

### MORE VOIR DIRE

Now that you have efficiently exercised your obligations under the **PrimeCOLE Voir Dire Hippocratic Oath**, and done no harm to your credibility, you get a second chance to do just that—individual *voir dire*. To avoid doing that, the best approach is to ask the judge, in a pretrial session, in your most pleading voice: “You’re going to handle individual *voir dire*, right? ... please.”

If that does not work, then either tread lightly or lower the hammer. For the prosecution, more often than not “no thank you” is the most appropriate response to the judge’s invitation to question a member. The characteristics of military members generally work in favor of the prosecution ... sorry defense. So unless a member has answered a question in group *voir dire* that makes you pretty sure they will not give your case fair consideration, be the potted plant.

And just because a member has answered a group *voir dire* question in a manner that suggests they may have some implied bias, there is no requirement that the prosecutor be the one that fleshes that out in individual *voir dire*. Some junior counsel have been taught to do this as a matter of routine in what appears to be a misguided effort to “protect the record.” Protecting the record is fine, but peruse the appellate cases that have reversed on member-selection issues and you will see just how obvious the defect has to be (*i.e.*, unresolved actual, or approaching actual, bias) before a conviction will be overturned. The problem with the go-first, protect-the-record approach is that junior counsel interrogates every member, poorly, trying to suss out some implied bias, and in the process invariably insults their intelligence or integrity, but fails to uncover enough to have any members excused for cause. They then can only dump one irritated member with a preemptory challenge, while the rest remain, scarred by the “attack” during *voir dire*. Record protected; credibility shot.

So let the defense do the work at the outset. Then you can decide whether to try to rehabilitate or let the member go if the defense has been able to demonstrate sufficient question about the member’s fitness to serve. Either protects the record (and not fighting for a lost cause is not going to hurt your case or your credibility with the judge). If you are going to try to rehab, have ready your versions of the standard questions: *e.g.*, Can you put aside anything you learned [or heard] in Situation X and decide this case solely on the evidence presented in this courtroom and the instructions given to you by the judge? Was there anything so monumental about Situation X that would prevent you from engaging in active deliberations with your fellow members of the jury? Do you have any doubts about your ability to be fair and impartial based on Situation X? And when you then argue against excusal, document those things the cold record will not reflect (*e.g.*, member’s tone, “body language,” lack of negative emotion).

If you have to go after a member, go for it, but remember the wisdom of Omar Little (*The Wire*): “You come at the king, you better not miss.” (Ralph Waldo E. said something like that as well). Be careful, the member is going to know you are coming after them, no matter how respectfully you do so, and they will be defensive (usually forgetting they could get out of “jury duty” if they just played along). Sympathetic and apologetic in tone is the best way to get you where you are going. And then it has to be leading questions, noting how the member would have a “tough time,” or be “challenged,” or “would have difficulty” with whatever (*e.g.*, compartmentalizing an emotional event). When you argue for excusal, also document any non-obvious perceptions (*e.g.*, pauses in answering, palpable distress). And most importantly, always keep one round available (your preemptory challenge) in case your first shot (with the judge) goes wide. Little worse for your psyche than getting stuck with a member you went after and missed in individual *voir dire*.

**So, overall, for *voir dire*: Good luck; less is more; and first, second, and third, do no harm.**