



# The Jury EXPERT

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*The Art and Science of Litigation Advocacy*

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#### More Thoughts on Effective Voir Dire

An experienced trial consultant shares a perspective on effective voir dire based on both experience and discussions with jurors after trial and, of course, after voir dire.

Page 1

#### Trial Graphics on the Cheap – 8 Useful Tips

A visual arts trial consultant shares Do It Yourself tips for quality DIY trial graphics

Page 12

#### Does Bifurcation Eliminate the Problem of Hindsight Bias?

An original research study on hindsight bias and bifurcation.

Page 17

#### How What Jurors Think About You Influences Verdict

A research study from the University of Nevada at Reno explores what real jurors thought of real trial lawyers. Two consultants & a trial lawyer respond.

Page 23

#### Our Favorite Thing

A Favorite Thing we think will keep us honest about our resolutions while simultaneously keeping you informed. Don't miss this one!

Page 42

#### SJQ for White Collar Crime

What are the issues to consider as you prepare for a white collar crime trial? An experienced trial consultant shares her experiences and offers tools for your immediate use!

Page 43

#### How to Pack Like a Pro

Tired of checking bags and waiting forever? Practical tips on packing light, looking great and having everything you need.

Page 53

## It's Déjà Vu All Over Again: More Thoughts on Doing Effective Voir Dire

by Charlotte A. Morris

After all the articles, lectures and workshops I've read, seen, watched or personally written, delivered and conducted on the topic of jury selection I wonder if there is really room in the world for another?

Let's face it: we've covered the basics from theory to practical application and back again.

- Do reduce the social distance between you and the jury.
- Don't talk too much about yourself or ask personal questions before you have introduced a topic more generally.
- Do try to identify psychological aspects of jury decision-making.
- Don't make your questions so crafty that the average juror either can't understand them or resists your attempts to get inside his or her head in open court.

- Do rely on attitudes, opinions and beliefs more than basic demographic characteristics.
- Don't forget that simple questions – based on life experience – are the best way to begin.
  
- Do ask questions that are case-specific and relevant to jury decision-making.
- Don't draw objections by asking argumentative or loaded questions designed as thinly-veiled attempts to sell your case or secure commitments.
  
- Do rely on attitudes, opinions and beliefs more than basic demographic characteristics.
- Don't forget that simple questions – based on life experience – are the best way to begin.

Most lawyers have gotten lots of good advice and there seems to be very little disagreement about the need to prepare and practice doing more effective voir dire. But in the immortal words of Dr. Phil I am compelled to ask: “How's That Workin' For Ya?”

### **Common Jury Selection Mistakes**

In the last year I've had the opportunity to conduct a number of post-trial interviews and I ask jurors to share their thoughts about their very first memories of the trial. I've compiled here a sample of verbatim comments that reflect some common mistakes made during jury selection.

#### ***Repetitive Questions***

There's no doubt we want attorneys to do a thorough job of eliciting the information we need to work up cause challenges, make educated strikes and connect with our case facts. But that can't mean asking the same question repeatedly.

*“I thought the attorney spent a little too much time on asking questions over and over.”*

What every lawyer needs is a menu of questions worded different ways to approach the same topic. The follow-up questions absolutely depend on the answers you get, so you also have to listen closely.

Consider the following variety of ways we could ask about attitudes and opinions toward lawsuits:

- Raise your hand if you or someone close to you has any experience with lawsuits. Tell us about that.
- What have you read or heard lately about lawsuits? What do you think?
- When does it make sense to sue? Why do you think so?
- When does it *not* make sense to sue? What makes you feel that way?
- Mr. Kennedy: What's your reaction to what you've heard so far?
- What are the makings of a legitimate lawsuit?
- Which lawsuits are frivolous? Why?
- Mrs. Smith: Tell us where you stand on the issue.
- Ms. Taylor: What are your thoughts?
- Mr. Covington: What ideas do you have?

In short, unless you have some extremely compelling research that has identified a single question that determines whether you will keep or strike a juror there is no need to repeat yourself.

## Superficial Questions

Jurors are listening to the questions you ask and looking for the meaning and relevance of them. We can't afford to squander that kind of juror interest or engagement by asking an important question without giving it context.

*“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 of managing individuals and expecting them to do their job...during the rest of the trial.”*

Finding out if people have management experience is almost always on my list of voir dire questions, but usually what follows are questions on a theme in our case. If you don't follow up on the ideas that people have *about* management (whether they have the experience or not), you haven't done justice to a worthwhile topic and the question of experience alone can be pointless for you and for them. A few ideas about themes we might pursue in the follow-up include: managers have a responsibility to enforce workplace safety rules; or managers have a duty to maintain company records; or managers are allowed to deviate from company policy under some circumstances.



Here's how you could elicit the experience and test themes during voir dire:

Raise your hand if you have ever managed or supervised others on the job.

- Tell me a little about the company and your position in it.
- How many people did you supervise?
- What are/were your responsibilities?
- What did you like least about your position? What did you like most?

Whether you've held a position in management or not, I'd like to ask about your experience with a few work-related topics. I'd like you to think about all the jobs you've had even if this doesn't directly apply to what you are doing now:

- Tell me about the rules for safety on your job. How are they enforced? Who is most responsible for seeing that the rules are followed? If someone breaks the rules for safety, what are the consequences?
- Tell me about record-keeping in your business. What kind of records are kept? Who keeps them? Are there policies – written or otherwise – for how the records should be kept? How important is it to keep accurate records? How are the records maintained? What were the rules about document destruction?
- Are there ever times when a manager has the discretion to waive a company rule or deviate from a company policy? Can you give me an example? Raise your hand if you've ever waived a company policy or rule in favor of satisfying a customer request? Are there ever times when a

manager can accommodate a special employee request even if it isn't the rule: like giving an extra personal day or allowing someone to leave early? Tell me about your experience with that. Why is it important that managers have some flexibility on the job?

You can see that beyond following up on ideas that may be critical to the evidence in our case, we are also strategically using words and phrases (e.g. "accurate records," "document destruction" and "discretion" or "flexibility") that we intend to argue in the case. By using them in voir dire we have an opportunity to test whether jurors buy into the argument and to what degree.

### ***Jurors Are Watching You Too***

Many attorneys have become devoted students of non-verbal communication research and the courtroom has always been a place where even reluctant litigators are inspired to perform. Nevertheless, the experience described below is less rare than we'd like to think:

*"The [plaintiff's] lawyer had a woman at the table with him during jury selection and she stared at everybody real hard. I thought to myself, 'I wonder what she's looking at' and when she stared at me I stared right back at her. All she wanted to know was our ages and I could tell they wanted women for sympathy. She kept turning to [the attorney] and saying things like, 'we'll keep her' but they never asked me any questions."*

On one hand we might fault the lawyer's assistant for failing to appreciate that her behavior at counsel table was inappropriate. On the other hand, the juror's comment tells us that she believed the attorney and his sidekick had a strategy to ignore and overlook everything about her but gender.

The worst thing about this is that it was the very first and lasting impression the trial team made on someone who actually stayed on the jury. You might get away with making a bad impression by ignoring someone you think you will eventually strike, but it is nearly impossible to recover from doing so with a person who becomes your juror.

### ***Focusing Too Narrowly On the Facts***

A little background here will make the following juror comments most impressive. The underlying claim in the legal malpractice trial described by jurors below was a product liability suit (we'll call the product a "widget").

*"The lawyers didn't ask that many questions. When I was on a rape case, they asked me about where I worked, my family and lots of things. They didn't ask me anything on this case. They never even asked us to tell a little about ourselves."*

For this, there is no excuse. Nothing is simpler than asking everyone on the jury to "tell us a little about yourself."

*"I thought the jury selection process was awful. I thought they did an awful job. They picked the jury in 30-45 minutes. They asked hardly any questions. Basically they wanted to know if we knew anything about widgets and, if so, you were dismissed."*

There were no time limits or restrictions on attorney-conducted voir dire in this trial. But even if counsel was only permitted an hour, there is most certainly time to ask about more than widgets.

*“They probably should have asked what I do [for work] 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.”*



Setting aside for now the idea that there are emotionless, unsympathetic social workers out there: aren’t we collectively wincing about the fact that the lawyer didn’t even ask this juror what she does for a living? Here’s still more from another juror on the case:

*“We were very surprised that none of the attorneys asked us about what we did for a living. I recall them asking about widget experience and whether or not jurors knew anyone else in the [jury] pool, but that’s about it. We commented on that later, the fact that we weren’t asked very many questions.”*

Really? **None** of the attorneys asked about the jurors’ work experience? It is hard to understand why neither side believed jurors’ occupations (past, present and future aspirations) would affect jury decision-making. In fact, an extremely influential juror in the same case also revealed to me that she was on her way to law school just weeks after the trial ended, but that too never came up during voir dire.

Unless you practice in a venue that restricts you to a half-hour or less, you should have a set of questions to use in every jury selection on at least three essential topics. These start as simple ice-breakers to get jurors talking about themselves, but they are limitless in terms of how far you can expand the topics to reach your case-specific goals for voir dire. You will learn a lot about decision-making from the way people describe their educational background, work and family life.

### **Work Life**

Tell me about your work life.

- Can you describe a typical day or typical week of your work?
- What led you to this work?
- What do you like most about your work? Why?
- What do you like least? Why?
- If this wasn’t your work, what else might you do?
- Do you have any future plans for a change in your work life? Tell us about that.
- Tell us about other jobs you’ve had in the past.
- When you were a kid, what did you want to be when you grew up?

### **Educational Background**

How far did you go in school?

- What was your major or what degree(s) do you hold?
- Describe the courses you have taken – even if they were not related to your degree(s)?
- Any technical or vocational classes?
- What do you like studying most? Least? Why?
- Are you taking any courses now or do you have any plans to take courses in the future?
- If you had the extra time or money to go back to school, what would you like to take and why?



Tell us some of the same things about your spouse or significant other.

### ***Family Life***

When you're not working, what do you do?

- Who do you spend the most time with and what do you like to do together?
- If you had more free time, how would you spend it?
- When it comes to family matters, what are the things that concern you the most?

Raise your hand if you spend at least part of your time caring for a family member (of any age)?

- Tell us about that.

None of these are case-specific but good voir dire is like good soup: if you start with good stock, the other things you add make it even better.

### ***Not Focusing on the Facts Enough***

And, finally, here is the opposite problem:

*“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.”*

You may be prosecuting or defending lawsuits today according to the popular “Rules of the Road” and “Reptile” models. If so, you need to develop a credible way of asking jurors about standards. You could start by asking people what they think “standards” are. It doesn’t have to be complicated or formulaic to work.

The comments shared above provide us with concrete examples for which there are readily available solutions. But we should also consider the bigger picture in our approach to jury selection.

### **Preparation, Purpose & Persuasion in Voir Dire**

Voir dire must be purposeful and it can also be persuasive. We cannot wing it and expect to win. What gets lawyers in trouble most often is a simple lack of time and effort devoted specifically to preparing for jury selection.

While most experienced lawyers and trial consultants could quickly generate a host of questions based on case type alone, we cannot conduct meaningful and persuasive voir dire without clearly identifying your case strategy and thinking about how it can be manifest in the conversation you have with jurors from the start.

You don’t have to forego the potential for persuasion at this earliest phase of trial – when jurors’ attention and interest are at their highest levels – in favor of focusing exclusively on finding your strikes. The goal is to get jurors to articulate their own experience, beliefs, attitudes and opinions that are closely aligned with your case before they even know what your case is really about.

## Start with Your Strategy

If you can clearly define your strategy for the case when you sit down to compose or compile a set of voir dire questions, your strategy for jury selection will follow. In the last few years of my practice, I've included in every set of voir dire questions a list of ideas that the attorney and I believe to be the most important to jury decision-making in the case. I also try to identify what we believe to be obvious about our strike strategy. The more pre-trial research we do on a case, the more specific these lists become.

Our over-arching goal is to find critical mass on a number of related thoughts or ideas that the majority of jurors come to trial already believing. Persuasion happens by degree, so it is essential to finish jury selection knowing where your seated jurors stand on key issues of decision-making in your case. The more they believe that your case is aligned with what they already think and feel, the easier it will be to persuade them.

Below is an example of the jury selection goals crafted for Plaintiff's counsel in a medical malpractice case. Notice that we focus on finding areas of agreement as much as on finding our unfavorable jurors. We want to empanel a jury of people who believe from the very beginning that *our case is just like their own experience*.

### Plaintiff's Goals for Voir Dire

Ask questions to elicit **jurors' own answers** that closely **match plaintiff's themes**:

- **Surgery is a last resort**, and requires careful evaluation and thorough follow up.
- **Aches and pain get worse** with age, not better.
- **Exercise is a significant feature of a healthy life**; when an active person is restricted from exercise there are physical and emotional consequences.
- When a medical mistake is made, **responsible healthcare professionals admit the mistake and pay** for the harm/damage done.
- **Medical records are the best way for healthcare professionals to provide an honest account of a patient's care** and they are the only way to track the care of a patient from one provider to another.
- **Not all illness or injuries are alike**: People who have been hurt by the mistake/negligence of another deserve compensation; people who have naturally occurring conditions or who are injured in an accident (without fault) may not.
- **Even if a victim of a medical mistake is making the best of a bad situation**, she is entitled to be compensated for the harm that was done.

### Identify and remove:

- Jurors who **believe they are smarter or more skeptical patients**, who may think Kate and/or her parents should have considered more carefully the decision to have the surgery and/or sought a second opinion.
- Jurors who are **reluctant to hold healthcare professionals responsible** for "honest mistakes."
- Jurors whose life experience tends to make them **think Kate has a stable and secure job that will provide lifetime salary and benefits** in spite of her physical limitations.
- Jurors who describe their own suffering (or that of someone close) as permanent and/or **intractable** and, as a result, aren't sympathetic to Kate.
- Younger jurors who may not appreciate that **Kate's condition will worsen over time**.

This might look something like a jury profile – a way to identify best and worst jurors – or a simple list of the themes within the case. Even if you believe these to be obvious, the act of writing them down and

committing to a jury selection process that will highlight your goals for selection and strikes is the important first step to conducting purposeful and persuasive voir dire.

### Trim Your Topics

In most courtrooms there are constraints on the amount of time you have to conduct voir dire and natural limitations on the judge's and jurors' patience. Even if you have a complete database of voir dire questions to draw from, there should also be some strategic intention behind the topics you cover and in what order.

If you practice in a liberal setting for attorney-conducted voir dire you have time to start gradually and go wide. In the medical malpractice case example, you could cover all of the following topics:

- Work Experience
- Quality of Life / Family Life
- Medical Care – Experience
- Illness/Injury/Disability
- Lawsuits – Experience
- Lawsuits – Attitudes
- Medical Malpractice
- Compensatory Damages



On the other hand, if your time is extremely limited, pick two or three issues that are central to decision-making in your case and generate a discussion that will encourage jurors to talk among themselves so you can assess group dynamics while you listen for the important words and phrases in their answers.

When time is short it will be even more important to focus on themes and ideas that generate agreement with your case, because it will be a challenge to thoroughly work up cause challenges and identify your very best strikes. In this instance it is more important that you finish voir dire knowing there are critical areas of consensus among all jurors that you can link to your presentation of evidence and arguments.

In the limited format you could narrow it down to the following three topics from above (and you might find a way to sneak questions from the other topics into these wherever possible):

- Quality of Life / Family Life
- Medical Care – Experience (throw in Illness/Injury/Disability questions here)
- Medical Malpractice (include lawsuits and damages here)

A judge is much more likely to cut you some slack if you can say clearly that you intend to cover just three topics that are essential to your case.



## Craft the Questions

I've been writing and rewriting voir dire questions on topics ranging from A (Alcohol Use & Abuse) to not-quite-Z (Workplace Safety) for almost 20 years. Like many of you, I now have hundreds of questions that can be used to create the first draft of voir dire in any case. But to prepare for each case we need to craft questions that are specific and strategic.

Every jury expert will tell you that good voir dire begins with open-ended questions. In fact, for the beginning lawyer, mastering this one skill alone may be the only goal you set for yourself in the next trial.

To be more strategic in your approach you want and need to guide prospective jurors through a set of questions that go from the general to the specific. For example, the vast majority of people agree with us every time we ask if they think "there are too many lawsuits" and "people are getting too much money they don't deserve." But attitudes like this are a mile wide and an inch deep when you start to ask jurors to tell you specifically what they think on the issues of lawsuits and damages.

In the first place many people have no first-hand experience with lawsuits and when pressed they can rarely point to a specific reason for why they agree. But people can and do find exceptions to the rule if they hear credible evidence and arguments, which is good news for plaintiffs and bad news for the defense.

Those who can clearly articulate the reasons for their position on the issues usually give you the kind of answers that make good material for cause challenges (e.g., "I think the entire court system is broken and needs overhauling"), or readily identify themselves as a strike for one side or the other (e.g., "I think people should pick themselves up and dust themselves off," or "I think big companies hurt people all the time and lawsuits are the only way to punish them").

So within each and every topic – on every new idea we want to test – craft the questions to go from general to specific with your strategy for the case in mind. We'll use a few from the medical malpractice example. Think about the plaintiff's goals we set out above as you consider how these questions can create consensus and identify strikes.

### ***Quality of Life / Impact of Injury***

Raise your hand if you've ever heard the phrase "quality of life?"

- What does it mean?
- What are the things that contribute to your quality of life?
- What are your top three, if you had to choose?
- Do you think most people agree with at least some of the things you mention?
- Is there anyone who has a really different idea about the things that contribute to your quality of life? If so, what are they for you?

For all of you who mentioned some form of activity or exercise – running, biking, hunting, camping, etc. – how difficult would it be for you to give those things up?

- If you had to find some alternative to your [running] habit, what would it be?
- Why do you consider those things to be a significant contribution to your quality of life?
- Has there ever been a time in your life when you couldn't do those things and you came to appreciate how important they were to you? Tell us about that.

## ***Surgery Experience / Quality of Care / Surgery as Last Resort / Second Opinions***

Raise your hand if you – or anyone close to you – has any experience with surgery.

- Tell us about that experience and how things turned out?
- Would you characterize the surgery as “minor” or “major?” Why?
- How did you know you/he/she needed the surgery?
- How long did the doctor spend treating you/him/her before recommending surgery? How many visits? What type of tests?
- What kind of information did the doctor give you/him/her before the surgery?
- What about after the surgery: did the doctor give you/him/her the details of what happened during surgery or how it went?
- Tell me about the follow-up care and treatment after surgery? Did you/he/she see the doctor again after surgery? Why or why not?
- Were you/he/she satisfied with the outcome of the surgery? Why or why not?
- Was surgery the first or only option for you/him/her, or was it more like a last resort?
- How many of you would agree that – in general – surgery is probably a last resort for most medical conditions or problems? What are the exceptions? Who doesn’t agree?
- Did you – or the person close to you – seek a second opinion before having the surgery? Why or why not?
- Raise your hand if you think a patient must always get a second opinion before having surgery of any kind? If “it depends,” what factors would you consider?
- Raise your hand if you – or anyone you know – has ignored or refused to have surgery even though a doctor recommended it. Tell us about that.
- Raise your hand if you – or anyone you know – has had a bad experience with surgery? Tell us about that. Was that a case of the doctor botching the surgery or was it some other natural complication?

There are so many good ways to ask open-ended and follow up questions so be sure to incorporate all the possibilities in your voir dire. Here are a few templates:

### ***Open-Ended***

- Raise your hand if you or someone close to you has ever...
- On a scale of 1 to 10 how [insert adjective here] is...
- Tell me about your experience with...
- What have you read or heard about...

### ***Follow-Up***

- Tell us about that.
- What happened?
- How did things turn out?
- Were you satisfied with the outcome?
- Why do you think/feel/believe so?
- If you had it to do over, what would you do differently?
- What did your experience teach you?



## Create Connections with Every Juror

For so many years – when we focused exclusively on exercising strikes instead of finding areas of agreement – it felt like we never had enough strikes to go around. And at the end of the jury selection process – when both sides had effectively eliminated their least favorable jurors – we would sometimes look up at the panel only to realize that we knew very little about all those people who landed in the “middle.” We’d congratulate ourselves on getting rid of our “worst,” talk about how much we missed those awesome people that the

other side struck, and hope that we could make the best with who we had left.

Now – when we marry our strategy for the case with our best evidence and arguments to jurors’ pre-existing experience, attitudes and beliefs – we more often end up with strikes to spare. We incorporate the words and phrases jurors used during voir dire into our opening statement, so that what we tell them about our case sounds more than vaguely familiar. Throughout the trial we are mindful that our conversation at the start has set the stage for everything that follows. And in closing argument we are permitted to argue directly to jurors by reminding them of their own pre-existing ideas and beliefs that they shared with us during jury selection.

That said, it is essential that you are also comfortable opening the door to the attitudes and opinions that are harmful to your case and there are separate strategies and skills for doing this effectively. We could devote an entire article to the art of generating effective cause challenges and there are great resources – such as [Jurywork: Systematic Techniques](#) – to help you make the case for getting additional peremptory strikes and creating the optimal conditions for voir dire.

When you purposely create a connection with every juror on the panel during jury selection – on one or more important issues in your case – you are quickly on your way to being more persuasive as a result. You are also much less likely to be on the receiving end of a bad review in my next post-verdict project. And if any of the jurors’ comments could have been made about your last jury selection, you can learn more about crafting meaningful and persuasive voir dire [here](#).

***Charli Morris is a trial consultant living in Raleigh, North Carolina and working in venues across the country. She has taught extensively on jury decision-making and all aspects of trial preparation. The second printing of her book, *The Persuasive Edge*, will soon be available in paperback. You can reach her at [cmorris35@nc.rr.com](mailto:cmorris35@nc.rr.com) and find out more by visiting [www.trial-prep.com](http://www.trial-prep.com).***

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## Editor's Note

2011. That happened fast! But we're ready (more or less). We're doing new things here at *The Jury Expert* in 2011. And we are excited about them. In our next issue, we'll have professional layout so you won't have to put up with my amateurish efforts any longer. (You are no more relieved than I!) And. Also in our next issue, we expect to have a new web design that will just amaze you. It will be beautiful. Trust me.

Also in 2011--we are introducing a new sort of respondent to the articles we publish from academics. So far, we have always had trial consultants respond to those pieces with thoughts on how they would (or would not) use the research findings in court. Now--we are adding in trial lawyers. Have you wished you could have your [tactful] say? Now you can. Just send me an email ([rhandrich@keenetrial.com](mailto:rhandrich@keenetrial.com)) and let me know you would like to respond to a *Jury Expert* article. You can see a how-to from Mark Bennett (a Houston criminal defense lawyer) in this issue. We thought it would be interesting to see how the thoughts of trial lawyers diverged and/or converged with the thoughts of trial consultants. So line up, oh gentle readers. Show us what you've got.

So in this issue of *The Jury Expert* you will find ways to do what you do better, smarter, and more efficiently. You will find ways to keep up with what's new, pack your bag (lightly), craft a SJQ for white collar crime cases, do better voir dire, consider how bifurcation interacts with hindsight bias, and get practical and useful tips for cheap DIY trial graphics. Just our effort to help you maintain your resolutions to do what you do better, smarter, and more efficiently.

Welcome to 2011. Welcome to another year of terrific content and thought-provoking commentary from *TJE*.

[Rita R. Handrich, Ph.D., Editor](#)

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