

## *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

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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 chase<sup>1</sup>. Writing about jury selection in Diane Wiley's wake may be a tall order, but there's a certain logic to leaping 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 appropriate for open court.

In my experience, there is *almost* no subject off-limits for oral *voir dire*<sup>2</sup>. 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 chemical 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?

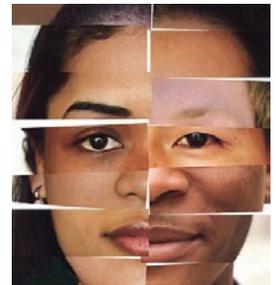
Raise your hand if you or anyone close to you has ever had such a bad experience with drugs or alcohol that it causes you to have strong feelings or a firm opinion about the issue.

- 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<sup>3</sup>.

#### *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.

## *Loss of Consortium<sup>4</sup>*

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*

<sup>1</sup>See [TJE Vol 23, Issue 1](#), Morris

<sup>2</sup>You 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](#).

<sup>3</sup>This 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.

<sup>4</sup>A 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](#)