



# A New Way of Thinking About Voir Dire

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**W**e need a system.

Teachers are bad. Relatives of law enforcement are bad. For this case, we want jurors with lower education levels. For that case, we want to pick middle-aged, Hispanic males. Prior jury service is bad.

When we first learned to “pick” a jury, we were taught with broad generalizations like this. We were taught to educate the panel and correct misinformation made by prosecutors. We’ve all heard the following, or something like it: “During voir dire, be engaging. Be likeable. Be knowledgeable. Get everyone to talk.”

We have always fancied ourselves good at voir dire. Megan is engaging, likeable, and knowledgeable. Daniel is humorous and a pretty good people-

reader, but in the end, our strikes still usually come down to stereotypes or initial gut impressions.

As defense lawyers, we know the pitfalls of allowing these generalizations to control our thinking. Racial biases and stereotypes are all too often the foundation of faulty criminal investigations. Eyewitness identifications have proven to be very problematic. Why? Because our brains are really good at making us believe things that simply aren’t true.

Now to be fair, we weren’t trained to pick a jury solely on assumptions alone. Like most, we were trained to “get something from everyone.” By making everyone talk, the theory goes, you have something to go along with your stereotypes and visual observations.

This is not as simple as it seems. In the last felony we tried, a DWI 3rd or More, we started with a panel of 108 people. It's virtually impossible to get something useful from 108 individuals in less than an hour while educating the panel and correcting whatever the state may have left for you to fix during its presentation.

About a year ago, we had the pleasure of seeing Robert Hirschhorn speak at the Center for American and International Law. (Short plug here for CAIL – if you haven't been, it is well worth the hike to Plano. They put on some phenomenal seminars and they are incredibly affordable, particularly if you do indigent representation.) Robert Hirschhorn is a renowned jury selection consultant. His method is all about identifying and eliminating bad jurors as effectively and efficiently as possible.

The remainder of this article is not teaching you the Hirschhorn method. Truth be told, we couldn't do that if we wanted to. We've only seen Hirschhorn present once, but it was a revelation. The remainder of this article will describe the process we are now using and how it has changed the way we look at and conduct voir dire forever. We must give credit where it is due and that is with Robert Hirschhorn, as this is our adaptation of his concepts.

### **Trust the system.**

It is extremely hard to step outside your comfort zone. For us, it was hard to trust a system that we had never used before, particularly when it was leading us towards highly counterintuitive jurors. For some, this may be impossible to implement and trust.

This system is based on polling the panel with scaled questions. In our presentation, we had five scaled questions. Each question has a 0-10 scale, with 0 being strongly disagree, 5 being neutral,

and 10 being strongly agree. It is important with scaled questions that the scale be weighted in the same direction every time. We choose 10 to be the answers most favorable to us, so a total of 50 would be a "perfect score". In addition, we used two "yes or no" questions. From a panel of 108 jurors, we recorded and analyzed 756 answers, seven answers per person.

Until now, we have been opposed to using scaled questions in voir dire. They have always seemed boring and time consuming. After having conducted a voir dire with a 108-person panel with seven questions, we can tell you that while scaled questions are a bit tedious, they don't have to be overly boring or time consuming. If done correctly, each scaled question, with our 108-person panel, should only take about 3-5 minutes per question, totaling about 25-35 minutes for the entire process.

At the very beginning of the presentation, Megan explained to the panel what we would be doing. She explained to the panel how important this information was to our client and asked the panel to help us. She also explained that we had practiced the questions, and if the panel helps us, we can get through each question in 3-5 minutes.

Megan explained to the panel that Daniel has to record the answer along with the court reporter. She explained that we may occasionally have to stop and make sure we correctly recorded the answers. She emphasized that each juror has to be identified, so the process will go significantly faster if the panel members identify themselves by number before they give their answer. We have found that if you explain to jurors what you are doing, why you are doing it, and how they can make the process go by quickly, 95% of them are willing to help.

Of course, there are those difficult ones. There are always a few jurors that you have to pull an answer

out of, or those who try and control the process by asking questions. Do not let any one juror control the process. If someone tries to interrupt you with questions, simply ask them to hold that thought while you get through everyone's answer, and tell them that you'll circle back to any questions. Confession ... we very rarely circle back unless the juror asks again.

Additionally, it is important not to get bogged down answering questions, because your explanations may influence the panel members who have not yet answered. If you have a particularly screwy juror who continues to not follow the rules you've laid out, usually they will appear obstructionist and you just keep moving. This will typically hurt their credibility and help yours if you deal with it with grace and control. Occasionally you may get a juror who wants to give you an answer like 3.6 or 4.5 – something not a whole number. First, ask them if they could narrow that down to a 4 or 5, explaining that the system only allows for whole numbers. If they still refuse, simply record the answer rounded to a whole number. We choose to round down as a precaution because lower numbers are bad for us using the 1 to 10 scale.

Here are the questions we used in our felony DWI trial. It may go without saying at this point, but if you aren't utilizing technology in your trial practice you need to start. PowerPoint is a key aspect to this method. We have been very resistant to PowerPoint up until recently. In the spirit of full disclosure, a lot of that resistance has probably been rooted in laziness. Criminal practitioners, especially those in Bexar County, know that trial courtrooms are like Wild West saloons. You may be going in there to get a whiskey, but you might very well leave with a bullet.

Oftentimes, like many of you, we have multiple cases set for trial on the same day. We've all experienced

the scenario where the "Number 6 and probably not going" case is now up when the "Number 1 that was a sure trial" has decided to take a deal and enter a plea. Part of the beauty of this system (and any good PowerPoint voir dire) is that it is largely interchangeable, leaving very little new work for each case. Change the charge and change the names and a lot of the work is done. It is also important to note that this is not our entire presentation, just the scaled question slides for the purpose of teaching this method.

### DWI 3<sup>rd</sup> OR MORE CHARGE

How strongly do you agree or disagree with the following statement:

**Just because the State of Texas has accused a person of DWI 3<sup>RD</sup> OR MORE, that DOES NOT mean he is guilty.**

0 1 2 3 4 5 6 7 8 9 10  
Strongly Disagree Neutral Strongly Agree

### BEYOND A REASONABLE DOUBT

How strongly do you agree or disagree with the following statement:

If I were chosen as a juror in a criminal case, I would require the prosecution to prove their case **beyond a reasonable doubt** before I would return a verdict of guilty.

0 1 2 3 4 5 6 7 8 9 10  
Strongly Disagree Neutral Strongly Agree

## RIGHT TO REMAIN SILENT

How strongly do you agree or disagree with the following statement:  
IF THE DEFENDANT DOES NOT TESTIFY, I **WILL NOT** HOLD HIS SILENCE AGAINST HIM.

0 1 2 3 4 5 6 7 8 9 10  
Strongly Disagree Neutral Strongly Agree

## PRIOR CONVICTIONS

How strongly do you agree or disagree with the following statement:  
PRIOR CONVICTIONS FOR DWI ARE **ZERO EVIDENCE OF GUILT** IN A NEW DWI CASE.

0 1 2 3 4 5 6 7 8 9 10  
Strongly Disagree Neutral Strongly Agree

The above three slides are important legal concepts. Obviously, we would say a correct answer is a 10, but anything 4 or less could be a challenge for cause.

## RIGHT TO REFUSE

How strongly do you agree or disagree with the following statement:  
If I were accused of DWI, I would exercise my **Constitutional Rights and Refuse** to provide a breath or blood sample.

0 1 2 3 4 5 6 7 8 9 10  
Strongly Disagree Neutral Strongly Agree

This question does not give us information that could be a basis for a challenge for cause, nor does it have an automatic “right answer”. It is interesting to see where people fall on this issue in a refusal case, because that evidence is coming in. The logic being, if my client refused, the jurors who are also likely to refuse are going to identify with him and that decision. It’s hard to condemn someone you identify with, and most people won’t hold something against that they would do themselves. Despite not directly resulting in a challenge for cause, like the other scaled questions—the lower the number, the worse the juror for our client.

It is very important not to “explain” these concepts before asking the question. First, by the time you get your crack at the panel, they have already heard most of the legal concepts at least once, usually twice. Repeating the same, dull material is inefficient. Second, you do not want anything you say to bias the results. This system is **NOT** about educating the panel. It is about identifying and eliminating bad jurors. The reality of the situation is that no matter how stellar of a communicator you are, you are not changing someone’s deeply held opinions and beliefs in an hour-long presentation, so why waste your time trying? If there are points you want to make on these key issues, do so after the collecting the scaled answers from the panel.

## State of Texas vs. Abel Gonzales

- WILL YOU WITHHOLD JUDGMENT UNTIL **ALL** THE EVIDENCE IS PRESENTED?
- CAN YOU ASSURE MR. GONZALES THAT YOU CAN GIVE HIM A FAIR TRIAL?

These final two questions are yes or no. The answers were not collected at the same time. A “No” answer

to either of these can be the basis of a “for cause” strike.

### **So many numbers.**

Data collection and analysis is the other key component to this system. We had 756 individual answers and only a few minutes to analyze and interpret those answers into a winning jury. We are not ready to say this method cannot be done by yourself, but it seems to us it would be very difficult. This is absolutely an exercise in team work and coordination. The data collection must be accurate or the whole concept fails.

We created an Excel spreadsheet to collect and analyze the data. Each question was represented by a column across the top of the page. Each juror was a row down the side. Using the SUM feature in Excel, we set the spreadsheet to add up the scores for questions 1-5 into in column 6, called Totals. Columns 7 and 8 are for the two “Y/N” questions. Using the format feature of Excel, we set the spreadsheet to display any numbers 0-4 and any “N” responses in Red. The theory is that any 0-4 or N could be the basis of a strike. Disagree with the burden of proof? That’s a strike. Strongly disagree with the right to remain silent? That’s a strike. Answer “no” to a fair trial? That’s a strike. The point is to identify and eliminate the bad jurors and we have yet to find a more efficient or effective way to do so. Harness the technology at your disposal to analyze the data.

We set the formatting on the Totals column to display the top 20 scores as green and the bottom 20 as red. This allowed any easy way to deal with strikes. As the prosecutor proposed agreed strikes, any “red people” could be agreed to, while the “green people” would not. As people are struck, all of their number values are replaced with an “X” which allows

the spreadsheet to automatically adjust the color formatting in real time, continually showing you the best and worst panel members left. It’s worth noting that we also collect the demographic info on the panel cards in a spare column off the side of the page. Age, Race, Sex, Marital Status, Education is a relatively easy combination of key strokes and will allow you to really know your panel.

If you want to implement this system, it is worth the time to practice the data collection as a team. Doing so will help the presenter get the pacing right with the data collector and allow the entire presentation to seamlessly progress.

When it comes time to strike, you simply cut the lowest remaining scores. Let the numbers pick the panel, eliminating any biases we might’ve brought to the process.

### **TRUST the system.**

In the end, we ended up with a jury that gave us great answers. Lots of 8, 9, and 10s. The lowest total score was a 38. Our panel had an administrative law judge, two teachers, a firefighter, five post graduate degrees, lots of prior jury service, and several parents of small children. We were taught that all of these should absolutely be avoided in these types of cases. Honestly, we were a bit concerned about the composition of the panel that we picked as we prepared our opening statement.

Did it work? We’ll tell you an acquittal on this case would have been a home run. In the end, we didn’t get an acquittal. The jury hung—nine in favor of not guilty and three for guilty. At this time, the state has not decided whether or not they will retry the case, so we are not inclined to discuss the facts. Without getting into the details, let’s just say it was a triable case, but there was plenty of evidence put forth to

convict. While a hung jury isn't the home run we wanted, we managed to score a couple of runs and hopefully that will be enough to win the game in the end.

What have we learned from this experience? Our magic ability to read people isn't so magical after all. We are all susceptible to biases and stereotypes, and individual people are far more complex than such generalities. Despite how engaging and educational our presentation is, we are never going to change minds in such a short time. Rather than trying to convince someone that refusing to testify is not evidence, our time is better spent identifying those that feel that way and getting rid of them. And most of all, we have learned to not be afraid to try new things. Like all worthy practitioners, the journey of improvement can never end. It is awkward to step outside of your comfort zone, but often that's where the most growth occurs.



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## UPCOMING CLE

### Best Practices

October 12th - Developing the Plea, Finding Mitigation, Art of Posture & Position

November 9th - Developing Your Theme

December 14th - Crossing the Witness

### Trial Strategies

Every 1st and 3rd Friday at Liberty Bar

### Third Thursday Happy Hour

TBD