$1.20 Form of Questions

Because you must ask questions rather than make speeches during voir dire, you need to give as well as receive information with your questions. The form of a question determines its purpose. Leading or directive questions give information to jurors by telling them what you want them to know: "You understand that the State must prove its case beyond a reasonable doubt, don't you?" Open-ended questions do just the opposite: they solicit information from jurors. "Who, what, when, where, why, how, describe, and explain" questions are best-suited for this purpose. Intersperse both types of questions throughout voir dire.

[1] Open-Ended Questions Elicit Information From Jurors

Learning about jurors as individuals is a critical part of voir dire. Start with open-ended questions so you can glean as much information as possible about the people who will decide your case. Then use this information to eliminate unfavorable jurors and relate more effectively those who remain. The best way to elicit information is by asking broad, open-ended questions that invite jurors to speak in paragraphs rather than words. Minimalist answers reveal little about jurors, so phrase your questions so they can't be answered with a simple 'yes' or 'no.' The more jurors talk, the more you learn about them.

"Tell me about yourself" is a great first question to individual jurors. It's what you might ask in a social setting, so it mirrors real life. Get to know jurors a bit before broaching the more difficult aspects of your case. Make your first few questions easy to answer. For example, all jurors will readily tell you about themselves and their families, if only you let them. Don't ask questions like "Where do you live? What do you do for a living? Are you married? Do you have any children?" Although such questions aren't leading, they will elicit nothing but short, uninformative, one or two-word answers.

Broader questions yield more information: "Tell me about, Describe, Explain,
Why, and How.'

Leading and directive questions elicit what you think important; open-ended questions elicit what the juror thinks is important. Give each juror as much leeway as possible. Let him decide what to discuss first so you can deduce what's important to him.

Jury selection forces you to make immediate, intuitive judgments about people you hardly know: "Jury selection ... is tedious as well as dangerous, since it forces lawyers to make snap decisions, with potentially fateful consequences, from fragmentary information and visceral impressions." This means you need to learn as much as you can as fast as you can, and open-ended questions are the best way to achieve this.

[2] Encourage Jurors to Open Up

You can ask all the open-ended questions you want, but jurors still won't say much unless they feel comfortable with you. There are many things you can do to increase their comfort level.

Begin by targeting a juror who wants to talk. If you've watched jurors carefully, you've already identified the talkers, so start with one of them. She can "model" proper behavior for other jurors by demonstrating a willingness to speak up. Don't ask her to answer questions for "the court," e.g., "Tell the court about yourself." It's far easier for jurors to speak directly to you than to "the court," "us," or "everyone." "Tell me about yourself" is hard to beat for a first question.

After asking a question, stop and listen to the answer. Jurors expect you to be manipulative, so try a little subtlety and a lot of silence instead -- virtues not often cultivated by lawyers. But jurors won't think you really want to hear what they have to say unless you listen. The more you listen, the more they'll talk.

Face each juror frontally. An open body position tells her you want to establish a friendly, trusting relationship. The better she thinks she knows you by the end of trial, the harder it will be for her to rule against you.

Give equal time and attention to each juror. Don't avoid anyone -- particularly unfavorable jurors -- because it gives the impression you're afraid of what they might say. Even more difficult is learning to relinquish control: "You have to [let go] and let the jurors go where they want." Sit back and let them speak without interruption.

Don't wear your most impressive "lawyer suit" to court on the day you select a jury. Try to look friendly and approachable, not buttoned-up and formal. Earth tones and blue shirts are better than dark suits and starched white shirts. As David Berg notes, "Being down to earth is a huge asset. Why do you think David Boies wears those polyester suits? Because he likes them?" Don't take "down to earth" to extremes. Jurors expect you to dress up, but without looking flashy or fashion-challenged.

[3] Ask Leading Questions to "Educate" Jurors

Because the substance of a leading question itself is instructive, it can influence a juror's thinking. Just as you must learn about jurors to determine their fitness to serve, jurors must learn about your case so they can help you
make that determination. These two aspects of voir dire work in tandem. The
learning process must be reciprocal. If you learn about jurors but teach them
nothing about your case, you're starting the trial at a disadvantage, and so are
they. But if you educate them about your case, you can elicit more meaningful
and complete information. If they understand the reasons for your questions,
they'll be more willing to help you decide if they can be fair.

Weave critical, admissible facts into your questions to educate jurors about
your case: "You will hear that Ms. Newman was wearing a tank top and a mini
skirt when she was attacked. How do you feel about women who wear this sort of
clothing? Have any of you, any members of your family, or close friends ever
been sexually assaulted? The answers to these questions tell you how jurors will
react to the evidence.

But beware: there is a fine line between advocacy and argument in voir dire.
Argument is prohibited. Voir dire is not the proper vehicle for the presentation
of evidence. Direct assertions, standing alone, are impermissible; but when an
assertion is merely a preface to a question, it is a way of educating the jury
without violating any rules or garnering an objection.


Use questions to educate jurors about your case, but don't ask tough,
unanswerable questions: "Could you tell me what the term 'negligence'
means?" It's not your job to test jurors on legal concepts; you merely want to
enlighten them and help them understand the evidence. Don't put them on the spot
by asking questions they can't answer. Instead, use leading questions to educate
jurors without embarrassing them. If the correct answer is contained in the body
of the question, it's hard to give a bad answer: "Do you understand that
negligence is simply carelessness -- failing to be as careful as a reasonable
person would be under the circumstances?" Then, once you've explained the
concept, you can go on to ask, "Do you think this is a fair standard? Why or
why not?" (Note, however, that some judges won't permit you to ask jurors if
they think the law is "fair," but merely whether they can follow it.)

[5] Varying the Form of Your Questions

After questioning one juror, don't move immediately to another and repeat the
same questions. This is too predictable, too boring. Vary the form as well as
the content of your questions to keep jurors awake. Pose a few general questions
to the entire panel, then ask specific questions of individual jurors to
maintain interaction with all of them.

Too often, lawyers seem to blindly follow some unwritten rule that says: "Thou
shalt ask all thy group questions first, then move to Juror Number One and ask
him all thy questions before moving on to a Juror to Number Two," and so on
down the line. It doesn't take Juror Number Twelve very long to figure out
you'll be questioning him last, so he goes to sleep. When his turn comes, he
looks up at you before you can even ask a question and says, "Yes, no, yes,
divorced, two children, high school education, electrician." He's no fool: he's
already figured out exactly what you'll ask, and he wants to get through the
ordeal quickly. Asking the same rote questions of everyone means you've failed
to hold the interest of anyone -- at least, not for long.

FOOTNOTES:
Footnote 1. Nolan, supra note 57, at 25.


Footnote 4. Jones, supra note 70, at 63.

Footnote 5. Ball, supra note 79, at 13.

Footnote 6. The Trial Lawyer, supra note 59, at 8.