THEORY-BASED VOIR DIRE

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RECEIVE INFORMATION

- Exercise intelligent peremptory challenges by avoiding stereotypes
- Develop challenges for cause
- Use later in trial
GIVE INFORMATION

• Advance your theory of the case

• Educate
DEVELOP A RELATIONSHIP

• Listen
• Be interested
• Respond Appropriately
WHY NO MEANINGFUL VOIR DIRE?
FEAR OF ...

- Losing control
- The judge stopping me
- A juror saying something that taints the entire panel
- Not knowing what to ask
- I hate talking to people
QUESTIONNAIRE
HOW DO WE APPROACH JURY SELECTION?
PREPARE

• Brainstorm a theory
• Identify the belief systems that are helpful or damaging to your theory
• How do I get at that information?
• Actually articulate the questions
What belief systems are helpful or damaging to your theory of the case?
• Do not seek to change the juror’s core values

• Do not lecture

• Make it a conversation
BELIEF SYSTEMS ABOUT WHAT?

- Race
- Eyewitness ID
- Child witness
- Gangs
- Sympathy
- Domestic assault
- Drugs
- Police credibility
- Guns
CLIENT CENTERED

• Include client in the process
• Prepare client
• Is there something about the client that you might want to talk about?
• Have client watch for non-verbal behavior
CONTROL
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Do...

Bad?  Good?
LIFE EXPERIENCE QUESTIONS

• No aspirational answers

• Ask jurors how they actually behaved in specified circumstances
EXAMPLES

• Tell us about a bad encounter you or someone you know has had with a police officer

• Share with us an embarrassing holiday incident experienced by you, a friend, or a family member

• Describe an uncomfortable stereotype you have heard someone use
FORMAT

• Command

• Life experience

• Save face
SAVE FACE

• That happened to you, a friend, or a family member

• That you heard someone you know say

• “I’m not going to ask you who this was”
ARTICULATE THE QUESTION
THINK ABOUT...

• How you would answer
• Am I being judgmental?
• Am I being disrespectful?
• Am I offending jurors?
• Preparing for the unexpected response
FOLLOW-UP QUESTIONS

- Requires listening
- Go with the flow
- Do not assume
KEY WORDS

• On the whole...
• Most of the time...
• I think so...
• Probably...
• I guess...
TEAMWORK

- Notes
- Eyes
- Input
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Lawyers struggle with jury selection, just ask them. Typically they have a sense that jury selection is important and those who are not allowed to participate in voir dire lament the lost opportunity. We don’t know what to ask. We fear losing control of the conversation. We fear one potential juror might taint the whole panel. We fear the judge will not allow us to ask the questions we deem most important. We fear, above all, being made to look foolish in front of a group of strangers who may control our client’s fate.

And yet, if we allow all of these fears to dominate our approach to jury selection, we’ve lost a major opportunity not only to empanel jurors we believe will be receptive to our case but to get them thinking about the themes that comprise our theory of the case. And this means that long before you begin reviewing juror questionnaires or making up your likely questions you need to have a theory of your case and to have put significant effort into thinking through its underlying themes.

It is impossible to overstate the importance of thinking through a theory you can articulate in three or four declarative sentences as well as the themes that will support it at trial. This is not your opening statement. Your theory must account for the facts, emotions, and law that will compel the jury to give you what you want. It is for your eyes only and it instructs what you do in every aspect of the case. As you think it through, or brainstorm it with colleagues, account for facts, helpful and not, that the jury is likely to
hear. You want to frame questions and listen for reactions that both gauge panel members’ attitudes and begin to outline your position for them.

Jury selection is important for several reasons. First, we need to get information from panel members. Second, we need to give information to them. And third, it is our opportunity to develop a relationship with our future jurors.

The first reason to get information is so that we can make intelligent peremptory challenges. If we are unable to get the potential jurors to truly reveal how they feel about issues, we will rely on stereotypes in making our final decisions. A generation ago, defense lawyers were told that they did not want secretaries or bankers on their juries, period.

Secretaries, we were told, liked rote tasks and could not think outside the box. Bankers saw everything in black and white. Neither of these traits were supposed to be good for our cases. Yet the truth is that some bankers and some secretaries would be really good for certain types of cases and certain theories. But it really depends on the attitudes of the individual person, and we won’t know what those are unless they tell us. The sad truth is that some of the questions we are taught as new lawyers are precisely the ones that shut potential jurors down and infuriate judges. The good news is that it’s relatively easy to simultaneously draw panel members out while introducing our theory of the case.

One day I ran into an acquaintance who had just finished jury duty who told me how surprised he was that the defense left him on the jury in a gun case. While he hated guns, he was very open-minded about the idea that police might overreach and he was
quite adamant about protecting the rights of the accused. I learned that the attorney in this case had told the jury that the gun did not belong to his client. The jury agreed and acquitted. After hearing more of the facts, and the defense theory, it made perfect sense that the defense wanted my acquaintance on the panel. Had the theory been different, had the client in this case brought the gun to a party and the defense planned to argue self-defense, it’s reasonable to imagine that particular potential juror, being anti-gun, would wonder why someone would show up at a party armed. In that case, lawyer probably should remove him.

Getting information from panel members will also help us develop challenges for cause. Those who really want off the jury will often volunteer the information needed to remove them. With others you have to probe more deeply. When you try to remove someone for cause, do not ask them whether they can be fair and impartial. No one wants to admit that they can’t be fair. We’ve all heard judges—particularly those bent on rehabilitating a potential juror—say, “Despite the fact that your entire family was killed by a drunk driver, you can still be fair and impartial to Mr. Smith in this DWI case, can’t you?”

Instead, you might ask, “Might it be difficult to serve on a DWI trial given the fact that your family was killed by a drunk driver? Even though you are a fair person and you would try really hard to be impartial, you would agree that it might be terribly difficult to presume that Mr. Smith is innocent?” In this way, you can affirm the person’s fundamental fairness while acknowledging that his personal experiences make him a better juror on another type of case.
The second reason jury selection is important is that it is your first chance to give information to the jurors. This does not mean lecturing them about legal concepts. Long speeches about the rights guaranteed by the Constitution followed by a request to apply them in your client’s case will be met by a polite smile and a nod. This interaction has given you no information because you have no idea how each potential juror feels about these principles and it has told them nothing new.

Instead, try to get them thinking about situations in their lives that have factual or emotional similarities to the themes underlying your theory of the case. For instance, let’s say your client is accused of killing someone and your theory is self-defense. While you are unlikely to find a potential juror who has killed someone, you will find people who have been in terrifying situations. They know what fear feels like. They can relate to what your client likely felt in a situation where they reacted out of sheer terror, even though the circumstances were different. You want a juror who can put him or herself in the shoes of your client.

You will also find members of the panel who have thought seriously about self-defense. Many people will raise their hands if you ask them what they would do if they were in bed one night and they heard an intruder. Some will describe plans that include guns, baseball bats, and other weapons. Others will talk about calling the police and getting out of the house as quickly as possible. Getting at panel members’ attitudes about these situations will give you a great deal of useful information to help you decide whether each would be good or bad for your theory of the case.
Finally, jury selection gives you the opportunity to develop a relationship with your panel. This is important because you want the jurors looking to you for answers in the case. You want to be the person in the courtroom they trust. This doesn’t necessarily mean that they will vote your way, but why wouldn’t you want the benefit of the doubt?

I was told by a juror in a murder trial that the panel liked the relatively new public defender so much that they were rooting for her to do well. When she struggled during her closing argument, they were actually pulling for her. They returned a guilty verdict on a lesser offense. Did they opt for the lesser charge because they liked her? Not necessarily, but the rapport she created with them certainly didn’t hurt.

So how do we develop rapport with our jurors? First, we listen. This may seem obvious, but lawyers are not known for our listening skills. Waiting impatiently for the speaker to finish so we can make our next point is not really listening. Instead, we need to learn to engage in active listening--during which we are not mentally formulating our next question. You are making eye contact, you are attending to their choice of words, their body language and facial expressions and—and we will return to this last point in a moment--responding appropriately to what they say.

Next, we need to look interested in what the juror is saying. We all know what it’s like to talk to someone who is distracted or bored. Jurors know that, too. If you are looking at your notes or your client, it’s not apparent to your potential juror that you are interested in what they are saying.

Some lawyers are painfully shy. For them, talking to a room full of strangers while maintaining eye contact can be extremely challenging. The answer here is to practice
deliberately putting ourselves in social situations in which we peel ourselves away from the wall and make a concerted effort to engage complete strangers. If this sounds awful, you probably do need to practice.

Finally, we need to respond appropriately to the answers that potential jurors give us. And once again, this requires us to listen. Looking down at your notes and mumbling, “uhuh, uhuh” does not convey to the speaker that you are interested. Many of us have interacted with a doctor whose eyes couldn’t be pried from the chart. Talking to the top of the doctor’s head really wasn’t a reassuring experience.

Our goal is to assure the potential juror that we want to know what they have to say. Our physical and verbal responses need to be specific to communicate that message. Make eye contact, nod when appropriate, and match the emotion you display to the content of their remarks.

Most lawyers admit to trepidation about voir dire yet rarely recall that jury duty is a novel and possibly intimidating experience for non-lawyers. We need to remember that the citizens who appear before us did not choose to be there and public speaking is terrifying for most of them. I was reminded of this when I asked a potential juror what I thought was an ice-breaking question. Her cheeks puffed out, her eyes became wide, and she stumbled out of the jury box and vomited in front of the bench. Without pausing, the judge told his clerk to take care of the juror and me to move on to the next potential juror. It was a bonding moment for me and the remaining panel members as we looked all stared at the carpet, trying to ignore the obvious.
Knowing that our panel members are afraid does not necessarily eliminate our own fears. Lawyers are wary of being cut off by the judge, who we believe the jurors see as an authority figure who may see us as foolish or irritating, of having a potential juror say something that will taint the entire panel, and of losing control. The number one problem, however, is that we really don’t know what to ask or how to ask it.

Worrying about the judge stopping us in front of our panel is a legitimate fear. Some judges might as well be in chambers reading a newspaper for all they care about what we ask, but others are primed to interrupt on their own when they perceive any impropriety. Remember first that the judge is not your audience. The finders of fact—the jurors—are. One key to preventing the judge from interrupting is to make sure that the potential jurors are doing most of the talking.

Lawyers are often our own worst enemies, boring everyone to tears by asking the same questions over and over. Getting the jurors to talk is critical for many reasons, including the fact that it’s much more difficult for a judge to cut off a tax-paying, voting citizen.

If you do get interrupted, ask to approach to explain why what you are asking is proper. If the judge is still unconvinced, move on and raise the issue with him or her later, probably after the trial, when he or she is not under pressure and can consider your explanation in a more neutral context. Persistence often yields change.

Many lawyers worry about a potential juror tainting the entire panel. Although there are exceptions—”My son went to school with your client and he was always getting arrested”—we should embrace the opportunity to explore issues that are on panel
members’ minds. In fact, why not take the initiative and point out the elephants in the room? You might ask, for example, “The judge has told you that you have to presume Mr. Smith innocent, but many people think that if someone is charged, there must be something to it: In other words where there is smoke there’s fire. How do you reconcile those two things?”

Whenever I ask jurors how they feel about being a juror in a particular case, they usually say it’s okay as long as it doesn’t involve child molestation. If you are trying that type of case, why not get the jurors talking about their fears? Your questions can give them an opportunity to talk openly about things most of them are already thinking. Listening to their concerns, and watching to see how other panel members respond to what they say, will provide you with a wealth of information.

You are watching for signs that a person may be so emotional about this type of allegation that they can’t listen or simply shut down. These people are unlikely to hear your case over their feelings. People who seem likely to feel extreme pressure in this type of case because getting it wrong either way would have drastic consequences may be good jurors but merit further discussion. Talking further allows you both to gather more information about their beliefs and to introduce themes of your own, such as the idea that they may never know what really happened, in which case the right thing to do would be to acquit.

Most infamously lawyers fear voir dire because they don’t want to lose control of the conversation. As a group, trial lawyers are controlling, type-A people. It is drummed into our heads that we must stay in charge of the conversation. Having a witness run away
on us in cross-examination is a potential catastrophe we train to avoid. We fear the unscripted moment.

In jury selection, however, we need to let the jurors speak in as open-ended and unfettered a manner as possible because this is the only way we will uncover their real attitudes. By encouraging them to talk we are, by definition, giving up control. This is disconcerting, to say the least, for a lawyer who lacks confidence in jury selection.

Part of letting go is giving up our script and allowing the panel member to wander into unexpected areas. Scary though this is, those unexpected areas can yield troves of insight. A particular topic might be on our list of issues to discuss, but if our potential juror heads in that direction before we think we are ready to go there, it’s important to go with the flow. You can always return to your script, but you can’t recreate the juror’s unscripted thought.

The best way to conquer the fear that all of this open-ended, unscripted conversation will snowball into chaos is thorough preparation. And the first task, which needs to happen long before voir dire begins, is to brainstorm a single theory of the case. Jury selection is our very first chance to expose the panel to our theory of the case, so that theory needs to be fully developed.

If we haven’t chosen a theory by voir dire we can’t tailor our questions around it. For example, if I have a murder case and I have viable defenses of self-defense and misidentification, what questions will I choose to ask my panel? I will want to know how they feel about the right to defend oneself and about how good they are at remembering faces.
If my goal is to get future jurors to relate to my client’s level of fear in the moment he or she reacted in self-defense, or the emotions of an eyewitness, I need to ask questions that will get individuals to talk about their experiences. Otherwise, I am missing out on an opportunity to fully develop my theory in their minds.

In addition, consider how it will look to panel members if you appear not to have a theory. Remember, you want them to trust and to look to you for answers.

Once we have our theory, we need to identify belief systems that would be helpful or damaging to our case. We cannot change a person’s belief systems, which is why those lectures about reasonable doubt and the other protections of the Constitution really aren’t helpful. Our goal is to uncover the attitudes relevant to our theory and to make an intelligent decision about how those beliefs will affect the juror’s perception of our theory. The most effective way of doing this is by engaging our potential jurors in conversation on topics designed to elicit their feelings about issues related to our theory.

Imagine that we represent a client accused of molesting his child and our theory is that the child was coached by her mother, who is trying to gain an advantage in a custody hearing. We need to know whether the potential juror believes not only that children can be coached, but that a parent would actually do such a thing to get custody.

What if we represent a man accused of hitting his girlfriend and our theory is self-defense? We need to find out how potential jurors feel about a man hitting a woman. Some people believe that it is never appropriate for a man to hit a woman no matter
what the woman does to him. A juror with this belief will be unlikely to accept your theory no matter how justified your client was in defending himself. The key is to identify what attitudes will be critical to your defense theory.

Once we identify these attitudes, we need to prepare questions to elicit this information. Usually, lawyers can fairly easily identify the relevant issues--race, eyewitness identification, guns, domestic assault, and use of drugs or alcohol to name a few. The harder assignment is to design questions that will allow potential jurors to reveal their true feelings.

It’s not enough for the lawyer to decide to ask questions about individuals’ feelings about race. Without additional preparation, we will find ourselves staring blankly at a panel of strangers wondering just what question we thought we were going to ask. It is critical to articulate or write out the questions in advance.

While it is difficult to completely avoid questions that start with “do,” when you ask them you will frequently receive a yes or no answer. To get potential jurors to talk we need to ask open-ended questions. Questions that begin with Who, What, Why, When or How require the person being questioned to respond with something more than yes or no.

For instance, asking, “Do you like your job?” will likely elicit a yes or no. By contrast, if you ask someone what they like about their job, they will be forced to give a more detailed answer.

Next, it’s critical to ask effective follow-up questions. We know that a person’s past behavior is a good predictor of how that person will react in the future. So asking
them about an experience they had and how they reacted is much more accurate than asking them how they might aspire to behave in the future. For instance, if you asked panel members how they would react if they were on a jury and the other eleven jurors wanted to find the client guilty and they thought the client was not guilty, most people would respond that they would hold fast to their opinion despite pressure. Yet, except for the plot in the movie “Twelve Angry Men” we know this is unlikely.

So, we can formulate a question that asks potential jurors about their past behavior: “Tell me about a time when you had to make an important decision with a group and you found yourself in the minority.” Follow up with, “What was your position?” or “how did the discussion evolve?” You want to end up knowing who took the leadership role and whether this juror was passive, decisive and so forth. That is a good predictor of how they will act in a similar situation.

Another example of this type of question is, “Tell me about a negative encounter you or someone you know has had with a police officer.” Or, “Describe a stereotype you have heard someone use.” Or, “Share with me a time when you, a friend, or a family member had to interact with someone who was struggling with chemical dependency.”

This type of question begins with a command, asks the person being questioned to relate an experience, and affords them an opportunity to protect their privacy. The person being asked the question is not given the option of a yes or no answer. The last part of the question allows the panel member to talk about the experience without revealing the identity of the people involved. Another technique is to preface your question by telling the potential juror that you are not going to ask who the parties were
because you are only interested in what happened and what impact it had on everyone involved.

During the process of brainstorming questions, it is important to prepare to respond appropriately to potential answers. First, we never want to be judgmental. Our goal is to get panel members to share their true attitudes with us and we will find some of those beliefs offensive. I vividly remember the older white man who raised his hand to tell me that he couldn’t be fair to my African-American client because a black boy grabbed his daughter’s breast when she was 13. I was disgusted and I wanted to say something sarcastic, but had I responded in that way, I would have sent the message to every other juror that it was dangerous to share. If we want the panel members to be honest we need to be able to say, “Oh I am sorry to hear that. Thanks for letting us know.”

We also need to be respectful. Most of us wouldn’t dream of being disrespectful to a group of people who will decide the fate of our client, but we are often unaware of how we are coming across. During jury selection in a murder trial, a panel member shared that she was a published author of science fiction books. My co-counsel asked her to describe the typical plot of one of her books. The author’s face tightened and her body tensed up. She had just been insulted. No creative person wants to think of their work as typical. To her, each plot was unique.

Again, while it seems obvious, we don’t want to offend our future finders of fact, yet some of us have no idea we are being offensive. During another murder trial, my co-counsel insisted on asking every woman on our panel whether she had been “blessed.” He meant whether they had children. During recess we had a heated argument about
whether that question was appropriate. I told him that women—or men for that matter—who were unable to have children, or who simply didn’t want them, might find this offensive. He vehemently disagreed and continued to ask this question.

We can all be completely oblivious that we are being insensitive to a person of another gender, race, ethnicity, etc, so bouncing our questions off of colleagues or friends with different backgrounds can be critical in getting feedback before we make fools of ourselves in the courtroom.

Finally, we need to prepare for the unexpected responses. The openness and honesty displayed by potential jurors frequently surprises us. If we are asking good questions, we need to expect that they will share very personal information. A lawyer I know was just starting to ask questions in a case involving interference with a 911 call. He asked a man whether he had ever felt angry enough to throw a phone. The man paused. “Funny you should ask,” he said. “Eight years ago today I got a phone call that my son was killed and I ripped the phone off the wall and threw it across the room.” After a second or two of unbearable silence the lawyer moved on to another panel member without ever acknowledging what the man had shared. In real life he would have known what to say, but he was completely caught off guard by the intensity of the emotions in the context of the courtroom. We cannot leave our humanity outside. We need to summon the strength to say, “I’m so sorry. Would you mind if I ask you some more questions?”

What if our question elicits an answer that is completely off track? Explain that you did not phrase the question very well, apologize, and try again. It’s much better for
us to take the blame when the juror didn’t understand the question, even if the question was perfectly clear. The last thing jurors want is to look stupid in front of a bunch of strangers.

There are also times when our questions are not clear. Many times I’ve asked a question only to look at the face of the poor, puzzled juror who has no idea what I’m talking about. I laugh and tell them that my question certainly didn’t come out the way I intended. They usually laugh, too, and I try another approach. Panel members appreciate lawyers who are genuine and who make every effort to put them at ease.

After we ask our open-ended and perfectly tailored past-experience questions, what do we do next? We ask good follow-up questions, which, once again, requires us to listen carefully. It’s amazing how often I’ve seen potential jurors volunteer tantalizing information, yet the lawyer moves on. Later when I ask the attorney whether they wanted to know more about what was said, they usually say yes yet can’t explain why they didn’t follow-up. The answer is that they really weren’t actively listening. Instead, they were formulating their next question because the fear of having nothing to say in front of the jury is overwhelming. You need to get comfortable with the idea that a juror may stop suddenly. It’s okay to take the time to figure out what to say next.

When we are actively listening to a panel member we often find it difficult not to assume what the experience meant to that person. Many a lawyer has offered condolences when panel members say they are divorced, only to have them say that it was the best thing they ever did and they don’t know why they waited so long. Resist
saying, “Well that must have been…” Instead, ask them what the experience was like. How they reacted or felt about the experience will give you invaluable information.

Another part of active listening is to hear answers with hedge words. When you hear “most of the time,” “probably,” “I think so,” and “I guess,” don’t hesitate to ask what the person meant. For example, you might say to a juror who agreed that some proposition was true most of the time. “Are there times when you think that might not be true?”

I’ve emphasized how important it is to have a conversation with jurors by maintaining eye contact and not taking notes. How is it possible to remember all of the information without taking notes? Have someone else with you whose responsibility it is to take notes. Co-counsel can be extremely helpful in any number of ways, although many public defenders do not have the luxury of pairing up on trials. People love to watch trials. Hit up a paralegal, a secretary, a friend, or a family member. The person does not need to sit at counsel table to be helpful. Another set of eyes can watch the reactions of other panel members. And finally, having the input of someone else, often not a lawyer, can be invaluable.

Finally, remember that as you are previewing your theory and themes for your future jury, you are also introducing them to your client. It is important to remember that while being in a courtroom is second nature for us; it is not a natural environment for most of our clients. We know that when we are in trial the jurors often watch our every move, which can be uncomfortable. Imagine how our clients feel. They are also unfamiliar with customs and protocols that we take for granted.
I once had a client return late from a 15-minute afternoon recess during trial. The judge was angry and had seated the jury while I paced anxiously in the hall. In time, my client appeared with a Burger King bag in her hand. Knowing the jury was in the box, I pasted a smile on my face and reached for the courtroom door. When it became apparent she intended to eat her burger at counsel table, I explained that this simply wasn't appropriate. She failed to show up the next day and after she got picked up on the warrant that was issued for her arrest, pled guilty because she said she couldn't stand the stress of a trial.

Our job is to prepare our clients for the entire process. We need to explain, in very precise terms, what a client needs to wear. Telling them to dress as they would for a job interview or for church is not enough. We know longer have a shared cultural understanding of what that means. To avoid T-shirts with marijuana plants and obscene sayings and shorts that leave nothing for the imagination, we need to be specific. If we want a suit and dress shoes, or khakis and a button-down shirt, we need to say so. To make sure that all clients have appropriate clothes for trial, many offices have a “client closet” with donated items.

Similarly it is important to prepare clients for voir dire and to include them in the process. Giving them paper and a pen to write notes can forestall the tug on our sleeve and the whispers in our ear while we are trying to listen to what potential jurors are saying. If I am really having a conversation with an individual panel member, I probably won’t notice how another potential juror is reacting. And I might hit it off with a juror, but that same person might be glaring at my client when I’m talking to someone else. Noticing and communicating these things to me can be tremendously helpful.
We can also use *voir dire* to prepare jurors for issues of concern about our clients. Language, behavior, tattoos, and expressions are all topics ripe for explanation. I once represented an 18-year-old client charged with murder who was asked by the police why many of his acquaintances were accusing him of the crime. His tape-recorded response was that he was “fucking their bitches.” One of the questions I asked parents on the panel was whether their teen’s language was the same around them as it was around their peers. Everyone laughed and described why this was definitely not the case. My hope was that when the jurors heard what my client told the police, the statement would not have the same shock value.

In sum, there is no reason to fear *voir dire*. Quite the opposite, it’s an opportunity to explore how the citizens who will hear your case may receive it, and to introduce them to the elements you want them to pick up on. Effective jury selection starts long before you enter the courtroom with the careful formulation of a simple, powerful, easy-to-articulate theory of the case, the identification of underlying themes, and the drafting of questions that will elicit jurors’ attitudes and likely reactions. The best will be open-ended, begin with a command, ask for information about a past experience and allow the juror some privacy when identifying the person having the experience.

Once you are meeting your potential jurors, listen, respond with appropriate emotions, and ask plenty of follow-up questions, Remember always that rapport is being established with your client, too.