject to follow-up) or those who respond in a hesitant manner (again, being subject to follow-up).

Tip Nine: Ask Key Questions with the “Bad” Answer in Mind

We ask a lot of jurors when we ask them to be candid and forthcoming in a group setting. We are armed with our open-ended questions and follow-up questions. And yet, sometimes we don't hear the “red flag” answers to our questions that we know exist in the jury pool. If there are critical answers that would serve as red flags (critical negative views uncovered in prior research or past experience), answers that would raise the potential for a challenge for cause or peremptory challenge, consider asking them directly. For example, negative views such as “money should not be given for pain and suffering because it doesn't stop the pain”; “if it's not written in the patient's chart, it never happened”; “a (criminal) defendant who does not testify must be guilty”; or “it would be hard to convict a defendant without DNA evidence because there would always be a little doubt in my mind” could be addressed to the group by attaching some version of the phrase “How many of you believe . . .” This inquiry could be addressed either after earlier treatments of the topic or, in very restrictive settings, as part of the original treatment of the topic.

Tip Ten: Avoid the Socially Desirable Response Bias

Finally, the way you phrase questions affects the degree of candor elicited from jurors. Particularly in a group setting, jurors are sensitive to how others will view them. Will I be seen as a good person/juror? Will others like me? Knowing that jurors are already involved in managing others' perception of them and are prone to respond in a manner that they hope makes them “look good,” we do not want to trigger this socially desirable response bias by giving them any clues as to what the “acceptable” or “right” answer is. Avoiding such phrases as “bias or prejudice,” “fair and impartial” or other phrases that set off the socially desirable response bias, such as “Do you understand . . .” is a must if you want to encourage juror honesty and candor. Focus on what the juror may or may not do as a way to address these concerns. For example, giving a witness's testimony less weight or requiring more evidence to prove something are actions that may reflect prejudice, bias, or partiality. Jurors are more likely admit to such activities then publically declare that they are biased or prejudiced.

Conclusion

While all of the above approaches have been used in various jurisdictions across the country, jurisdictions and judges differ and some of the above approaches may not be allowed in your jurisdiction. However, given some thought on the principles and goals behind them, you can come up with creative ways to maximize juror disclosure and participation in the group voir dire settings you encounter.

Endnotes

- i See Cathy Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of Its Content and Effect*, 18 *Law & Hum. Behav.* 309 (1994).
- ii Some of these recommendations apply just as well to individual questioning. However, their value in group settings is accentuated because of the increased social pressures inherent in this setting. The recommendations contained in this article are not meant to be exhaustive. A more detailed discussion of these and other matters related to voir dire and jury selection can be found in Jeffrey Frederick's *Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury*, Third Edition (2011).
- iii See discussions by Jeffrey Frederick, *Voir Dire Techniques to Maximize Damage Recovery: A Primer*, 21 (1) *J. Va. Trial Law. Ass'n* 32 (2009) and Karen Lisko, *Proven Jury Arguments and Evidence* (2010).