

Practice Tip: Voir Dire Under Directive 4-07 – Just Too Valuable to Waive

**Michael A. Ferrara, Jr
Cherry Hill, NJ
856.779.9500**

For the past 35 years I have been telling anyone who cared to listen that voir dire is the most important part of any trial. Trial after trial jurors were asked “can you be fair and impartial” and 100% of them said “of course”. We trial lawyers, of course, knew they were lying but could not do anything more to ferret out the truth, relying on our hunches to use our preemptory challenges. Some of us who have done attorney-conducted voir dire in other states also knew how valuable the questioning of prospective jurors can be. But for years, New Jersey was stuck with judges doing quick questioning, convinced that jurors so selected were being candid with the Court.

That is all changed now. When “Best” Practices was adopted, there was a glaring omission and that was it didn’t deal with a standard voir dire process to be used in all 21 counties. In fact, it didn’t deal with voir dire at all. We brought that up with the powers to be and Judge Lisa and his committee were assigned the task of working on how to make voir dire fairer to all sides. Our own Abbott Brown and Alan Medvin were important contributing members of that committee and we owe them a debt of gratitude for what they helped accomplish. After many meetings and hard work, the Supreme Court issued Directive 4-07. You can access it directly from the judiciary website www.judiciary.state.nj.us. I will not reprint it here, but urge each of you to print

yourself out a copy, include it in your pre-trial exchanges and give a copy to your trial judge.

What I have been telling trial judges is the following: “Your Honor, I know it will take longer to pick a jury using the mandatory closed and open-ended questions, but we have no choice. The Supreme Court requires it”. What is most disheartening is that I was told by a judge in Camden County that only one attorney has requested the mandatory open-ended questions and many are waiving the closed ended ones.

When I heard this, I felt the need to remind all of you that you are making a terrible mistake to waive them. What has been disclosed at side-bar conferences with the open-ended questions and the follow up has been pure gold. Stuff that we would have never known. This is not just a plaintiff-friendly tool, but provides the defense with some valuable data as well so your adversary will most likely not object.

The practice pointers are to make sure you review the closed ended questions carefully and make the necessary changes to fit your case. Then make sure you have enough pens to give out since every member of the panel must be given a copy of the closed ended questions and mark “Yes” to those that apply. Without having a copy of the questions, and without a pen, they can’t do this. I recently sat on a jury panel in Burlington with no questions in hand. When asked: “Would your answers have been yes to any questions”, who could possibly remember? That’s why the pen and a copy of the questions are required. One juror recently was asked at sidebar if any answers would have been “yes” and he said he didn’t bring his reading glasses to court and couldn’t read the questions. Since then, I have gone to a drug store and bought several pairs of inexpensive reading glasses, given them to the trial judge, in case this happens

again. A tougher question is what happens if the potential juror has difficulty reading or understanding the questions and is hesitant to admit it. I think the judge should cover that as well.

Directive 4-07 also requires at least three open ended questions. Did I say requires? It's not optional. The trick here is how to craft good open-ended questions. Questions that call for a yes or no answer are not open ended. Questions that ask: "how do you feel about such and such" or "tell us about such and such" are open ended. Just before your trial, post on the listserv for suggestions and our sisters and brothers will help you craft them. I have been submitting about 10 and happy to get three good ones. Those answers must be given at sidebar, a nice opportunity to meet the juror and ask follow up questions.

The directive also deals with specific kinds of cases, e.g. medical negligence, auto, slip and fall, etc. Be certain you spend time and craft custom ones for your case. Nothing shows the trial judge you are unprepared as to give him or her suggested auto questions for a slip and fall case.

In summary, read Directive 4-07. Study it. Memorize what is required. And then persuade your judge to use it. I think it is a deviation from the standard of care for a trial lawyer to waive it. It's that useful.

On a related jury selection issue, be aware that defendants still are exercising their preemptories in an impermissible race-based fashion. Make your Babson objection and be prepared to deal with an indignant defense attorney resenting that you are accusing him or her of racism. But the truth is the truth. Every defense preemptory in my last two trials was an African American or Latino juror, and my experience trying 250 trials over

35 years confirms this practice and I'm sure yours does as well. But what to do about that issue is for another day, just keep it in mind and think of solutions.

Keep fighting for your clients and remember the words of the late Tom Lambert: "Tort law is never settled until it is settled right". Good luck on your next trial.