Purpose & Persuasion in Voir Dire

Charlotte A. Morris
Charlotte A. Morris, M.A.
Litigation & Communication Consulting
2741 Oberlin Rd. #107
Raleigh, NC 27608
(919) 788-8966
charli@trial-prep.com
trial-prep.com
Purpose & Persuasion in Voir Dire

Charlotte A. Morris, M.A.
Litigation & Communication Consultant
charli@trial-prep.com
www.trial-prep.com
Legitimate Goals for Voir Dire

1. Collect themes, ideas, and language that jurors use when they are discussing the central issues of your case.
2. Generate persuasive momentum for your opening statement.
3. Establish credibility: you, your client, your witnesses
4. Make informed decisions about exercising precious few strikes.
5. Ask the right type and number of questions to establish removal for cause.
Attorney-Conducted Voir Dire IS:

Purposeful
Well-Planned
All About the Jurors
Attorney-Conducted Voir Dire IS NOT

Indoctrination
Argument
Evidence
Common Jury Selection Mistakes:

True Stories from Post-Trial Interviews
Repetitive Questions

“I thought [the attorney] spent a little too much time on asking questions over and over.”
“One question I thought interesting was [the attorney] asking if we manage a group of people – I didn’t really understand why that question was asked – [the attorney] never used that idea – that of managing individuals and expecting them to do their job – specifically during rest of trial.”
Focusing Too Narrowly On Your Case

“They probably should have asked what I do [for a living] because I felt like the plaintiff was basing [the case] on sympathy and I don’t have that in me. I’m a social worker: I’ve learned to separate my emotions from the facts at hand.”
“They probably should have asked about standard of care: I just spent the last year of grad school working on standard of care [issues] and the other jurors were so confused about it. The standard of care, as I understand it, is any competent provider who is acting in good faith. It’s not really different from one professional to the next.”
Preparing for Voir Dire

- Start Sooner
- Identify Case Themes and Strategies
- Prepare Topic List
- Craft the Questions
Be Specific About Your Goals for Voir Dire

- Ask questions to elicit juror experience, attitude and opinion that match your case
- Ask questions to create cause challenges and identify strikes
Plaintiff Goals for Voir Dire (Sample: Medical Malpractice)

- Medical professionals must choose the safest/most careful way to work every time, with every patient.

- When a medical mistake is made, responsible healthcare professionals admit the mistake and pay for the harm/damage done.
Plaintiff Goals for Voir Dire
(Sample: Medical Malpractice)

- Medical records are the best way for healthcare professionals to provide an honest account of a patient’s care.

- Not all illnesses and injuries are alike: people who have been hurt by the negligence/mistake of another person deserve compensation; people who have naturally occurring conditions or who are injured in an accident without fault may not.
Plaintiff Goals for Voir Dire
(Sample: Medical Malpractice)

Identify and remove jurors who:

- Think there is a difference between a medical mistake and medical malpractice.
- Believe that sometimes bad things happen to good people and nothing can be done about it.
- Believe that no one has ever compensated them for their troubles, so why should they compensate the Plaintiff.
- Accept personal responsibility for bad things that have happened in their own lives.
Preparing the Topic List

- Order is important
- Make it match your story
- No filler/No fluff
Preparing the Topic List

- Work Experience
  - Quality of Life/Family Life
  - Medical Care Experience
- Illness/Injury/Disability/Chronic Pain
  - Medical Care Attitudes
- Lawsuits – Experience & Attitudes
  - Medical Malpractice
- Compensatory Damages
Or, in Virginia...

- Work Experience
- Quality of Life/Family Life
- Medical Care Experience & Attitudes
- Medical Malpractice
Crafting the Questions

Universal Questions:
When in Doubt, Ask About…

- Work
- Family
Crafting the Questions

Stock Questions:

- Tell me about your work...
- Tell me about your family...
- Experience/Attitudes Toward Lawyers/Lawsuits
- Experience/Attitudes Toward Damages
  - Icebreakers (if nec.)
- Questions for Cause & Hardship
Crafting the Questions

Case Specific Questions
Types Include:
- Open-ended
- Closed-ended
- Combination
- Scaled Response
Open-Ended Questions

- Raise your hand if you or someone close to you has ever...
- Tell me about ...
- How did things turn out?
- What did you learn from that experience?
- What kinds of things have you read or heard about...
- Why do you think so?
Closed-Ended Questions

- Have you ever heard the term “standard of care?”
- Have you ever been involved in a lawsuit of any kind?
- Where did you go to college?

These are always followed by: Tell me about that.
Combination Questions

- Some people think there are too many rules and regulations and that is hurting small businesses. What do you think?
- Some people say bad things happen to good people and there’s nothing we can do about that. How do you feel about that?
- Some people believe there ought to be a limit on the amount of money juries can award. What do you believe?
Scaled Response Questions

On a Scale of 1 to 10 –

• with 10 being extremely concerned - how concerned are you about the rising cost of healthcare?

▪ with 10 being completely - how much would you say you trust doctors, in general?

▪ with 10 being extremely well - how well do you think most doctors communicate with most patients?
Sequence: The Funnel Approach

- Raise your hand if you or someone else has ever made a mistake or had an accident at work. Tell us about that.
- Generally speaking if you make a mistake at work, who is responsible for making sure it is corrected? Is it your responsibility alone or does your employer take some responsibility for that?
The Funnel Approach

- Anyone ever had a very serious mistake happen at work – even if it wasn’t your own – that the company had to pay for or take care of? Tell us about that.

- Do you think it’s fair to make a company pay for the mistakes of its employees? Why or why not?
The Funnel Approach

The “Ultimate” Question:

What if the company is a hospital: does that make a difference to your opinion about holding corporations responsible for the mistakes of their employees? Tell me about that.
Word Choice: It’s Not Just What You Say, It’s How You Say It

Would you agree that medical records are important in the care and treatment of a patient?

-versus-

Why do you think medical records are important in the care/treatment of a patient?
Word Choice: It’s Not Just What You Say, It’s How You Say It

Raise your hand if you think there are too many frivolous lawsuits and people are getting more money than they deserve?

-versus-

When does it make sense to sue?
When does it make sense not to sue?
How can you tell the difference between a legitimate lawsuit and a frivolous case?
Tackling Sensitive Topics in Voir Dire

- Must do so
- Carefully placed within the order of topics you will cover
- Self-disclosure first
- Remind them of their oath
- Offer them the option of answering privately
- Don’t be afraid
Allow Jurors to Advance / Argue Your Case

- Create connections with every juror
- What to Do (and not do) with the answers you get:
  - Principle of Positive Reinforcement
  - The Power of Silence
- Incorporate juror language immediately into your opening statement, use it with witnesses and argue it in closing

© Charli Morris - VTLA - March 23, 2013 - Williamsburg, VA
Purpose & Persuasion in Voir Dire

Charlotte A. Morris, M.A.
Litigation & Communication Consultant
charli@trial-prep.com
www.trial-prep.com
Smoking Dope and Burning Vaginas  
[Did I Just Say That Out Loud?]  
And Other Voir Dire Questions You Really Can Ask Out Loud

BY CHARLOTTE A. MORRIS

Charlotte A. (Charli) Morris, M.A., is a trial consultant who lives in Raleigh, NC and works wherever the cases take her. She is the co-author of The Persuasive Edge and when she is not working she practices the fine art of persuasion on her three children.

I’m on record for all the reasons I think attorneys must master the mechanics of effective voir dire, http://www.thejuryexpert.com/2011/01/its-deja-vu-all-over-againmore-thoughts-on-doing-effective-voir-dire/ so this time I can skip theory and cut to the chase1. Writing about jury selection in Diane Wiley’s wake may be a tall order, but there’s a certain logic to leapfrogging from the sensitive questions that belong in a written supplemental juror questionnaire http://www.thejuryexpert.com/2011/11/are-you-now-or-have-you-ever-been-crazy-questions-about-mental-health-for-supplemental-juror-questionnaires/ to the ones that are also appropiate for open court.

In my experience, there is almost no subject off-limits for oral voir dire2. If it is an issue in your case, and you are reasonably certain the jury is going to talk about it behind closed doors during deliberations, you cannot be afraid to discuss it openly during the jury selection process.

Why You Must Do It (or Settle)

I only tell stories about cases if they are both true and relevant, so here’s one that illustrates the importance of thinking ahead about what would be necessary for a complete and candid voir dire on the sensitive issues in your case. I work with a lawyer who represented a young woman in a medical negligence matter. She was suing a gynecologist who had prescribed, for the treatment of a common STD, an off-label use of a topical ointment which caused severe chemicals burns on the surface of her skin and left permanent damage to nerve endings. She reported the painful sensations right away but the doctor urged her to continue so she complied. Which meant that even though it hurt to do so, she kept applying the ointment once a week for ten weeks because that’s what the doctor ordered. I still affectionately refer to this as the “burning vagina” case.
I told the lawyer from our first conversation that he would have to start practicing voir dire in the elevator on his way up to the office each day. I suggested that after some polite small talk, he would want to ask women if they would ever dream of continuing to apply an ointment that burned their vaginas for ten solid weeks without getting a second opinion – because that’s what his client did. And I reminded him to talk with men too, because I was certain he’d have a difficult time finding even one who would say he’d have done the same thing to his penis for ten straight weeks.

The case settled short of trial. Not only was the greatest source of bias against the plaintiff likely to be jurors’ incredulity that she kept using the drug, the lawyer would also have to get comfortable (and help jurors get comfortable) using the language of his case. The actual questions for trial would have been much more nuanced, of course; I wouldn’t really suggest that he ask people during jury selection whether they’d ever burned their private parts. But he would need to ask all prospective jurors some serious questions about the very sensitive issue of gynecologic care.

Before you read the sample questions for the topics below, be aware that every lawyer I have ever written them for has told me that it could not be done. And then each of them has told me that they were stunned at how well it works after I convinced them to try. We’ve even gotten good feedback from the judges who allowed us to ask them. As you would guess, these are written for cases in State Court in jurisdictions where attorneys conduct voir dire. And yes, you can use them (or modified versions of them) even where you may only get a few hours (or less) – as long as the topics are central to decision-making in your case.

**Here’s How It Works**

The best way to start is to identify jurors who may have any experience, education or training on a topic before asking for something more personal. Every prospective juror with healthcare work experience is a prime candidate for questions about a wide variety of potentially sensitive topics such as drug use, child abuse, or psychological injuries.

You can also start very broadly on any topic by getting people to tell you about their lives away from work or school. Once you know some pretty basic things about a person’s demographic profile you will find the opportunity to connect what you learn to something more specific in your case.

*For example:*

- Every person who has ever been married can tell you something about a claim for the loss of consortium.
- Every parent can tell you about how he or she distinguishes between corporal punishment and child abuse.
- Anyone who lived through high school or college can tell you about experiences with drugs and alcohol.

The idea that these topics are “sensitive” need not deter you from dealing with them directly. Think about the people you love and trust most in your life – they are typically the ones who aren’t afraid to speak the truth about the stickiest of subjects. If you are genuinely thoughtful in your approach and listen well, you will know when a juror needs you to back off. Consider using a little self-disclosure to introduce the topic (but only if you are telling the truth because jurors can smell insincerity). Then be sure to show genuine gratitude for their willingness to share openly with you.
Drug and Alcohol Abuse

Some topics, such as drug or alcohol abuse, require a good set-up before you ask a question. The phrase “you or someone close to you” in the questions gives jurors an opportunity to talk about someone else if they are not comfortable revealing the truth about themselves. You may also note that the appropriate use of humor can go a long way to putting jurors at ease.

Sample Questions

I need to talk to you about your experience and attitudes toward drug and alcohol use. This is an issue central to this case, it is a serious topic and your honest answers are valuable to all of us. I’m not going to ask you to raise your hand and tell us if you smoke dope, but I do need to know your thoughts.

We can promise you that no one will be in trouble for telling the truth. If you are selected to serve on this jury you may find yourself in a conversation that is very similar to the one I want to have with you…so this can be a good way for you to know if you are comfortable serving on a case with these issues.

And if you’re not comfortable talking in open court about any of the questions I ask, you can request to talk with us privately.

Some of you have already told me that you’ve had experience, education or training in the medical profession. Mr. Jones, please tell me what you were taught or trained to do as an EMT with respect to drug or alcohol use or abuse.

This question is for everyone: Raise your hand if you – or someone close to you – has ever experimented with alcohol or drugs of any kind.

- Tell us about that.
- Do you consider that to be drug/alcohol USE or drug/alcohol ABUSE?
- What’s the difference between USE and ABUSE, if any, in your opinion?

Tell me the difference between alcohol use and drug use?

Anyone here ever been in a situation where the use of alcohol or drugs has put you in an uncomfortable position?

- What happened?
- How did things turn out?
- What did you learn from that experience?

What have your experiences with drugs or alcohol taught you over time?

- Do you think your perspective has changed over the years?
- If so, how?
- If not, why not?

For those of you who are parents: what kind of conversations have you had with your kids about the use of drugs and alcohol?
Are some drugs more serious than others?
  • If yes, which ones?
  • Why do you think so?

On a scale of 1 to 10, how would you rate the danger of using marijuana?
  • Why do you think so?
  • How does it compare to other types of drugs or alcohol?

Raise your hand if you or anyone close to you has ever had such a bad experience with drugs or alcohol that it causes you to have strong feelings or a firm opinion about the issue.
  • Tell us about that.

One of the first responses we got to the “experimented” question was given by an African-American woman business owner in Charlotte, North Carolina who said, “I went to Berkeley in the 60’s, of course I experimented!” She broke the ice for us with the rest of the panel.

**Race Relations In Our Community**

Notice how some questions on the next topic are designed to work like mini “community attitude surveys” which allows people to reveal a lot about themselves without actually sharing a personal experience. In this case our concern was that the attorney represented a mixed-race couple: African-American man, White woman in the very culturally and racially diverse (heavily Hispanic and Cuban) venue of Dade County, Florida.

**Sample Questions**

We live in a very diverse community and I’d like to know how you think we are doing in terms of race relations. On a scale of 1 to 10, with 10 being the most positive or the best how would you rate this community? [Get a number from everyone before following up]

We got a range of answers so I just want to hear your thoughts about the number you chose. [follow up with each]

How often does the issue come to your attention or can you give me some examples that come to mind on the subject?

What do you think we do well, as a community, to get along?

What do you think we could do better?

How have things changed in your lifetime?

How do you think your kids see things differently?

What do you think the future holds and why?

We have used an approach similar to this on the subject of homosexuality in a case in which the
client was gay. In both instances, the lawyer revealed the nature of our concern after we had the discussion with jurors and – because we had the conversation out in the open – we genuinely felt like the potentially biasing issues were neutralized from the start.

**Child Abuse & Neglect**

In a very recent trial we needed to explore the tough topic of experience with child abuse and we took the direct approach. The questions below provoked some startling truths about jurors who freely and sincerely answered them in open court. We started by talking to teachers, social workers, and healthcare providers about their professional experience but we didn’t finish on the topic until we had spoken with every juror.

**Sample Questions**

In your experience, what are the signs and symptoms of child abuse or child neglect?

- Are the signs and symptoms of child abuse always obvious? Give me some examples.
- Are there only certain types of people or certain types of families who abuse or neglect their children? Is there a “profile” for an abuser?
- Do you think it requires special expertise or training to recognize signs or symptoms of abuse? Why or why not?

Who do you think is in the best position to recognize signs or symptoms of child abuse? Why do you think so?

How do you think doctors or nurses can spot child abuse or neglect?

- Are they better trained to do so?
- Are they in a better position to see the signs and symptoms?

What should someone do if they see signs or symptoms of child abuse or neglect?

- Does anyone here think you can get in trouble for reporting potential child abuse?
- Tell us what you think or know and how or why you think so?

Raise your hand if you’ve actually learned or discovered that someone in your own family was abused or neglected but you had not known about the abuse at the time it was happening?

- Tell us about that.
- How do you think it happens that sometimes even family members don’t know about abuse?
- In your experience, why don’t children tell on their abusers?

During our discussion one juror revealed her experience with abuse at the hands of both her biological family and the foster family that adopted her. To say that everyone in the courtroom was moved by her honesty is an understatement. And “all” we had to do was ask.
Finally, here are a few ideas on talking about the taboo topic of S-E-X. This is a topic most important for plaintiffs’ attorneys who, frankly, struggle to talk candidly even with their own clients about the details. Here again, set-up is the key.

Sample Questions

Most of you told the judge when you first introduced yourself that you are either currently married or have been married before. We’re going to tell you some things about our clients that are extremely personal to them, but they are things I think we all have in common. So first let me start with an easy one for the married folks:

What do you think are some of the most important aspects of a healthy, happy marriage?

[If no one mentions attraction or intimacy:] None of you specifically mentioned intimacy: does that count among the things you have mentioned or is it something that came to mind for any of you?

I’m going to be even more specific and we’re going to talk in this case about physical intimacy, or more simply, sex. So the next question is really for everyone whether you’ve ever been married or not.

On a scale of 1 to 10 – how important do you think sex is for a healthy, happy marriage?

• Why do you feel that way?

We are seeking compensation for a host of injuries associated with Mr. Smith’s medical treatment, including the physical and emotional damage it has caused to their marriage. Given your thoughts about the importance of physical intimacy in a marriage, does the loss of what our state’s law calls “consortium” seem like a potentially legitimate element of damages in a lawsuit?

Is there anyone who would not be comfortable hearing evidence about this type of loss or discussing it with your fellow jurors? If so, we want to give you an opportunity to tell us if you think you would be better suited for a different type of case.

If you are still a skeptic or you are certain these questions could not be asked in your jurisdiction, you will need to consider using a written questionnaire. Otherwise, you will need to settle the case, because if you can’t get comfortable with the idea of talking about something like burning vaginas before the trial, you won’t be able to effectively represent your client during the trial.
References

1See *TJE Vol 23, Issue 1*, Morris

2You might be thinking of some really good exceptions already, like personal experience with rape or a prior criminal conviction, so there are other ways to deal with those situations covered nicely in the previous issue: Wiley: *TJE Vol 23, Issue 6*.

3This is not a complete list of the extensive questions we asked about child abuse/neglect because the entire case against the defendants was failure to recognize and report symptoms of abuse resulting in catastrophic brain injury.

4A plaintiff might have non-economic damages that arise out of sexual dysfunction whether or not he/she is married, so you could expand the question to refer to “relationships.” But for most cases involving a spouse’s claim for loss of consortium it is usually best to frame the questions in terms of marriage.

Image credits: *Red canna, Gumshoe, Race relations*
Charli Morris

Experience

- Significant consulting on civil and criminal cases – for plaintiff and defense – since 1993.
- Case types include: antitrust, contract, class action, condemnation, employment, environmental, intellectual property, medical negligence, personal injury, product liability, premises liability, and securities litigation.

Expertise

- Design and Analysis of Pre-Trial Research
- Case Theme Development
- Opening Statement/Closing Argument Construction
- Supplemental Juror Questionnaires, Voir Dire Questions and Jury Selection Strategy
- Witness Evaluation and Preparation

Education

- The University of Kansas
- Dual Bachelor’s degrees in Sociology and Applied Behavioral Sciences, Magna Cum Laude (1992)
- Master’s Degree in Litigation Science, Summa Cum Laude (1994)
- Phi Beta Kappa