# New Jersey Judiciary

# BENCH MANUAL ON JURY SELECTION


Approved by the Judicial Council

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# N O T I C E

This Bench Manual on Jury Selection (Manual) is intended to provide procedural and operational guidance to New Jersey judges regarding the selection of juries in civil and criminal trials. The Manual was prepared by the New Jersey Supreme Court Committee on Jury Selection in Civil and Criminal Trials -- a committee consisting of members of the bench, bar, and jury management professionals. It has been reviewed and endorsed by the Conference of Civil Presiding Judges and Conference of Criminal Presiding Judges. It has been approved by the Judicial Council following review on the recommendation of the Conference of Civil Presiding Judges and Conference of Criminal Presiding Judges. It is intended to be used by attorneys and court staff, in order to promote uniform jury selection procedures statewide.

The Manual relates Judiciary policies current as of the publication date, implemented by the New Jersey Supreme Court and the Administrative Director of the Courts. The Manual does not itself establish Judiciary case management policy. If there is a conflict between the Manual and any statement of policy issued by the Supreme Court or the Administrative Director of the Courts, the statement of policy, rather than the provision in the Manual, will control.

# P R E A M B L E

In early 2004, the New Jersey Supreme Court appointed the Special Committee on Peremptory Challenges and Jury Voir Dire (Special Committee). It issued its Report and recommendations on May 16, 2005. Several of the recommendations (including the Jury Selection Standards) were approved by the New Jersey Supreme Court in September 2006. Among these recommendations are that judges and attorneys be educated, on a continuing basis, in the jury selection process, and the preparation of a jury selection manual. The Court thereafter created the Supreme Court Committee on Jury Selection in Civil and Criminal Trials (Committee) as a means of implementing the approved goals of the Special Committee. Preparation of this Judge's Bench Manual on Jury Selection (Manual) comports with the Court's directive to this Committee and is one of the means by which the Committee is fulfilling its role of providing educational materials to the bench, bar, and public.

Our State and Federal Constitutions guarantee the right to trial by an impartial jury. U.S. Const. amends. VI, VII, XIV; N.J. Const. art. I, ¶ 9, ¶ 10. "[A]n impartial jury is a necessary condition to a fair trial" in our constitutional framework. State v. Williams, 113 N.J. 393, 409 (1988) (Williams II) (citing Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S. Ct. 1507, 1522-23, 16 L. Ed. 2d 600, 620 (1966)). Jurors, therefore, must be "as nearly impartial as the lot of humanity will admit." State v. Williams, 93 N.J. 39, 60 (1983) (Williams I) (internal quotation marks omitted).

The trial court's duty is to take all appropriate measures to ensure the fair and proper administration of a trial and that must begin with voir dire. A vital aspect of that responsibility is to ensure the impaneling of only impartial jurors by searching out potential and latent juror biases. To carry out that task, a thorough voir dire "should probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially." State v. Erazo, 126 N.J. 112, 129 (1991). A thorough voir dire also serves the purpose of enabling the informed use by litigants of their peremptory challenges.

Although a trial court's exercise of its broad discretionary powers in conducting voir dire "will ordinarily not be disturbed on appeal," Williams II, supra, 113 N.J. at 410 (internal quotation marks omitted), appellate courts have not hesitated to correct mistakes that undermine the very foundation of a fair trial -- the selection of an impartial jury. This Manual is

designed to assist not only the Judiciary, but the other participants in the jury selection process: jury managers, parties, and attorneys. The Manual is intended to address jury selection in all cases.

The Manual is planned to be used by a varied audience and does not purport to be either an instructional "how-to" manual or a learned treatise. Instead, it may be used as a road map to navigate the ebb and flow of the jury selection process. The ultimate hope is that as the Manual and its future revisions are distributed, the procedures associated with jury selection will be applied fairly, uniformly, and effectively.

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# 1. INTRODUCTION

Current voir dire practices may be traced from State v. Manley, 54 N.J. 259 (1969). Prior to Manley, attorneys played a substantial role in questioning jurors, and, as the practice evolved, abuses became unchecked, with attorneys taking the opportunity to indoctrinate jurors to their point of view. The New Jersey Supreme Court stated:

> The situation in New Jersey is substantially the same as in other states. In many instances it has taken as long or longer to empanel a jury as to try the case. The impression is inescapable that the aim of counsel is no longer exclusion of unfit or partial or biased jurors. It has become the selection of a jury favorable to the party's point of view as indoctrination through the medium of questions on assumed facts and rules of law can accomplish. [Id. at 281.]

The Court directed that under the newly revised R. 1:8-3(a), "[t]he basic intent is to have the voir dire conducted exclusively by or through the trial judges to the extent reasonably possible," and, although "supplementary questioning by counsel personally is not foreclosed entirely, . . . control over its scope and content is left to the experienced judgment and discretion of the trial judge to be exercised with the history and purpose of the rule in mind." Id. at 282-83. A "guarded exercise of discretion," Id. at 283, was prescribed "to restore the fundamental basis for preliminary questioning, i.e., an expedient selection of a fair and impartial jury. . . . " Id. at 280.

Thus, since 1969, trial judges have exclusively or at least substantially questioned jurors in the voir dire process. In State v. Fortin, 178 N.J. 540, 577-78 (2004), the New Jersey Supreme Court described the evolution of Manley in this way:

> In recent years, we have taken occasion to correct the misapplication of Manley by trial courts in capital cases. See, e.g., State v. Biegenwald, 126 N.J. 1, 33 (1991) (Biegenwald IV) ("Regrettably, we perceive from the records in many of the cases coming before us that trial courts have read Manley . . . to limit voir dire to the bare minimum necessary to qualify a juror."); State v. Moore, 122 N.J. 420, 455 (1991) ("Although Manley may be read as discouraging [the questioning of prospective jurors concerning their understanding of the burden of proof and presumption of innocence] . . . capital cases require a thorough and searching inquiry in regard to voir dire.") (internal quotations marks omitted). Once again, we do so here. In capital cases, "[c]ounsel must be afforded the opportunity for a thorough voir dire to evaluate and assess jurors' attitudes in order to

> effectively participate in jury selection. If counsel is unable to screen out prejudice and bias, that inevitably leads to unfair jurors." Williams II, supra, 113 N.J. at 409, 550. We are unwilling to undermine the integrity of the trial process, even where the evidence of guilt is compelling. Ibid. The right to a fair trial does not depend on the nature of the crime charged or the quantum of evidence produced against a defendant. Ibid. (emphasis added).

While the scope of voir dire in non-capital trials is obviously much more limited than was formerly provided in capital trials, the broad principles expressed by the New Jersey Supreme Court in Fortin apply in all jury trials. More than a "bare minimum" is required. "Expedience can never trump the considered and thoughtful selection of jurors whose impartiality and fairness must be beyond reproach. The extra time necessary to empanel twelve dispassionate jurors in this case would have been a small price to pay for the assurance of a fair trial." Id. at 581.

A more recent excursion into the realm of jury selection was conducted by the Special Committee on Peremptory Challenges and Jury Voir Dire (Special Committee). Its May 16, 2005 Report is well worth the read; it may be accessed at www.njcourts.com/pnp/peremptory_voirdire.pdf. Of critical importance are the ensuing Directives that emanated from the New Jersey Supreme Court's adoption of many of the Report's recommendations: Directive #21-06 and Directive #4-07. Directive #4-07 was promulgated to improve the voir dire procedures first established by Directive #21-06, particularly that the trial judge no longer be required to verbally ask every voir dire question of each juror. The new directive eliminated that requirement, changed other procedures, and instituted revised standard voir dire questions. Trial judges should follow Directive #4-07 when conducting voir dire in both civil and criminal trials. Directive #4-07 is attached to this manual. The directives may be accessed through the Judiciary website (www.njcourts.com). Directives are mandatory and have the force of law. State v. Morales, 390 N.J. Super. 470, 472 (App. Div. 2007):

> [T]he Directive, entitled, "Approved Jury Selection Standards, Including Model Voir Dire Questions," dated December 11, 2006, and effective for trials commencing on or after January 22, 2007, is unquestionably binding on all trial courts. In re P.L. 2001, Chapter 362, 186 N.J. 368, 379-80, 895 A.2d 1128 (2006); Pasqua v. Council, 186 N.J. 127, 152, 892 A.2d 663 (2006); State v. Linares, 192 N.J. Super 391, 397, 470 A.2d 39 (Law Div. 1983). [Id.]

This Manual is intended to explain the relationship of the directives, statutes and Rules, as well as common practices and procedures that have developed in New Jersey courts regarding jury selection.

# 2. JURORS: PRE-VOIR DIRE

## 2.1. Source List

New Jersey jurors are selected from a single source list that contains the names of registered voters, licensed drivers, filers of New Jersey personal income tax returns, and applicants for homestead rebates, i.e., property tax relief. N.J.S.A. 2B:20-2(a). The lists are combined using uniform procedures that identify duplicate records so that each person whose name is on one of the lists specified in the statute is represented once on the final source list. The merger programming uses available identifiers to identify duplicate records. If there is a question, it is resolved in terms of retaining both records so that no one is denied his or her opportunity to serve as a juror. Any necessary changes can then be made when that record holder is summoned. A new merged list is created each year. N.J.S.A. 2B:20-2(b).

## 2.2. Selection Process

Jurors are randomly selected by using computer programming that provides every eligible name with the same opportunity to be selected. A juror list is created for each of three court stated sessions. N.J.S.A. 2B:20-4(a). That list is publicly available in each vicinage in the office of each County Clerk. N.J.S.A. 2B:20-5. The number of names selected as petit jurors (as well as grand jurors and State grand jurors) is set forth in a session order signed by the Assignment Judge, setting forth the number of jurors to be selected for the four month session. N.J.S.A. 2B:20-4(b). A summoned juror is mailed a letter style summons which contains the juror's summons information and which provides an online site at which the juror can complete his or her qualification questionnaire. Jurors who do not, or cannot, respond online are mailed a print summons questionnaire which also contains the relevant summons information (directing the juror to report on a certain date, to a specified location, at a specified time, for service as a particular juror type). N.J.S.A. 2B:20-3. The juror must complete and return the qualification questionnaire section of the form.

## 2.3. Juror Qualifications

In order to be qualified as a juror in New Jersey, a person must meet statutory qualifications set forth in N.J.S.A. 2B:20-1. These qualifications relate to age (must be at least eighteen years old), residency (must be a resident in the summoning county), citizenship (must be a citizen of the United States), language ability (must be able to read and understand the English language), criminal record (must not have been convicted of an indictable offense), and physical/mental condition (must be able to perform the functions of a juror -- noting that the Judiciary will

provide accommodations consistent with the requirements of the Americans with Disabilities Act).

It needs to be kept in mind, with regard to scheduling trials that require a number of jurors that is larger than usual, that the questionnaire/summonses are mailed to jurors about six weeks in advance of the summons date. The Judiciary is required to provide 30 days' notice of their summons date. N.J.S.A. 2B:20-8(b). The Judiciary has found that six to eight weeks works best statewide with regard to juror convenience and processing efficiency, including providing for emergencies (e.g., the 2001 shutdown of a United States Postal Service facility due to the presence of anthrax). Judges should check with vicinage jury managers regarding the number of weeks of notice generally provided to jurors.

## 2.4. Reporting Jurors

Each juror is checked in by scanning the bar coded juror summons that was received by mail. Jurors are then directed to a juror assembly room where they receive an general orientation about juror service, including viewing a fifteen minute videotape and being addressed by jury management staff or a judge, about factors relating to juror service in that particular vicinage. Once orientation is completed, the jurors remain in the assembly room until assigned to a trial, excused for lunch, or dismissed for the remainder of the day (if no longer needed for voir dire). Jury management personnel are in close contact throughout the day with other court staff regarding trial courts' anticipated juror needs and jurors are dismissed for the day once it is determined that they will not be needed. Before their service on a voir dire, jurors must be administered the following oath: "Do you swear or affirm that you will support the Constitution of the United States and the Constitution of this State?" N.J.S.A. 2B:20-18.

## 2.5. Notice of Panel Need to Jury Management Office

Someone at the judge's chambers, generally the court clerk or the judge's secretary, will contact the jury management office to request jurors. The means of communicating the request will depend upon the vicinage preference and direction. Each request must contain details such as the judge's name and courtroom, trial start date, time requested, indictment/case number, title of the case, type of case, attorney names, number of jurors to be seated, total number of jurors requested and any special instructions -- again depending on local direction. When requesting jurors, consideration must be given to limits set locally for the typical civil trial and criminal trial. Most counties have based their local recommendations on their own experience and have

gone below those numbers in some locations. Care is also taken to ensure that the seating capacity of the courtroom is not exceeded by the number of prospective jurors summoned.

## 2.6. Voir Dire Panel Creation

The Judiciary randomly selects jurors for voir dire from among those available in the jury selection pool using its Jury Automated System (JAS). N.J.S.A. 2B:23-2(c). When a voir dire panel is selected using JAS, jury management personnel will print lists of jurors for use by the trial judge and counsel. The list provided to the trial judge, labeled as "Judge's List," will show the selected jurors' names in order of their random selection. The list provided to each attorney, labeled as "Attorney's List," will show the jurors' names in alphabetical order but will include an asterisk next to the names of the jurors who will first be seated in the jury box (i.e., the first 14 names in a criminal trial and the first 8 names in a civil trial). The trial judge will use the Judge's List when conducting voir dire. The court clerk will also have a copy of the Judge's List in order to accomplish his or her in-court responsibilities.

## 2.7. Factors Affecting Venire Size

Jury management personnel will work with court staff to ensure that sufficient jurors are available for trials. However, within a vicinage, priority may be given to cases on a first-come, first-served basis, or may be based on the nature of the trials. Some vicinages share the schedule of upcoming jury trials, along with the juror requests, with all judges in the vicinage so that they may stagger their requests to prevent any potential conflicts. Experience has also shown that similar trials should not be conducted on the same day because jurors excused for cause for one such trial will most likely be excused from all such trials, e.g., sex offenses, construction, or professional negligence. Jury management staff will maintain close contact with court staff to ensure that jurors are sent to the courtrooms when needed and that all competing needs are fully considered.

The vicinage Operations Division will maintain a chart or record of the seating capacity of each courtroom. The Jury Management Office will consider each courtroom's capacity when determining the number of jurors to send to court. Generally, no more than can fit in the audience section of the courtroom will be sent. This will allow the jury box to remain free for the voir dire. Jury selection is a critical trial phase and must be conducted publicly, meaning that the courtroom cannot be closed to all spectators just so that more jurors can be accommodated for jury selection. State v. Cuccio, 350 N.J. Super. 248 (App. Div. 2005) (the Sixth Amendment

to the Constitution of the United States and Article 1, Para. 10 of the New Jersey Constitution afford a criminal defendant the right to a public trial; as with most constitutional guarantees, however, the right to a public trial is not absolute). In special cases where more jurors are needed than will comfortably fit in the audience, it may be possible, working with the vicinage's Operations Division, to add extra chairs. Where there is the need for a large number of jurors, the trial judge may consider conducting jury selection in a larger courtroom, where available, and then returning to his or her original courtroom to conduct the remainder of the trial.

# 3. THE PRE-VOIR DIRE CONFERENCE: R. 1:8-3(f)

## 3.1. Required Conference

The jury selection process, particularly voir dire, is a formal and well-defined stage of the overall trial mechanism. Nevertheless, each judge approaches and implements the voir dire in a distinct manner. Additionally, the parties indubitably have developed particularized views concerning the best way to select the trier of fact. The time and place where each of the participants learn of the others' point of view is the R. 1:8-3(f) conference that usually is held immediately before the judge actually requisitions a venire. The latest the conference may be conducted is "[p]rior to the examination of the prospective jurors." R. 1:8-3(f). This mandatory conference is held on the record and should be in open court. Many judges will conduct a conference in chambers before going on the record to sort out any procedural issues that are best addressed in chambers.

## 3.2. Topics to Be Considered for Conference

The following topics are illustrative of the issues that will likely be discussed at the R. 1:8-3(f) Conference. By not including a topic, it is not meant to suggest its exclusion from the R. 1:8-3(f) conference. Rather, it will be in the judge's discretion to add or exclude issues for consideration at the R. 1:8-3(f) conference. In order to meaningfully discuss jury selection issues at the R. 1:8-3(f) conference it is essential that the attorneys have complied with R. 4:25-7(b), which provides for the exchange of information and filing with the court no later than the commencement of the trial.

The judge should memorialize on the record the procedure that will be followed in questioning jurors, and confirm the number of peremptory challenges allowed for each party, and the manner and order in which peremptory challenges will be exercised. The specific questions that will be posed to all jurors (including open-ended questions) must be resolved on the record. The judge must rule on the parties' requests for questions. A final form of written questionnaire, if used, should be marked as a court exhibit.

## 3.3. Permitted Waiver of the Use of Uniform Questions in Civil Trials

The jury selection procedures set forth in Directive #4-07 are mandatory and binding on all civil and criminal trial courts. However, the attorneys, with the approval of the trial judge, may agree, in civil actions only, to waive the full use of the model questions.

Waivers are not authorized for criminal trials

"Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). While the waiver need not be express, "[t]he party waiving a known right must do so clearly, unequivocally, and decisively." Ibid. See also Merchants Indem. Corp. v. Eggleston, 68 N.J. Super. 235, 253 (App. Div. 1961) ("[w]aiver is the voluntary and intentional relinquishment of a known right, operative unilaterally and without regard to reliance by others.").

Note that counsels' agreement regarding waiver does not need to be all or nothing. The waiver authorization speaks of waiver of the "full use" of the standard questions and counsel may agree to use certain standard questions, and not use others. Further, as in all cases, counsel are encouraged to develop case-specific questions not included within the standard questions.

## 3.4. Waiver Considerations

In order to save valuable time and resources, the question of waiver should be addressed early on at the R. 1:8-3(f) conference. Waiver must be expressly stated on the record or memorialized in a written stipulation that is entered into the record. Judges must neither cajole nor "bargain" for a waiver. The attorneys are entitled to learn from the judge how he or she will actually conduct jury selection in the presence of a waiver, in order to intelligently advise their clients whether to exercise the right to waive. Judges must be forthcoming in explaining their alternate means for jury selection, keeping in mind that the touchstone remains the empanelment of a fair and unbiased jury.

The variety of alternate methods of selecting juries is infinite. Most involve some level of questioning of potential jurors orally. No method in the jury selection process, however, can rely upon the juror recalling questions previously posed to other jurors. The now-discredited former practice -- where judges would ask a series of questions of a single juror; if acceptable answers are received and the juror is not excused for cause, the judge would ask the remaining potential jurors whether they heard the questions and answers of their fellow juror(s) and to indicate if their own answers might be different -- is now firmly abandoned.

Even where an intelligent and knowing waiver is obtained, the trial judge must ensure that the voir dire process produces a fair and impartial jury. At the very least, it is recommended that each and every juror be required to verbally express biographical information so that the juror's

voice is heard, body language can be discerned, and a reasonable assessment of the juror's suitability to act as a trier of fact is accomplished.

## 3.5. Non-application of Standard Questions in Expedited Jury Trials

The purpose of summary or expedited trial procedures (See R. 1:40-2(a)(3); Section VII Civil CDR Bench Manual, Fall 1997; Model Jury Charge (Civil), § 1.22, "Expedited Jury Trials," approved 1/01), is to provide parties with a means to swiftly and effectively resolve matters which lend themselves to such treatment (upon appropriate notice and agreement of the parties). It is therefore not required that judges ask the standard civil questions in such proceedings or otherwise utilize the jury selection standards, so long as all counsel are informed in advance accordingly and also informed of the jury selection procedure that will be utilized and express their consent on the record.

## 3.6. Number of Deliberating Jurors

New Jersey law delineates that no more than twelve jurors shall deliberate in a criminal action. R. 1:8-2(a). Deliberations by fewer than twelve deliberating jurors are permitted in criminal actions where, at any point prior to a verdict, the parties stipulate (in writing) and the court approves. In civil actions, the parties may agree to several alternatives:

1. Six jurors. R. 1:8-2(b).
2. Twelve jurors (for good cause if ordered by the court). R. 1:8-2(b)(1).
3. Fewer than six jurors. R. 1:8-2(b)(2).
4. More than six jurors. R. 1:8-2(b)(3).

It is recommended that at the R. 1:8-3(f) conference a discussion be conducted to inquire whether the attorneys then wish to agree to a number of deliberating jurors other than the usual six or twelve. The Rules of Court are silent as to *when* the agreement to alter the usual practice must occur. R. 1:8-2(d)(2). Some practitioners are insistent upon not making the decision until after the judge charges the jury, in order that the number of remaining jurors is known and the fullest assessment of jurors may occur. In light of the practice of allowing jurors to ask questions during the trial, which may skew a lawyer's thinking about the complexion of the jury or the individual juror, it may be advisable for an attorney to wait to commit to a particular sized deliberative jury panel. Additionally, where parties in civil trials agree to permit more than six but fewer than twelve jurors to deliberate to a verdict, the parties must also agree, on the record, on the number of jurors who must agree on the verdict. Civil parties are entitled to a five-sixth

verdict (R. 1:8-2(c)(3)) and, where more than six jurors deliberate, the parties must agree to any verdict that corresponds to a lesser percentage of jurors than is reflected by five of six (83%).

On the other hand, if the attorneys are agreeable to allow seven or eight jurors to deliberate in a civil action, and commit to that agreement during the R. 1:8-3(f) conference, the litigants and judge will be able to avoid the risks and consternation associated with having to select alternates who have had to endure the rigors of trial, but do not get to participate in the verdict. Most judges who select alternates (R. 1:8-2(d)) hope that they all will be given an opportunity to participate as deliberating jurors. It can be very disheartening to the judge and dispiriting to the juror who ends up like a proverbial potted palm at the end of a trial.

## 3.7. Reduction in Number of Deliberating Jurors

The judge and attorneys should always discuss the possibility of the jury complement falling below the usual six or twelve, notwithstanding the best efforts of everyone to ensure a full panel. In criminal actions, at any time before verdict, the parties may stipulate that the jury may consist of fewer than twelve persons. This agreement must be in writing and approved by the court. R. 1:8-2(a). If fewer than twelve jurors deliberate in a criminal action under a stipulation, it is understood that the verdict must be unanimous. In a civil action, a panel of fewer than six jurors must be unanimous, unless the parties further agree to a lesser majority.

# 4. VOIR DIRE: DIRECTIVE #4-07

## 4.1. Jurors In the Courtroom

By the time prospective jurors walk into a courtroom for the actual voir dire and selection process, they have undergone several orientation and organizational procedures. For example, general juror information has been given to them by the jury manager, panels of jurors have been organized by the staff, and directions to a particular courtroom have been provided. Except in exceptional circumstances, the panel is wholly unaware of the nature of the specific case on which they may be asked to serve as the triers of fact. However, in some vicinages, as the jury panel is being escorted to the courtroom, the identity of the judge and the type of part (Criminal or Civil) overseen by the judge will become known to the jurors.

The attorneys and their clients should be advised of the imminent arrival of the jurors so that they may either be present or immediately return to the courtroom upon the entry of jurors. Arriving jurors will be directed to seats by court staff who should also ensure that parties and witnesses do not mingle with the prospective jurors in the gallery while they await the beginning of the proceedings.

## 4.2. Security and Presumption of Innocence Issues

### 4.2.1. General Considerations

In cases involving defendants who are incarcerated at the time of trial, special measures must be taken to ensure that the defendant's custodial status is either unknown to jurors or minimized. Handcuffs and shackles must be removed from the defendant during the prospective jurors' presence, except in extraordinary circumstances. Although the presence of security personnel -- sheriff's officers, corrections officers, state police, prosecutor's staff, or local police -- will probably be obvious to even the least attentive juror, the security detail should be low key and not appear to be hovering over the defendant, special circumstances excepted. Outside of the presence of prospective jurors, the judge should always discuss with the attorneys, and consult with the security staff, regarding the best way to facilitate the defendant's entry to and exit from the courtroom. It is a particularly important consideration when jurors are present or in the vicinity, but should always be done as if jurors were nearby. Transportation outside of the courtroom -- in hallways, elevators, or other common areas -- is best left exclusively to the established protocols of the security staff.

### 4.2.2. Special Considerations

In certain cases, security concerns related to a defendant or his apparent gang or organized criminal affiliations may have an impact on jury selection. The issue of jury intimidation or tampering may be implicated in some cases as well. The trial judge needs to balance the particular circumstances to ensure the defendant's right to a fair and open trial and to protect the presumption of innocence while ensuring the safety, security, impartiality and fairness of jurors.

When issues of juror safety and security are present, trial judges should consult well in advance of jury selection with all interested parties, including counsel, jury management, criminal division management, law enforcement, the sheriff's department and any others involved in managing the case or providing security. Any security plan developed for the trial should include measures to address juror safety and security.

In such cases, keeping in mind the requirement to conduct jury selection in open court, the trial judge, after consulting with counsel on the record, may consider the following measures to address juror safety and security issues:

1. The trial judge may not exclude the public from the courtroom during jury selection unless there is a compelling need to do so. R. 1:8-3 (g) (1). If the trial judge determines that the public should be excluded or limited from jury selection to prevent a risk to the safety or security of prospective jurors, the trial judge must issue a statement of reasons for such action. Similarly, the defendant has the right to participate in the voir dire process to the maximum extent possible, including at sidebars. State v. W.A., 184 N.J. 45, 60-62 (2005). However, as described in W.A., there are acceptable alternatives to allowing a defendant to be physically present at sidebar.
2. Excluding the public or limiting the defendant from jury selection are likely the last measures that the trial court would implement. When there are concerns about juror safety and security, trial judges may implement other measures designed to limit unnecessary public disclosure of juror information and identifiers:
   - Individual voir dire on the record at sidebar, or in writing. R. 1:8-3(g)(2). This practice may limit public disclosure of juror identity and information.
   - Availability of Juror Lists. The list of the general panel of petit jurors shall be made available by the clerk of the court to any trial party requesting the same at least 10 days prior to the date fixed for trial. R. 1:8-5. The list is comprised of the prospective jurors'

names, addresses and occupations if provided, and would be requested from the Jury Management Office. There is also a requirement within N.J.S.A. 2B:20-5 that the session list be publicly posted (jurors randomly selected for service during a specified four month period). Only availability is required, which may be satisfied by providing for inspection of the list in the clerk's office during normal business hours. The trial judge may also consider specifying procedures that will control the use of, and access to, the printed juror lists used in court by the parties and court staff.

- Sequestration. There is a strong presumption of non-sequestration of jurors. R. 1:8-6. However, if the trial court, in its discretion, should find that there are "extraordinary circumstances requiring sequestration for the protection of the jurors" then sequestration can be ordered. If ordered, the trial judge should develop a record setting forth the nature of the extraordinary circumstances, the reasons the jurors are in need of protection, and the other measures undertaken or considered and why they are inadequate. It's noted in State v. Harris, 156 N.J. 122 (1998) that the principal reasons for the decline in the use of sequestration is the burden on the courts and jurors, noting that many jurors cannot serve if sequestered. Sequestration will necessarily require involvement of, and consultation with, many parties including those involved with security as well as jury management.
- Foreign Jury. Either party can move for a jury from another county, usually to avoid the taint of prejudicial pretrial publicity. A foreign jury may be called if a local jury panel would be more susceptible to safety and security concerns, especially if gang related issues are pervasive in the county of venue. The trial judge shall direct a foreign jury if the court finds that "a fair and impartial trial cannot otherwise be had." R. 3:14-2. Like sequestration, a foreign jury comes with many logistical difficulties and challenges for the trial judge to consider, including whether an order for a foreign jury will increase the likelihood that jurors will need to be sequestered.
- Use of Jurors' Names. The trial judge may direct that jurors are referred to by number or by initials while in open court during juror selection. This practice would further limit unnecessary public disclosure of jurors' identities.
- Physical Separation and Escorting of Jurors. As part of a security plan, the trial judge may direct that jurors, parties, spectators and the general public remain apart when not in the courtroom. Common spaces such as parking lots, restrooms, cafeterias, lounges and the like should be reviewed and access restricted as needed. To the greatest extent possible, the prospective jurors should be allowed separate access to the court facilities

and allowed separate facilities and waiting areas. Court staff and those persons escorting jurors should be directed to be vigilant to ensure that jurors are properly insulated from others before, during and after jury selection.

- Limitations on Electronic Devices. The trial judge may limit the use or possession of devices in court to prevent the unauthorized recording of jurors, their information and identities. The security plan should address how such devices are controlled while in court or in the areas where jurors will be located.

## 4.3. Voir Dire Open to the Public and Media Outlets

Voir dire, as a critical phase of the trial, is required to be conducted as a public proceeding from which the public and media are not to be denied access. R. 1:8-3(g), State v. Cuccio, 350 N.J. Super. 248 (App. Div.), certif. denied, 174 N.J. 43 (2002). R. 1:8-3(g) was made effective September 1, 2013 and provides greater emphasis to the existing requirement that public access by provided during voir dire. Although there may be situations in which it's appropriate to exclude non-jurors from the courtroom for juror selection due to the space constraints that exist in many courtrooms or the security concerns relating to some trials, the Appellate Division relied in Cuccio on a criminal defendant's rights to a public trial as provided by the 6th Amendment to the United States Constitution and article 1, ¶10 of the New Jersey Constitution, as well as the public's right to attend trials, as provided by the 1st Amendment to the United States Constitution and article 1, ¶6 of the New Jersey Constitution.

Additionally, Cuccio relied on the test established in Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); which required that a presumption of openness may only be overcome by an overriding interest based on findings that closure of the courtroom is essential to preserve higher values and is narrowly tailored to serve that interest. It is also required that the specific interest be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. It has been noted in cases that lesser alternatives to closure, such as moving to a larger courtroom or reducing the number of jurors in the panel, are almost always available.

Cuccio cites the statement in Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) that a defendant is not required to prove specific prejudice in order to obtain relief for a violation of his or her Sixth Amendment public trial guarantee -- that such a denial is a

"structural" error and "…thus subject to automatic reversal since it affects the 'framework within which the trial proceeds.'"

## 4.4. Welcome and Introductions

Once the jury panel is in the courtroom and seated, the judge will enter and have the opportunity to introduce himself or herself and welcome the prospective jurors. First impressions are very important at this stage, and it is recommended that the judge be confident and friendly in approach. Some judges try to use humor to lighten the mood, without being cavalier. At this point, the judge may ask that the printed questionnaires and writing instruments be distributed to prospective jurors, or he or she may delay this activity until further along in the preliminary instructions because it may disrupt those instructions if done at this time.

The judge will introduce the parties and the attorneys involved in the litigation (or allow the attorneys to do the introductions) and explain to the jury panel that they are about to begin the voir dire process and that the purpose of jury selection is to obtain a jury that: 1) can decide the case without preconceived ideas or opinions against any of the parties involved, 2) will evaluate the evidence with an open mind, 3) will listen to the arguments of the attorneys, and 4) will apply the law as instructed by the judge.

As part of the preliminary instructions, the trial judge, out of concern for possible "contamination" of jurors in the assembly area, should consider instructing jurors not to make statements about the case or share comments about their courtroom experience with their fellow jurors if they are dismissed from voir dire and return to the juror assembly area. This instruction is also noted in section 5.6, page 38.

## 4.5. Beginning of Voir Dire Questioning

The voir dire practice is geared to elicit meaningful information from prospective jurors so those with a real potential for bias can be excused. The process should be designed to provide the attorneys and the judge with sufficient information to appropriately excuse jurors for cause and also provide the attorneys with sufficient information to intelligently exercise peremptory challenges. In questioning jurors, judges must comply with the approved Jury Selection Standards (attached as an Appendix to this Bench Manual) and the applicable directives. The intent of these materials is to set forth standards that will provide a sufficient measure of uniformity and predictability to the jury selection process throughout the State and also ensure that the process is thorough and meaningful and allows for reasonable flexibility in the exercise

of judicial discretion. These materials set forth minimum requirements regarding juror questioning and judges are not precluded from doing more -- including asking more than three open-ended questions or asking each juror each question. The intent of the selection process is to gain meaningful information about jurors, their backgrounds, their relevant views and opinions and life experiences to ensure as best as humanly feasible that they will be able to decide the case in a fair and impartial manner.

In New Jersey the judge presides over and is responsible for the conduct of the jury selection process. The judge is vested with discretion in the manner in which the process is conducted. Jurors shall be examined as follows: "For the purpose of determining whether a challenge should be interposed, the Court shall interrogate the prospective juror in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the Court's interrogation in its discretion." R. 1:8-3.

## 4.6. Every Juror Must Be Aware of Each Voir Dire Question

No method in the jury selection process can rely on the jurors recalling questions previously posed to other jurors. That practice is found to be unreliable in eliciting the required information from each juror. Each juror must address each question that is asked of the juror either individually, en banc, or in a combination of the two. Directive #4-07, which modified earlier Directive #21-06, instructs judges to provide the questions in printed form and distribute the questionnaires to the individual jurors instructing that prospective jurors mark the forms as to their response to each question.

In some civil cases, the parties may wish to expedite the voir dire process. Since these are private disputes and with the consent of counsel and the approval of the judge, full use of the model questions in civil trials may be waived. Of course any waiver discussion and determination should be placed on the record during the pre-selection conference pursuant to R. 1:8-3(f). The Supreme Court has rejected the waiver of printed questions in criminal trials.

## 4.7. Use of Printed Questions

The use of the printed questions proceeds as follows:

### 4.7.1. Format

Each prospective juror in the panel shall be furnished a printed copy of the voir dire questions which shall consist of all the standard questions for the case type as supplemented and determined by the Judge at the R. 1:8-3 conference. The questions shall call for a yes or no

answer. Judges may wish to add "uncertain" as a pre-printed answer or simply allow prospective jurors to answer that they are uncertain as to their response to any of the questions. Jurors may mark their questionnaire with the appropriate response or just circle those questions where they would answer "yes" or where they want to further discuss the question with the court. The names of the trial witnesses shall be included within or attached as an exhibit to the printed questions and all jurors shall be furnished a pen or pencil so that they can mark their individual questionnaires.

### 4.7.2. Hardship Inquiries

The questions regarding disqualification of a juror may be reviewed at the outset along with hardship issues. Jurors determined by the court to have reasons why they cannot serve can be excused immediately.

### 4.7.3. Read Aloud Each Question Once

The judge must read out loud and review each question en banc with the jurors seated in the jury box. Judges are encouraged to provide explanatory commentary at this time to clarify the questions. The judge should also instruct all of the remaining jurors in the array to pay close attention and direct them to mark their printed copies of the questions with the appropriate yes or no (or uncertain) responses, at the same time telling the jurors that these questions will not be read aloud again and ask them to pay close attention. If jurors have any questions about the voir dire questions they can bring them to the court's attention if they are selected as potential jurors.

### 4.7.4. Jurors Informed of Narrative Questions

The judge shall also inform the jurors in the box and the array that jurors will also be individually asked several questions in a narrative form. These additional questions may be printed and distributed to the prospective jurors, or they may simply be read aloud to each juror during the individualized questioning.

### 4.7.5. Individualized Questioning

After giving the panel a reasonable period of time to read and complete the printed questions, the judge will embark upon individualized questioning. This may be conducted in open court or at sidebar. Many judges prefer to conduct individualized questioning at sidebar in order to avoid juror responses that might arguably improperly influence other jurors and necessitate a curative instruction. When the juror comes to sidebar, the judge shall verify that the prospective juror understood all of the printed questions and inquire whether the prospective juror answered yes or

uncertain to any questions. Follow up questions must be asked of the prospective juror to illuminate why the answer was yes or uncertain.

If the juror is not disqualified for cause during the review of the questionnaire, then the prospective juror shall be asked the standard biographical question and two omnibus qualification questions. Directive 4-07 contains a standard, biographical question that must be posed verbally to each prospective juror. It is a multi-part question, and it is asked in this way so as to encourage the juror to speak in a narrative fashion, rather than answering the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. In that way, jurors will self-select the order in which they respond to the various sections, which may, itself, suggest information about the juror. If a juror omits a response to one or more sections, they judge should follow up by asking, in effect: “I notice that you didn’t mention [specify]. Can you tell us about that?

Because the biographical question is part of the standard questions that will be distributed in printed form to each juror, the judge may simply ask the juror to answer, verbally, the biographical question, without the necessity of repeating it to each juror. The judge, with input from counsel, is also free to supplement the biographical question. Some judges prefer asking questions relating to such things as favorite all time movies, actors, school subjects etc., whatever the judge feels will allow the juror to feel comfortable and gain confidence in speaking out loud to the group. This also allows judges, in an individual way, to develop a rapport with each juror. The judge should allow the juror to provide as much detail initially as the juror deems necessary when answering the biographical question, but the judge must then follow up to ask any of the biographical question's unanswered parts.

The critical importance of a proper voir dire was discussed in Pellicer v. St. Barnabas Hospital, 200 N. J. 22 (2009), where a substantial verdict was reversed because of an improper voir dire.

In Pellicer, supra, a medical malpractice case which predated Directives #21-06 and #4-07, the jury returned a verdict in the molded amount of $70,891,781.59. The defendants appealed, primarily contending that by conducting the voir dire of potential jurors in open court, rather than at sidebar, the jurors were repeatedly exposed to "prejudicial views that interfered with their ability to decide the issues fairly and impartially." Id. at 39. The Supreme Court began its analysis by observing that "the inquiries needed to uncover hidden bias of a potential juror may

be wide-ranging and open-ended." Id. at 41. The Court added that the required voir dire may often inquire about sensitive or personal matters. "Those subjects are often ones that a prospective juror might be reluctant to discuss candidly if compelled to do so in open court, but as to which candor is essential." Ibid. The Court expressed concern about "the very real risk" that certain comments could "infect the thinking of others who hear it." Id. at 43. For this reason, the Court instructed that the expedience of questioning jurors about sensitive or personal issues in open court must yield to the practice of bringing potential jurors to sidebar for follow up on such issues or other issues that could alert the parties about potential bias. Id. at 46-47. The Supreme Court concluded that the failure of the trial court to do so deprived the Court of any confidence that the jury could "fairly and dispassionately evaluate the difficult and emotionally-charged issues that were central to this litigation," and therefore the Supreme Court would not permit this jury's verdict to stand. Id. at 47-48.

**Note:** See Section 4.7.6 for a discussion of State v. Gonzales, 407 N.J. Super. 576 (App. Div. 2009), dealing with the mandatory use of open-ended questions.

### 4.7.6. Open-Ended Questions

The procedures set forth in Directive #4-07 require the judge to ask at least three open-ended questions verbally to each juror to elicit narrative responses. These questions will provide the court, attorneys and litigants an opportunity to more thoroughly assess the juror's attitudes and ascertain if any possible bias or prejudice exists that might interfere with the ability of the juror to be fair and impartial. The open ended questions also afford the opportunity to assess the juror's reasoning ability and capacity to remember information and allow the judge and attorneys to evaluate the demeanor and forthrightness of the individual juror. The judge must ask these open-ended questions in addition to the biographical question and the two omnibus qualification questions.

There has been some confusion with respect to the formulation of open-ended questions. Appended to Directive #4-07 are *examples* of open-ended questions that may be used in civil or criminal trials. The appendix to this Manual contains additional examples. It is emphasized that these are merely examples, and none of these questions need be used in any trial. They can be used in the form set forth or as modified for a particular case. Directive #4-07 made this clear with the following provision:

> Appended to this Supplemental Directive is a list of sample open-ended questions, provided here only for the purpose of assisting judges and counsel by illustrating the type of questions contemplated. These are examples; they are not model, or standard, open-ended questions. Some of the examples are reformulations of standard questions, and others are not. There is no requirement that any of these examples be used in any case, although they may be used.

The open-ended questions should be created, with or without reference to the examples, on a case-by-case basis with the input of counsel and with a focus on case-specific significance. Although the court should encourage counsel to attempt to agree upon the content of the open-ended questions, agreement of counsel is not mandated.

Though Directive #4-07 mandates that at least three verbal open ended questions be posed to each potential juror; that is a *minimum* number and judges are encouraged to ask more where such action would be appropriate. While the Directive requires that every prospective juror in the panel be furnished with a printed copy of the standard questions, the same does not apply with respect to open-ended questions. The judge may, but is not required to, distribute copies of these questions to the jurors in the box and in the array.

The critical importance of a proper voir dire was discussed in Gonzales v. Silver, 407 N. J. Super. 576 (App. Div. 2009), a medical malpractice case, in which the Appellate Division observed that the trial court's voir dire did not "technically comply" with Directive #4-07. Id. at 595. Specifically, the trial court "failed to ask three open ended questions of each prospective juror during voir dire, as required by Directive #4-07." Id. at 596. Since the case was being reversed on other grounds, the Appellate Division would not offer an opinion as to whether "the trial court's deviation from the strict requirements of these Directives constituted reversible error." Ibid. The court nevertheless instructed that on retrial the voir dire must "conform to the dictates of the Directives, which are unquestionably binding on all trial courts." Id. at 598. However, the court added that although "we consider it error not to have asked the requisite open-ended questions...we also recognize that a certain residual discretion resides in the trial judge to accommodate the individual circumstances of each case and the consensus views of counsel, even when doing so renders the voir dire procedure less than fully conforming to the Directives' mandates." Id. at 597. The court explained that although the standard voir dire questions are "mandatory, judges in their discretion may alter the sequence of the questions as

they determine is appropriate, including whether to ask key challenge for cause questions early on, to incorporate questions suggested by counsel, or to integrate case type specific questions." Ibid. The court supported this conclusion by observing that the Report of the 2004 Special Committee on Peremptory Challenges and Jury Voir Dire explained that judges are not required to follow a "rigid script" in conducting voir dire." Ibid. Nevertheless, Gonzales makes clear that compliance with Directive #4-07 is mandatory.

Please be aware that Gonzales is a civil trial and that Jury Selection Standard 2, approved by Supreme Court Directives, provides that "…with the consent of counsel and approval of the judge, full use of the model questions in civil trials may be waived" but that no waiver provision exists for criminal trials. Of course, judges in criminal trials are granted the discretion and flexibility to vary the wording of the standard questions, change the order, add case-specific questions, etc. so that they are not bound by a rigid script. But they cannot omit any of the standard questions. **Note:** See Section 4.7.5 on page 17 for a discussion of Pellicer v. St. Barnabas Hospital, 200 N. J. 22 (2009), dealing with a trial judge's use of side-bar questioning to avoid the possibility of jurors' voir dire responses being inflammatory with respect to other jurors, including those prospective jurors who have yet to be questioned.

### 4.7.7. Questioning of Replacement Jurors

As jurors are challenged for cause or peremptorily excused from the jury box, the judge will seat the replacement jurors and preliminarily ask each replacement juror if they understood the questions when they were read earlier and also answer any questions the juror may have for clarification and again go through the open ended verbal response questions along with the biographical question and two follow up omnibus qualification questions.

## 4.8. Altering the Sequence and Wording of Questions

While the use of the standard voir dire questions is mandatory, judges in their discretion may alter the sequence and wording of the questions as they determine appropriate, as long as the substance is not materially modified. Judges are not required to follow a rigid script in conducting the voir dire. The voir dire questions to be asked, the sequence in which to ask them, modifications of wording, inclusion of any supplemental questions requested by counsel, and the proposed open ended questions should all be discussed as part of the R. 1:8-3(f) conference. Directive #4-07.

## 4.9. Attorney-Suggested Supplemental Questions

In addition to the required standard questions (including, where applicable, those relevant to a specific case type), the use of supplemental "yes-no" questions is encouraged, whether relevant to trial issues, the parties, or other relevant matters. Counsel should submit such proposed supplemental questions in writing in advance. These supplemental questions are not included in the standard questions, but are created on a case-by-case basis.

All proposed supplemental "yes-no" questions and proposed open-ended questions requiring a verbal response should be discussed and ruled on at the R. 1:8-3(f) conference. The trial judge must ensure that these questions are balanced and neutral and not geared towards conditioning the jury to one party's position.

## 4.10. Attorney Participation in Juror Questioning

At the discretion of the judge if requested by counsel, at least some participation by counsel in the questioning of the jurors should be permitted; however, the manner and scope of this participation must remain discretionary with the judge. State v. Manley, 54 N. J. 259 (1969). Rule 1:8-3(a) allows for attorney participation, and R. 1:8-3(f) requires a discussion of how to conduct the practice, if requested by counsel, during the pre-voir dire conference. Most attorney participation occurs at sidebar conferences. Attorneys should be permitted, if they wish, to participate in the sidebar discussions with jurors. Some judges allow the attorneys to speak directly to the juror; other judges require that the attorneys speak to the judge, who thereafter poses the inquiry to the juror. Typically, sidebar discussions are more conversational and less formal than those conducted in open court. With the court's permission, attorneys should be permitted limited participation in the follow up questions.

## 4.11. Excusing Jurors for Cause

Jurors should be excused for cause either by the Court or upon parties' request when it appears that the juror will have difficulty in being fair and impartial. Judges should avoid extensive efforts to rehabilitate a juror or to reject reasons offered by the juror for not serving, recognizing that such efforts indicate that there are significant issues about that juror that need to be addressed. The follow up questions should be sufficiently probative to ferret out the ability of the individual to fairly judge the case. Jurors who express hardship problems (child care issues, absence from work without pay, etc.) should be liberally excused especially when the trial is anticipated to take an extended period of time.

# 4.12. Peremptory Challenges

## 4.12.1. Number; Order of Exercise

Now that the judge and the attorneys have gone through all of the challenges for cause, we proceed towards the peremptory challenges. Generally speaking in civil actions each party is entitled to six peremptory challenges; on the criminal side on the major felonies the defense will have twenty peremptory challenges and the State twelve; and on the other ordinary criminal matters, each side is entitled to ten challenges. R. 1:8-3(c)-(d). The order of exercising the peremptory challenges is an alternating one by one procedure with the State or plaintiff going first. There are some exceptions allowed within R. 1:8-3 for multi-defendant cases or an uneven number of peremptory challenges but the procedure needs to be discussed and set forth on the record prior to the commencement of the jury selection process. It is clear that the entire voir dire process must be conducted so that the parties may intelligently exercise their peremptory challenges.

In exercising a peremptory challenge, each attorney is entitled to abide the individual's intuitive reaction to individual jurors. In exercising these challenges, the attorney is attempting to reach a certain comfort level with the jury that is eventually composed, as aptly pointed out by Justice Clifford:

> A party is entitled to the visceral reaction of the trial attorney to the prospective juror, and especially to the attorney's appraisal of the venireman's visceral reaction to him, to the extent that it may be divined. This is difficult to identify and articulate, and the tendency to exaggerate it in some considerable degree is no doubt endemic to the trial bar; but it is nonetheless real, it is valuable, and it should be taken into account. Roman v. Mitchell, 82 N.J. 336, 361 (1980)

## 4.12.2. Presumed Group Bias Issues

The U.S. Supreme Court in State v. Gilmore, 103 N.J. 508 (1986), determined that the State's use of its peremptory challenges to exclude jurors belonging to cognizable groups based on race, religion, color, ancestry, national origin, and gender violates the defendant's constitutional right to an impartial jury because those challenges were based on presumed group bias rather than situation specific bias. This principle is also recognized on the civil side in Russell v. Community Health Plan, Inc., 280 N.J. Super. 445 (App. Div. 1995) and Hitchman v. Nagy, 382 N.J. Super. 433 (App. Div. 2006). However, an attorney may exercise peremptory challenges to exclude members of a cognizable group for valid, articulated trial related reasons.

Although Gilmore addressed the State's improper use of peremptory challenges, its principles apply to criminal defendants as well. In Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits a criminal defendant from exercising peremptory challenges based on race. In State v. Johnson, 325 N.J. Super. 78 (App. Div. 1999) the New Jersey Appellate Division held that pursuant to McCollum the defendant may not exercise peremptory challenges to strike jurors based only on race and in State v. Chevalier, 340 N.J. Super. 339 (App. Div. 2001), the appellate court held that the defendant may not use peremptory challenges to exclude jurors based only on gender.

The New Jersey Constitution guarantees an impartial jury drawn from a representative cross section of the community. New Jersey explicitly includes religion, race, color, ancestry, national origin, and sex. Under this theory, discrimination based upon disability or sexual preference, protected by the New Jersey Law Against Discrimination (NJLAD) (N.J.S.A. 10:5-1 et. seq.), might also be protected. Gilmore, supra, 103 N.J. at 527, fn.3. The New Jersey constitutional theory, particularly Art. I, §5, emphasizes the right of citizens to participate in the administration of justice by serving on juries. A representative cross-section also "enhances the legitimacy of the judicial process in the eyes of the public." Id.

It is important to understand the procedure a trial court should employ in addressing possible improper use of peremptory challenges. The procedure to be followed when one party asserts that the other party is exercising peremptory challenges to exclude jurors on an impermissible basis is outlined in State v. Osorio, 199 N.J. 486 (2009). Osorio refined procedures originally set forth in Gilmore.

In Osorio**,** 199 N.J. at 492-93, the Court stated that a three-step process must be employed in order to assess an assertion that an exercised peremptory challenge was based on an impermissible group bias and described the three-step process in the following way:

> Step one requires that, as a threshold matter, the party contesting the exercise of a peremptory challenge must make a prima facie showing that the peremptory challenge was exercised on the basis of race or ethnicity. That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination. If that burden is met, step two is triggered, and the burden then

> shifts to the party exercising the peremptory challenge to prove a race- or ethnicity-neutral basis supporting the peremptory challenge. In gauging whether the party exercising the peremptory challenge has acted constitutionally, the trial court must ascertain whether that party has presented a reasoned, neutral basis for the challenge or if the explanations tendered are pretext. Once that analysis is completed, the third step is triggered, requiring that the trial court weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias.

Gilmore identified several factors available to meet the burden at step one and they were restated in State v. Watkins, 114 N.J. at 259 (1989): "(1) that the prosecutor struck most or all of the members of the identified group from the venire; (2) that the prosecutor used a disproportionate number of his or her peremptories against the group; (3) that the prosecutor failed to ask or propose questions to the challenged jurors; (4) that other than their race, the challenged jurors are as heterogeneous as the community as a whole; and (5) that the challenged jurors, unlike the victims, are the same race as defendant." Watkins at 266. Osorio did not change those factors.

However, in applying the first step of Osorio, a bit of historical perspective is helpful. Osorio modified the first step of the procedures that were initially established in Gilmore, to make clear that the challenger has a relatively light burden to initially raise a Gilmore issue. The adjustment made by the Court is consistent with Johnson v. California, 545 U.S. 162 (2005).

In Osorio, the Court stated that it was refining slightly "…the methodology to be applied in gauging bias claims in the jury selection process…" and explained its reasons for the modification in the following way: "A defendant satisfies the requirements of [the] first step by producing evidence sufficient to draw an inference that discrimination has occurred." Gilmore had required a showing of a substantial likelihood that the challenges were based on assumptions about group bias rather than any indication of situation-specific bias. In explaining the reason for the adjustment, Osorio included the following statement from the U.S. Supreme Court's opinion in Johnson:

> We did not intend the first step [of the Batson challenge process] to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts,

> some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

State v. Clark, 316 N.J. Super. 462, 720 A. 2d 632, (App. Div. 1998) offers additional guidance regarding considerations that are relevant to the final step of the challenge process set forth in Gilmore. In State v. Thompson, ___ N.J. Super. ___ (App. Div. 2014), the Appellate Division provided further guidance regarding the analysis that a trial court is required to undertake at the third step of a Gilmore review. After reiterating its reliance on the summary in Clark, which the Court referenced in the following way in Osorio: "[w]e cannot improve on that summary[.]". Osorio, supra, 199 N.J. at 506, Thompson states the following regarding the analysis required at the third step:

> Thus, a trial court's analysis under the third step must include:
> separate findings [by the court] as to the proffered reasons for peremptorily excusing the juror "'with respect to each disputed challenge'"; (2) whether the proffered reason has been evenly applied; the overall pattern of the use of peremptory challenges, notwithstanding that the proffered explanation as to each individual juror excused, may appear "'genuine and reasonable'"; and (3) the "'composition of the jury ultimately selected to try the case.'" Osorio, supra, 199 N.J. at 506-07 (quoting Clark, supra, 316 N.J. Super. at 473-74).

### 4.12.3. Sua Sponte Intervention by Judge

Sua sponte intervention by the trial judge may be needed because neither party can be counted on to protect the rights of jurors that Gilmore recognized when both parties appear to be engaging in discriminatory use of challenges but neither objects. "Article I, paragraph 5 implicates not only the defendant's civil rights but also those of citizens generally and, historically, one of the rights and obligations of citizenship has been to participate in the administration of justice by serving on grand and petit juries." Gilmore, supra, 103 N.J. at 525. In McCollum, supra, 505 U.S. at 449-50, 112 S. Ct. at 2354, 120 L. Ed.2d at 45 the court stated, "[I]f a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice -- our citizens' confidence in it." (citing State v. Alvarado, 221 N.J. Super. 324, 328 (Law Div. 1987)).

### 4.12.4. Possible Remedies; Gilmore Violation

In State v. Amir Andrews, 216 N.J. 271 (2013), the New Jersey Supreme Court set forth revised remedies to be applied where it is determined that a party has impermissibly exercised peremptory challenges. Under the Court's earlier ruling in State v. Gilmore, 103 N.J. 508 (1986), the sole available remedy where a violation was determined to have occurred regarding the exercise of peremptory challenges was discharging the jury panel and beginning voir dire anew. In Andrews, the Supreme Court provided a broader set of remedies.

During the trial in Andrews, the prosecutor stated his belief that defense counsel was impermissibly challenging jurors based on race and that he felt compelled to object although he stated that he was reluctant to do so because he did not want to lose the panel of selected jurors (through discharge if successful) and have to start voir dire over. The trial court found that the challenged peremptory was exercised on a group bias basis and therefore impermissible but seated the challenged juror and continued voir dire rather than discharge the panel. The Appellate Division determined that the only remedy available to the trial court, given its finding that the peremptory challenge was used impermissibly, was to discharge the seated jurors and the juror panel and begin voir dire anew.

In Andrews, the Supreme Court found that: "…Gilmore's single, bright line remedy does not necessarily deter unconstitutional behavior." because it could be seen to reward the offending party by starting voir dire anew and because the non-offending party sometimes failed to challenge an impermissible use so as to not trigger, if successful, the discharge of the assembled jury. With regard to available remedies where a violation is found to have occurred, the Court stated: "The choice of remedy must be guided by the twin goals of assuring a fair trial and redressing the constitutionally impermissible behavior." The Court stated that it was guided by decisions in other states and it set forth the following list of remedies:

1. Reseat impermissibly challenged juror(s).
2. Reseat impermissibly challenged juror(s) and order forfeiture of challenges.
3. Require subsequent peremptory challenges to be exercised at sidebar.
4. Grant additional peremptory challenges to non-offending party or parties.
5. Dismiss empaneled jurors and start voir dire over.
6. Combine remedies set forth above.

Note that despite remedy #6 allowing other remedies to be combined, there are some that cannot be combined because they are exclusive of another or incompatible.

In fashioning its list of possible remedies, the Court noted practical considerations that may relate to the consideration of possible remedies, noting that a trial judge – before determining the appropriate remedy (which may involve reseating a challenged juror) must first:

- ensure that a challenged juror is available to be reseated;
- if the juror is available, consult with counsel regarding the need to question the juror about whether the juror is able to participate fairly and impartially; and
- consult with counsel, if the juror is available and able to participate, regarding whether a cautionary instruction will be required to be provided to the jury.

The Court additionally instructed the trial court, with regard to the possible remedies, that certain actions are not permitted to be ordered as remedies, including: dismissing the indictment; removing a juror of another race or ethnicity in order to offset the impact of the impermissible challenge; or allowing the challenged juror to choose whether to remain as a seated juror.

# 5. ADDITIONAL ITEMS TO CONSIDER

## 5.1. Jury Service for Persons With Disabilities

Jury service is an important part of a citizen's right to participate in society. Although sometimes viewed as an obligation or annoyance by those who have to serve, jury service is often treasured by those citizens who have to fight for their right to sit in the jury box. Jury duty is a significant opportunity for a citizen to participate in the democratic process. For people with disabilities, jury service remains an elusive opportunity in some jurisdictions, and exclusion from jury service remains a major obstacle to full inclusion in the American mainstream. Keep in mind that jurors with disabilities who are qualified for jury service are a self-selected group in that they have not sought, in their responses to the qualification questionnaire, to be excused due to their disability. Any extra time that may be required in the voir dire process demonstrates fairness to both litigants and jurors.

Individuals with disabilities have historically been denied the opportunity and right to serve as jurors. This denial has taken many forms. Until recently, many state statutes excluded people with any disabilities. Often statutes used offensive and exclusionary phrases requiring jurors to possess their "natural faculties" and disqualifying persons "afflicted with permanent disease or physical weakness" or "afflicted with a bodily infirmity amounting to a disability." In addition, the requirement that qualified jurors must be able to read, understand, or speak English historically was interpreted to exclude individuals with disabilities. Those who got as far as the jury pool were often eliminated by challenges "for cause." Moreover, these same individuals faced practical barriers: inaccessible courtrooms, difficulty in obtaining transportation to court, and a lack of reasonable accommodations, such as sign interpreters or assistive communication devices. People with disabilities also encountered "humanistic" barriers such as the court officer who "takes care" of the juror with a disability by trying to help the juror avoid jury duty or the paternalistic judge who patronizes the juror. Each of these circumstances is wrong and violates judiciary policy, the New Jersey Law against Discrimination (NJLAD) and the American with Disabilities Act (ADA).

It is the policy of the Judiciary not to permit discrimination against any individual on the basis of race, ethnicity, color, religion, creed, sex, marital status, sexual orientation, age, national origin, physical or mental disability, or any other basis prohibited by law. The Judiciary will make reasonable accommodations for those with disabilities to participate in court processes and

programs. It informs prospective jurors, on the uniform qualification questionnaire, that the Judiciary will provide reasonable accommodations consistent with the ADA.

Judges should survey their courtrooms with the vicinage ADA coordinator in order to identify potential access issues in advance of a juror's service. The limitations and problems of a courtroom may be solved only by actions that may be outside a judge's control, but the specific limitations and problems that are likely to be encountered should be known by the judge. A judge should be willing in these circumstances to change a courtroom location to accommodate a juror when that appears to a be a fair and practical solution.

When an auxiliary aid or service is required to ensure effective communication, the court will provide an opportunity for an individual with a disability to request the auxiliary aid or service of his or her choice and will give primary consideration to the choice expressed by the individual. However, the ultimate decision regarding an accommodation should rest with the vicinage ADA Coordinator based on the availability of the auxiliary aid or service requested and other relevant factors as the vicinage ADA Coordinator may determine. "Auxiliary aids and services" include Braille, readers, qualified interpreters, note takers, transcription services, written materials, assistive listening devices and systems, or other effective methods of making written or orally delivered materials available to individuals with sight or hearing impairments. Prospective jurors are entitled to these considerations.

Sometimes a juror will ask to be excused claiming that some medical condition or disability prevents the juror from being fair and impartial or that the juror’s pain and discomfort would distract the juror from paying attention to the trial. Nothing in the ADA or the NJLAD prevents the court from granting that application. If the medical condition seems temporary, the judge might suggest that the juror ask the Jury Manager to reschedule jury service to a time when the juror believes the condition will have improved and the juror is able to serve.

Occasionally, a juror may disclose a hearing impairment for the first time at sidebar after not hearing the voir dire questions clearly. A tactful choice is to ask the juror to return to the central jury management area and discuss possible accommodations that would enable the juror to serve. Sometimes a juror with a disability (or even one without a disability) will have a medical appointment or similar need during the trial and the only accommodation needed is to recess trial early one afternoon or start late one morning. After consultation with counsel, try to

accommodate such request if, upon inquiry with the juror, this will be satisfactory. The recess time can always be used for N.J.R.E. 104 hearings, jury charge conferences, or other trial-related matters.

Another common problem involves jurors who require frequent breaks due to back stiffness or other issues. These issues can often be accommodated by allowing the juror to sit in the back row and stand up in place frequently or by taking more frequent breaks. After consultation with counsel, try to accommodate such requests if, upon inquiry with the juror, this will be satisfactory.

All juror specific inquiries on disability issues should be done at sidebar to preserve the juror's privacy. For example, ask how the juror with impaired vision would evaluate photographs of crime or accident scenes, or determine whether a witness's descriptions of photographs, as is done for the benefit of the transcript, would be sufficient. For example, ask the juror with a hearing impairment if the juror adequately understands the interpreter. For example, ask the juror who discloses a mental or emotional problem, "Tell us what being a juror means to you? Tell us about any experience you have ever had in court? What does it mean to you to be fair and impartial?"

If a juror comes accompanied by an ASL interpreter, the judge should verify with appropriate court staff that the ASL interpreter is qualified and swear in the ASL interpreter. The AOC employs full-time ASL interpreters and maintains a registry of approved ASL interpreters. The vicinage chief of interpreting services may be able to help secure proper interpretation services. The judge should meet with the ASL interpreters and attorneys to discuss the use of the ASL interpreters and to try to accommodate the professional needs of the ASL interpreters, including the location in the courtroom where the ASL interpreters will be placed. Normally the best place for an ASL interpreter is next to the witness stand but if, for example, a diagram is used, moving near the diagram may be better. The ASL interpreter's oath that may be administered is the following:

> Do you swear or affirm that you will make a true interpretation in an understandable manner to the person for whom you are appointed and that you will repeat the statements of the person in the English language to the best of your skill and judgment, including any spoken word which may occur during the course of jury deliberation, and that you will in no way supplant or add to or

> supplement any of the wording and language used during the course of the trial and/or deliberation and further that you will always abide by the rules regarding interpreted proceedings as promulgated by the New Jersey Supreme Court?

These principles also apply to other persons who may accompany a juror with a disability such as a reader, audio-describer for the blind, note taker, or real time transcriber.

With regard to the positioning of a juror who requires an accommodation, very often the simplest accommodation is simply moving the location of the juror. For voir dire as well as during the trial, the interpreter must be positioned in full view of and spatially situated to the juror in order to assure proper communication with the person with the hearing impairment. See N.J.S.A. 34:1-69.11. For a juror who has slight visual or hearing impairment, possible solutions may be to move the juror's seat closer to the witness box, have witnesses raise their voices, bring demonstrative evidence closer to the juror, adjust drapes or blinds or increase illumination to help a juror to see. For a juror using a wheelchair, the judge may have other jurors sit alongside the juror in a wheelchair so that the juror is not isolated. A juror using an interpreter should sit in the front row of the jury box.

When jury selection is complete and jury is sworn, instruct the jury about the interpreter's role. A sample instruction might state:

> As you note juror [name] is being assisted by the services of an interpreter. The interpreter is here solely to help your fellow juror participate fully by giving your fellow juror full access to everything that is being said. I am sure that many of you are familiar with such interpreters as you have seen them at most public events when, for example, the President addresses the nation. Like those occasions, I assure you that the novelty of having an interpreter present will wear off and soon you probably won't even notice the interpreter.
>
> The interpreter is independent of any party here and is provided by the court. There are Supreme Court rules about interpreting and the interpreter has agreed to abide by them. These rules include the requirement the interpreter must:
> 1) interpret everything accurately and never leave out, add, or change anything;
> 2) keep everything said during the conversations between jurors confidential; and
> 3) be unbiased and free of any conflicts of interest.

Another interpreter will be soon be joining us to help. Interpreting is a job that requires a high degree of skill and intense concentration. It is very hard to interpret for long periods of time without frequent breaks. For that reason interpreters usually operate in teams so they can relieve each other. They will try to do this during natural breaks in the proceedings to avoid interrupting the proceedings but they may have to interrupt if they need to switch.

When you are talking among yourselves outside the courtroom or in the jury room during recesses or at lunch, do not talk to or try to involve the interpreters directly. While I am sure that you will not violate my instructions and talk about this case until you are deliberating, this rule about not talking to the interpreters extends to conversations that have nothing to do about this case. If you are curious about things like what kind of training or education an interpreter requires, what the opportunities for employment in that field may be, or similar questions, please wait until after the trial is over. As I will explain later, the interpreter is also specifically prohibited from participating in deliberations in any way except to interpret the deliberations.

Please remember that when you wish to talk to your fellow juror using an interpreter, please look at and talk to that juror as if the interpreter was not there. Do not look at or talk directly to the interpreter. As I will remind you again later, it is especially important that when you are talking in a group, you speak one at a time and that you give your colleague an opportunity to respond through the interpreter.

## 5.2. Handling Jurors' Responses to Open-Ended Questions

Open-ended questions that ask jurors to express their thoughts, feelings, and attitudes about particular issues may be posed to the individual juror either in open court or at side bar. That decision is left to the discretion of the court, with input from counsel. Asking open-ended questions in open court of potential jurors about feelings, thoughts and attitudes raises the question of how best to deal with problematic responses heard by others in the array. Do expressions of bias, partiality, opinions about the nature of the justice system, or strong feelings about the nature of a particular case contaminate the other members of the array to the extent of

requiring a mistrial? There are strong feelings about this phenomenon and although the available scientific data is incomplete, there is respectable opinion that in the context of jury selection, the expression of opinions by strangers does not necessarily result in taint. People have been found to not relinquish their attitudes, biases, and opinions just because another juror offers a contrasting one.

So, how should the judge handle a response made to an open-ended question in open court that sounds, on its face, to be problematic? What if a juror says, in a case in which a large corporation is a defendant:

> "I do not trust big corporations. I think they wield far too much power, and we all pay the price. I couldn't be fair in a case against one of these companies."

Or, in a motor vehicle accident case involving a soft tissue injury, a juror stated:

> "I think that these whiplash cases are scams. I think that the plaintiffs are faking injury and trying to hit the jury jackpot."

It is suggested that in such cases, a judge might simply thank the juror for his or her candor, excuse the juror, and ask the panel if anyone else had similar views. Starting jury selection over with a new panel that has not heard these opinions in open court is a last resort. In order to avoid the potential for such problems, many judges engage jurors with open-ended questions only at sidebar.

Asking those questions at sidebar may also have the salutary effect of diminishing the inhibitions or jurors in giving full and candid answers. It might also serve to avoid a phenomenon where jurors merely "piggyback" the answers given by prior jurors, rather than expressing their independent views on the subject. If it is determined that the open-ended questions are best asked at sidebar, the following technique will be useful in streamlining the process. If any juror is at sidebar for any reason, most notably to answers follow up questions about yes or uncertain answers to written questions, and if that juror appears to be qualified to that point, ask the open-ended questions while the juror is at sidebar. For other jurors, who do not go to sidebar for reasons other than the open-ended questions, and who also appear to be qualified, the judge may allow them to remain their seats until the questioning with reference to the written questions is completed as to all jurors in the box. Then, those jurors may be invited to sidebar individually for the open-ended questions. In this manner, the judge and attorneys will already be set up at sidebar, resulting in less disruption and movement in the courtroom.

## 5.3. Rehabilitation of Jurors

Trial court decisions as to whether to excuse prospective jurors for cause are given substantial deference. These decisions are generally discretionary as they implicate the trial judge's superior ability to evaluate the whole person in the courtroom. Catando v. Sheraton Poste Inn, 249 N.J. Super. 253, 258 (App.Div.), certif. denied, 127 N.J. 550 (1991) (citing State v. Marshall, 123 N.J. 1, 85-87 (1991) and State v. Singletary, 80 N.J. 55, 64 (1979)). It is, however, important to recognize that securing and preserving an impartial jury goes to the very essence of a fair trial. Id. at 258-59 (citing State v. Williams, 93 N.J. 39, 60 (1983)).

It is axiomatic that all parties to litigation are "entitled to have each of the jurors who hears the case impartial, unprejudiced and free from improper influences." Wright v. Bernstein, 23 N.J. 284, 295 (1957). The jurors must not only be fair and impartial, they also must appear so, in order to maintain the litigants' confidence in the basic fairness of the trial. Catando, supra, 249 N.J. Super. at 261-62. "If a party's reasonable apprehension of unfairness can be avoided without injuring the rights of others, a sound exercise of judgment favors excusing a juror." Id. at 262.

Judges are not encouraged to attempt to rehabilitate a juror who has expressed a potential problem relating to an ability to be objective, fair, or impartial based upon a juror's prior experience or held beliefs. For example, it is not preferred practice for a judge to say something to the effect: "Well, we appreciate what happened to your mother three years ago in a nursing home, but you do understand, don't you, that this case will be decided solely based on the evidence presented in this courtroom? Understanding that, do you think you could put aside your feelings about nursing homes, whatever they might be, and decide this case based only on the evidence you hear in the courtroom in a fair and impartial manner?"

Once a juror has expressed a concern about an ability to sit on a case because of prior experience, prejudice, or bias, there is a strong presumption that the judge should simply excuse the juror for cause. In Catando, supra, 249 N.J. Super. at 261 it was noted, "[e]arly answers from prospective jurors may have a spontaneous accuracy that later, judicially channeled answers may lack." In addition, a judge is not bound by a prospective juror's declaration of an ability to be fair if the circumstances behind that assertion would cause a reasonable person to have doubt about the potential for objectivity. For example, a juror whose spouse, brother, and father were

all physicians might not be fairly able to sit in a medical malpractice trial, even if the juror professed an ability to be fair in spite of his or her close ties to the medical profession.

## 5.4. Jury Selection in High Profile Cases

Communication is the key factor relating to the management of jurors in high profile cases or trials that will require large numbers of jurors. It is particularly important that there be communication regarding the date(s) on which jurors are to report, the number of days on which voir dire is expected to be conducted, and the anticipated length of the trial, because these items will affect when jurors will need to be summoned, the number to be summoned, the likely impact on other trials, and other factors. That necessary discourse should involve all affected divisions and units, as well as the trial court administrator for the vicinage and perhaps the division manager. It will be necessary that all divisions work with the other branches and offices regarding arrangements concerning security, media access, parking, and other trial related issues that may arise.

A high volume juror guide was developed in 2006 by jury managers from the Atlantic and Essex vicinages, working with central office staff and the Committee for Jury Management. The jury managers were experienced with regard to jury selection in civil trials (Vioxx trials in the Atlantic vicinage) as well as criminal trials (in the Essex vicinage) that involved large numbers of jurors and significant media interest. The document was drafted as a means to assist staff in handling such events and was also presented as the background for a course at a 2006 conference of MAACM (the Mid-Atlantic Association for Court Management). It provides a framework by which to summon, qualify, provide orientation, dismiss, and select jurors in high volume/high profile trials -- so that the selection process: 1) is sufficient with regard to the number of anticipated challenges and the yield rate, 2) is cost-effective so that trial costs are controlled, and 3) is random pursuant to New Jersey statutes. The guide is organized as a policy and procedure model and includes documents and standardized methods that were used in these actual high volume jury selections for trials that were conducted in Atlantic City and Newark (and are consistent with procedures in other vicinages as well).

In terms of planning, the guide calls for the trial judge, assistant division manager/team leader, and jury manager to meet at least eight weeks before the proposed reporting date for jurors, for a notification memorandum to be developed to advise attorneys regarding details established at

that meeting, for the session order to be amended (if necessary), and for a special juror pool to be created for the trial in the jury automated system.

Items recommended to be addressed at the meeting of the trial judge, assistant division manager (or team leader), and jury manager would include the following: 1) the nature of the trial, including the degree and type of charge(s) in criminal trials or the nature of the claims in civil trials, 2) any seasonal factors such as holidays or vacation periods, 3) the number of parties, 4) the estimated number of peremptory challenges, 5) the desired size of the venire, panel, and jury, 6) the estimated time frame for the trial, 7) the trial start date, anticipated voir dire dates, and any possible changes to the usual selection process, 8) whether the usual juror orientation should be modified, 9) the impact of the notoriety of the case on juror numbers or other considerations, 10) the anticipated juror yield (based on experience), 11) the possible use of a voir dire questionnaire, 12) the possibility of sequestration, and 13) any unusual trial issues, such as media coverage and access.

## 5.5. Miscellaneous Circumstances

It goes without saying that if the court and counsel are misinformed, or inadequately informed by a juror, during voir dire, the parties' ability to meaningfully exercise peremptory challenges is infringed. Sometimes this is the result of purposeful dissembling, sometimes by inadvertence. It matters not the motivation, because in such a situation there has been a deprivation of the parties' fundamental right to a fair trial. State v. Thompson, 142 N.J. Super. 274, 280 (App. Div. 1976) (inadvertent failure to disclose prior four-month employment as a corrections officer 25 years before the voir dire at trial and present employment as a juvenile counselor warranted a new trial).

Notwithstanding the plain error inherent in false or erroneous voir dire information, there are circumstances where the error may be laid aside. In State v. Bianco, 391 N.J. Super. 509 (App. Div. 2007), a defendant was deemed to have waived the defect because he was aware of a juror's omission during voir dire, remained silent until after the verdict was rendered, and thereby relinquished his right to complain. The court distinguished State v. Thompson, supra, and several other similar cases that have held that an omission or falsification of information by a juror during voir dire will constitute grounds for reversal without a showing of prejudice if it can be shown that a peremptory challenge would have been utilized to excuse the juror had the information been known. The basis for different treatment lies in the fact that the juror who

omitted disclosing a prior familiarity with the defendant and an important witness in the case was found to have been likely biased *in favor of* the defendant, unlike all of the other cases where the juror was potentially biased *against* the defendant.

State v. Bianco, supra, also counsels that the trial judge, in his or her preliminary instructions to jurors after they're sworn, should instruct them regarding their obligation to immediately advise the court if at any point they realize that, during voir dire, they made a misstatement or omission. Id. at 523. See Model Jury Charge (Criminal; Instructions After Jury is Sworn, p.2).

## 5.6. Instructing Excused Jurors Returning to the Juror Assembly Room

When a trial judge dismisses jurors from voir dire and those jurors will be returning to the juror assembly room, the trial judge should consider instructing those jurors to not make statements about the case or share comments about their courtroom experience with fellow jurors in the assembly area. Such instruction should be given at the beginning of voir dire and may be repeated at the discretion of the trial judge. The concern prompting this instruction is that the returning jurors, even if they are not fully aware of the facts of a case, may make statements to other jurors that may affect the ability of those other jurors to serve, especially if assigned to voir dire for that same trial. This matter is addressed in the Criminal Model Jury Charge entitled "Preliminary Instructions to the Jury" which was revised April 15, 2013 to include the following:

> If you are excused and return to the juror assembly area, it is important that you do not discuss anything about this case or about your experience in this courtroom with your fellow jurors -- because any such information may affect the ability of those individuals to serve on this trial or another trial.

# 6. ANSWERS TO FREQUENTLY ASKED QUESTIONS

1. **In a criminal trial, where waiver of the full use of the model questions is not permitted, is the trial judge required to ask three open-ended questions?**

   The requirement for asking at least three open-ended questions has its genesis in Directive #4-07 which authorizes judges to provide jurors with a printed list of the standard juror questions. It is to be noted that because waiver is permitted in civil actions, the attorneys -- with the approval of the trial judge -- may eliminate all open-ended questions in civil trials if they so agree. Waiver in criminal trials was recommended to the Supreme Court by the Committee on Jury Selection but the recommendation was not approved.

2. **May the order of asking the questions be adjusted?**

   Yes. The process of selecting a fair and impartial jury should not be constrained by a rigid script. Directive #4-07 expressly states that "judges in their discretion may alter the sequence of the questions as they determine is appropriate." Reasons for departing from the order initially promulgated include a desire to ask certain case specific questions early on, to address hardship issues near the beginning of the process, to tackle key challenge for cause questions initially, or for other good cause.

3. **Are the mandatory questions carved in stone or may their language be modified?**

   Even if waiver is not agreed upon by the attorneys and the trial judge, modifications of wording on a case-appropriate basis is permitted by Directive #4-07.

4. **Is it permissible to include the biographical question and open-ended questions in the printed questionnaire, containing the standard questions, that is distributed to jurors?**

   Yes. Judges may, but are not required to, distribute copies of these questions to the jurors in the box and in the array.

5. **May individual jurors be questioned at sidebar, or must all communications between the judge and jurors be in open court?**

   Substantial discretion is lodged in the trial judge concerning how to actually conduct voir dire and particularly, how individualized communications with jurors are facilitated. Input from the attorneys is expected. Thus, the judge may make all inquiries at sidebar or in open court, as deemed appropriate. The judge may decide to hear some of the jurors' responses in open court and others at sidebar. All sidebar discussions, of course, must be audible and properly recorded or transcribed for purposes of the record.

# 7. TABLE OF APPENDICES

# ADMINISTRATIVE OFFICE OF THE COURTS
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## DIRECTIVE #4-07
**[SUPPLEMENTS AND MODIFIES DIRECTIVE #21-06]**

**[Questions or comments may be directed to 609-292-2634.]**

**TO:** **SUPERIOR COURT JUDGES**

**FROM:** **PHILIP S. CARCHMAN, JAD**

**SUBJ:** **JURY SELECTION – MODEL VOIR DIRE QUESTIONS PROMULGATED BY DIRECTIVE #21-06 – REVISED PROCEDURES AND QUESTIONS**

**DATE:** **MAY 16, 2007**

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This Directive supplements Directive #21-06 (issued December 11, 2006). That earlier Directive promulgated the Jury Selection Standards (Standards), including model jury voir dire questions, as approved by the Supreme Court. This Directive provides additional explanation or further direction from the Court with regard to juror questioning at voir dire. Where this Directive modifies voir dire procedures set forth in Directive #21-06, it supersedes the relevant portions of that Directive.

The standard voir dire questions approved by the Court and promulgated by the earlier Directive – as stated in the underlying Report by the Supreme Court Special Committee on Peremptory Challenges and Jury Voir Dire (Special Committee) and in the promulgated Standards – are intended to provide for a full and complete voir dire of prospective jurors so that reasons for any appropriate challenges for cause can be discovered and so that counsel is provided with information that may be relevant to their lawful exercise of peremptory challenges. The use of the standard voir dire questions required certain new procedures, as provided for in the Standards and the earlier Directive. The explanations discussed and modifications set forth in this Directive are reflections of the complexity of the jury selection process and of those procedures.

Following implementation of the procedures required by Directive #21-06, trial judges reported regarding their experience with the application of the Standards, incorporating comments from attorneys and jurors in some instances. Those were offered in a cooperative spirit that demonstrated a common interest in serving justice and a shared concern for efficient court operations. Such efforts are appreciated and encouraged and provide benefits not just for judges, but for others involved at trial, including jurors.

A key focus of comments involved judges being required to repeat the same question to each juror, with general agreement that such action is not necessary to ensure that jurors have

heard, understood, and can fully respond to the voir dire questions being asked. Although they understood that to be the intent of the questioning using the standard voir dire questions, many judges throughout the state indicated their belief that the procedures set forth in the Standards, particularly the questioning method, could be adjusted so as to assure thorough and complete questioning of prospective jurors without requiring excessive repeated readings of questions to jurors.

The matter was considered by the newly established Supreme Court Committee on Jury Selection in Criminal and Civil Trials (Committee), which is chaired by Appellate Division Judge Joseph F. Lisa and includes experienced judges and attorneys. After thorough consideration the Committee reached a broad consensus and issued a report to the Supreme Court dated March 30, 2007, recommending adjustments to the jury selection procedures and setting forth its proposed changes in this Supplemental Directive. The Committee agreed that the requirement that each prospective juror be verbally asked each question is unnecessary and, to some extent, counterproductive to the goals of the jury selection standards. The Committee was of the view that the modified procedure, if implemented, will provide a format that ensures that each prospective juror will furnish the information requested by each question, in a more expeditious and streamlined fashion, but nevertheless in a manner designed for reliability in eliciting the information and not dependent upon the juror's recollection of questions asked of other jurors. The modified procedure recommended by the Committee also would require that a judge ask a limited number of open-ended questions at voir dire, in order to require verbal responses from, and interaction with, prospective jurors, which will provide valuable information and insight during the selection process. The Committee also recommends that the waiver of the full use of the standard questions be approved for use at criminal trials. The Committee is of the view that the modified procedures will continue to adhere to the goals and purposes of the Jury Selection Standards that the Court previously approved.

After careful review, the Supreme Court has accepted the recommendations of the Committee, with the exception of that regarding waiver in criminal trials. Accordingly, the Court hereby modifies the procedures set forth in the Jury Selection Standards promulgated by Directive #21-06, as set forth below.

**A.** The first modification authorizes judges, as an alternative procedure, to conduct jury voir dire without being required to verbally ask each question to each juror. Under this alternate procedure the questions must be provided to jurors in print and, at a minimum, the voir dire elements described below must be part of the process.

1. At the beginning of the voir dire process, each prospective juror in the panel shall be furnished with a printed copy of the voir dire questions, which shall consist of all the standard questions for the case type, as supplemented and determined by the judge at the Rule 1:8-3 conference. The form of these questions calls for a yes or no answer. The names of witnesses shall be included in print, either on the form after question #4, or on a separate paper. All prospective jurors shall also be furnished with a pencil or pen.

2. Questions 1 though 6 may be addressed to the entire array in any trial, not just lengthy trials, and excusals may be made of those disqualified by their responses at the outset of the proceeding. Question 2a, pertaining to the length of the trial, may be included in this questioning regardless of the expected length of the trial.

3. The judge must read and review each question *en banc* with the first jurors seated in the box. The judge should instruct all jurors in the array to pay close attention and may tell them to mark their printed copy of the questions with their yes or no responses. The judge should instruct that, unless requested by a particular juror, the questions will not be read again, thus making this the appropriate opportunity for jurors to note their answers. The judge should also instruct that if a juror is unsure of his or her answer or is uncertain as to the meaning of the question, the juror should bring that to the judge's attention when called upon. Jurors will not place their names on the printed copies, and when a juror has completed the process, the printed copy will be returned to court staff and destroyed if written upon or damaged.

4. When reading the questions to the jurors in the box and the array, judges are encouraged to provide some explanatory commentary, in their own words, about the intent and meaning of some or all of the questions.

5. In addition to the printed questions, the judge shall also inform the jurors in the box and the array that jurors will also be individually asked several questions that they will be required to answer in narrative form. One such question will be the biographical question contained in the standard questionnaire. In addition to the biographical question, several other open-ended questions will be posed to prospective jurors, as will be discussed below. The judge may, but is not required to, distribute copies of these questions to the jurors in the box and in the array.

6. The judge may read all of the questions one time before addressing each juror in the box individually. The judge shall verify that the juror understood all of the printed questions and inquire whether the juror answered yes or uncertain to any of them. If so, appropriate follow up questions shall be asked. The judge will then ask that juror each of the open-ended questions, to which a verbal response shall be given and for which appropriate follow up questions will be asked. Each juror must then be verbally asked the two omnibus qualifying questions that follow the biographical question in the lists of standard questions for civil voir dire and criminal voir dire. Questioning shall be in open court or at sidebar, in the discretion of the court, with input from counsel.

7. As jurors are challenged for cause or peremptorily and excused from the box, the judge will seat the replacement juror(s). The judge will preliminarily ask each replacement juror if he or she understood the questions when they were read earlier. If the juror requests clarification or rereading of any one or more of the questions, the judge shall do so. The judge will then ask whether the juror answered yes or uncertain to any question and, if so, ask appropriate follow up questions. When questioning the jurors about the written form, the judge must refer to questions by number or description, sufficient to establish for the record the question to which the juror is responding. An unmarked copy of the printed form should be made part of the record as a court exhibit.

8. Some open-ended questions must be posed verbally to each juror to elicit a verbal response. The purpose of this requirement is to ensure that jurors verbalize their answers, so the court, attorneys and litigants can better assess the jurors' attitudes and ascertain any possible bias or prejudice, not evident from a yes or no response, that might interfere with the ability of that juror to be fair and impartial. Open-ended questions also will provide an opportunity to assess a juror's reasoning ability and capacity to remember information, demeanor, forthrightness or hesitancy, body

language, facial expressions, etc. It is recognized that specific questions to be posed verbally might appropriately differ from one case to another, depending upon the type of case, the anticipated evidence, the particular circumstances, etc. Therefore, rather than designating specific questions to be posed verbally to each juror, the determination is left to the court, with input from counsel, in each case.

The verbal questions should be selected based upon what is deemed particularly important in the jury selection process in that case. They could be derived from the standard list of questions or be developed without regard to the standard questions by the judge, with input from counsel, to address case-specific issues. The verbal questions should elicit open-ended answers. The judge must ask at least three such questions, in addition to the biographical question and the two omnibus qualifying questions. This is a minimum number and judges are encouraged to ask more where such action would be appropriate. If questions are derived from the standard list of questions, they must be reformulated to elicit open-ended answers.

Appended to this Supplemental Directive is a list of sample open-ended questions, provided here only for the purpose of assisting judges and counsel by illustrating the type of questions contemplated. These are examples; they are not model, or standard, open-ended questions. Some of the examples are reformulations of standard questions, and others are not. There is no requirement that any of these examples be used in any case, although they may be used. The open-ended questions shall be asked either at sidebar or in open court, in the discretion of the court, with input from counsel.

**B.** The following is clarification regarding Directive #21-06.

With regard to the ability of jurors to read voir dire questions that are displayed or provided in print, trial judges should keep in mind that jurors are asked on their qualification questionnaire (which they return in advance of service) whether they can read and understand the English language. Although some jurors nonetheless may raise language issues for the first time during voir dire, the Jury Management Office will have addressed any language questions that the juror indicated on his or her qualification questionnaire. Consistent with the Americans with Disabilities Act (ADA), the Judiciary will, upon request, provide reasonable accommodations regarding the printed questions, such as providing a larger print size.

While use of the standard voir dire questions is mandatory, judges in their discretion may alter the sequence of the questions as they determine is appropriate – including whether to ask key challenge for cause questions early on, to incorporate questions suggested by counsel, or to integrate case type specific questions. The earlier Report of the Special Committee suggested that judges should not be required to follow a "rigid script" in conducting voir dire. The voir dire questions to be asked, including the sequence in which to ask them, modifications of wording on a case-appropriate basis, the inclusion of supplemental questions requested by counsel, and the proposed open-ended questions, should be part of the Rule 1:8-3 conference. The promulgated standard voir dire questions are posted on the Judiciary's Internet site in Word format.

With regard to asking the "biographical" question as separate parts rather than as a whole, that question is intended to be asked as a single question so that jurors must select the topic that they want to answer first. As noted in the earlier Special Committee Report (Report at page 35): "The jurors, in responding in narrative fashion to the variety of subjects presented

in the question, will also provide important information by self-selecting what they choose to talk about."

Criminal Standard Question #25 (renumbered on the attached revision as #27) was the subject of a number of specific comments. A criminal defendant may waive the inclusion of this question, which deals with that defendant's decision not to testify. Where that question is waived by defendant, the trial judge must not only ensure that the question is not asked, but also that neither the question nor any reference to the question is included in the list of questions that is distributed. The note that is included with that question in the standard criminal questions includes the following: "The defendant's decision in that regard should be discussed during the voir dire conference."

As part of its charge, the Committee on Jury Selection in Criminal and Civil Trials will be responsible for considering and making recommendations regarding any changes to the standard voir dire questions, the introduction of possible additional case type questions, the drafting of a voir dire manual, development of training programs for judges and attorneys, and other related efforts. While the membership of that committee is necessarily limited in number, the Court trusts that every judge and every attorney, not just those appointed to the Committee, will continue to be involved in our ongoing efforts to improve the trial process.

**C.** Also attached to this supplemental directive are revised standard voir dire questions, which supersede those earlier promulgated by Directive #21-06.

Any questions or comments regarding this Supplemental Directive (Directive #4-07), the underlying Directive (Directive #21-06), or any related materials, including standard voir dire questions and open-ended voir dire questions, may be directed to Michael F. Garrahan, Esq., of the AOC's Office of Trial Court Services (and staff to the Committee on Jury Selection) by e-mail (Michael.Garrahan@judiciary.state.nj.us) or by phone (609-292-2634).

P.S.C.

attachments
cc: Chief Justice James R. Zazzali
Associate Justices
Hon. Joseph F. Lisa
Assignment Judges
Assignment Judge Designate Travis L. Francis
Civil and Criminal Presiding Judges
Theodore J. Fetter, Deputy Admin. Director
AOC Directors and Assistant Directors
Trial Court Administrators
Operations Managers/ATCAs
Vicinage Jury Managers
Michael F. Garrahan, Jury Programs
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant

# MODEL JURY SELECTION QUESTIONS

## Standard Jury Voir Dire

## Civil

[Revised as Promulgated by Directive #4-07]

1. In order to be qualified under New Jersey law to serve on a jury, a person must have certain qualifying characteristics. A juror must be:

   - age 18 or older
   - a citizen of the United States
   - able to read and understand the English language.
   - a resident of _____ county (*the summoning county*)

   Also a juror must not:
   - have been convicted of any indictable offense in any state or federal court, and
   - must not have any physical or mental disability which would prevent the person from properly serving as a juror. Please consider that the Judiciary will provide reasonable accommodations consistent with the Americans with Disabilities Act.

   Is there any one of you who does not meet these requirements?

2 a. This trial is expected to last for _____. Is there anything about the length or scheduling of the trial that would interfere with your ability to serve?

   b. Do you have any medical, personal or financial problem that would prevent you from serving on this jury?

   c. Do any of you have a special need or require a reasonable accommodation to help you in listening, paying attention, reading printed materials, deliberating, or otherwise participating as a fair juror? The court will provide reasonable accommodations to your special needs but I will only be aware of any such needs if you let me know about them. My only purpose in asking you these circumstances relates to your ability to serve as a juror. If you have any such request, please raise your hand and I will speak to you at sidebar.

   [Note: If a juror makes a request, contact the ADA Coordinator to see if the TCA can meet the request right away (*e.g.*, a portable speaker system available immediately) or if the juror's service should be deferred so that the TCA can arrange the accommodation timely (*e.g.*, an ASL interpreter that may require three or four months' reservation in advance).]

3. *Introduce the lawyers and the parties.* Do any of you know either/any of the lawyers? Has either/any of them or anyone in their office ever represented you or brought any action against you? Do you know Mr./Ms. (names of parties)?

4. *Read names of potential witnesses.* Do you know any of the potential witnesses? [Note: List witnesses' names here or attach a separate sheet.]

5. I have already briefly described the case. Do you know anything about this case from any source other than what I've just told you?

6. Are any of you familiar with the area or address of the incident?

7. Have you or any family member or close personal friend ever filed a claim or a lawsuit of any kind?

8. Has anyone ever filed a claim or a lawsuit against you or a member of your family or a close friend?

9. Have you or a family member or close personal friend either currently or in the past been involved as a party…as either a plaintiff or a defendant…in a lawsuit involving damages for personal injury?

10. A plaintiff is a person or corporation [or other entity] who has initiated a lawsuit. Do you have an opinion for or against a plaintiff simply because he or she has brought a lawsuit?

11. a. A defendant is a person or corporation [or other entity] against whom a lawsuit has been brought. Do you have an opinion for or against a defendant simply because a lawsuit has been brought against him or her?

    [Ask if applicable]

    b. The defendant is a corporation. Under the law, a corporation is entitled to be treated the same as anyone else and is entitled to be treated the same as a private individual. Would any of you have any difficulty in accepting that principle?

12. The court is aware that there has been a great deal of public discussion about something called Tort Reform (laws that restrict the right to sue or limit the amount recovered). Do you have an opinion, one way or the other, on this subject?

13. If the law and evidence warranted, would you be able to render a verdict in favor of the plaintiff or defendant regardless of any sympathy you may have for either party?

14. Based on what I have told you, is there anything about this case, or the nature of the claim itself, that would interfere with your ability to be fair and impartial and to apply the law as instructed by the court?

15. Can you accept the law as explained by the court and apply it to the facts regardless of your personal beliefs about what the law is or should be?

16. Have you ever served on a trial jury before today, here in New Jersey or in any state court or federal court?

17. Do you know anyone else in the jury box other than as a result of reporting here today?

18. Would your verdict in this case be influenced in any way by any factors other than the evidence in the courtroom such as friendships or family relationships or the type of work you do?

19. Have you ever been a witness in a civil matter, regardless of whether it went to trial?

20. Have you ever testified in any court proceeding?

21. New Jersey law requires that a plaintiff has to prove his or her case against a defendant before he or she is entitled to recover money damages from that defendant. Do you have any difficulty accepting that concept?

## Biographical Question

*The following questions should be asked of each potential juror, one by one, in the jury box:*

You have answered a series of questions about civil trials and civil cases. Now we would like to learn a little bit about each of you. Please tell us the type of work you do; whether you have ever done any type of work which is substantially different from what you do now; whether you've served in the military; what is your educational history; who else lives in your household and the type of work they do, if any; whether you have any children living elsewhere and the type of work they do; which television shows you watch; any sources from which you learn the news, i.e. the newspapers you read or radio or TV news stations you listen to; if you have a bumper sticker that does not pertain to a political candidate, what does it say? What you do in your spare time and anything else you feel is important.

[Note: This question is intended to allow and encourage the juror to speak in a narrative fashion, rather than answer the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. If the juror omits a response to one or more sections, the judge should follow up by asking, in effect: "I notice you didn't mention [specify]. Can you please tell us about that?"]

## Omnibus Qualification Questions (Two)

1. Is there anything, whether or not covered in the previous questions, which would affect your ability to be a fair and impartial juror or in any way be a problem for you in serving on this jury?

2. Is there anything else that you feel is important for the parties in this case to know about you?

# Examples of Open-Ended Questions - Civil

## General

1. What do you think about large corporations that are named as defendants in law suits? Would you consider the legal rights and responsibilities of a corporation differently than those of an actual person? Why do you feel this way?

2. Do you have any feelings about whether or not our society is too litigious, that is, that people sue over things too often that they should not sue over; or do you think, on the other hand, there are too many restrictions on the right of people to sue for legitimate reasons; or do you think our system has struck the right balance in this regard? Have you heard of the concept of "tort reform" (laws that restrict the right to sue or limit the amount that may be recovered)? How do you feel about such laws?

3. There may be expert witnesses in this case. If there are, I will instruct you in more detail, but let me say for now that you do not have to accept their opinions, but you should consider their opinions with an open mind. The expected field of expertise of these witnesses is _____. How do you feel about experts in that field? Will you be able to evaluate their opinions fairly and with an open mind? Why do you feel the way you do about this?

4. Do you have any particular feelings about whether people should be allowed to sue doctors, hospitals, and other health care providers if they are dissatisfied with the results of medical treatment? Tell me how you feel about this and about what kind of circumstances you think should have to be proven before a dissatisfied patient should be allowed to recover damages?

5. How do you feel about the jury system? Do you think law suits would be better decided by some sort of professional hearing officers, arbitration panels, or judges? In our country, under our constitution, in cases such as this one, people have the right to a jury trial. If it were up to you, should that right continue to exist or be eliminated?

6. Do you believe that you will make a good juror for this case? Please explain.

7. What are your thoughts or feelings about lawsuits in general; damages awarded by juries; our justice system; the jury system; the "McDonald's" hot coffee spill verdict?

8. Some people believe that people who have sued for injuries typically exaggerate their injuries. Others believe that does not typically occur. What do you believe and why?

## Actions Against Governmental Units

1. Tell us how you feel about the ability of the government to take private property.

2. Have you or an immediate family member ever applied for a variance from a zoning board of adjustment? If so, please tell what happened and how you felt about the process.

## Commercial Disputes

1. Tell us about your experiences in investing, including stocks, bonds, mutual funds, and real estate.

## Employment Discrimination

1. What are your thoughts or feelings about employers in the workplace setting?

2. What are your thoughts or feelings about employees in the workplace setting?

3. Have you ever had experience supervising, including evaluating or disciplining others? Tell us about supervisory position you had in your working career in which you had the greatest amount of supervisory experience and how you felt about that responsibility.

4. Have you ever had experience hiring or firing others? Tell us how you felt about having that responsibility?

5. Have you ever been supervised or disciplined at work or disagreed with a decision of your employer? Tell us about how you feel about it.

## Medical Negligence

1. What are your thoughts or feelings about medical treatment by physicians/dentists/chiropractors/ psychologists/hospitals/nurses?

## Products Liability

1. Some people believe that companies cut corners on testing (or safety supervision/manufacture/ design, etc.) when placing products on the market. Others believe that companies do not cut corners on testing (etc.). What do you believe and why?

## Standard Jury Voir Dire
## (Auto, Slip & Fall, Medical Negligence)

**Auto**

1. Please indicate if you are a licensed driver.

2. Have you or any family member or close personal friend ever been involved in a motor vehicle accident in which an injury resulted?

3. Have you or a family member or close personal friend sustained an injury to the _____ or have chronic problems with _____?

[Ask if applicable]

4. Have you or a family member or close personal friend utilized the services of a chiropractor?

5. The court is aware that there has been a great deal of public discussion in print and in the media about automobile accident lawsuits and automobile accident claims. Do you have an opinion, one way or the other on this subject?

**Slip and Fall**

1. Are you a tenant?

2. Are you a landlord?

3. Are you a homeowner?

4. Have you or a family member or close personal friend ever been involved …as either a plaintiff or a defendant…in a slip and fall accident in which an injury resulted?

5. Have you or a family member or close personal friend ever been involved in litigation or filed a claim of any sort?

6. Have you or a family member or close personal friend sustained an injury to the _____ or have chronic problems with _____?

**Medical Negligence** (**Note**: This information is not to be included on printed copies provided to jurors.)

It is expected that the parties will submit a few specific questions seeking juror attitudes towards particular injury claims, such as pecuniary loss for wrongful death or a claim for emotional distress, if applicable, or juror attitudes about other particular types of claims, such as wrongful birth or informed consent issues. In particular, wrongful birth claims might require a questionnaire or separate voir dire to address attitudes about termination of pregnancy.

Before asking the questions below, explain that the trial involves a claim of medical negligence, which people sometimes refer to as medical malpractice and that the terms both mean the same thing.

1. Have you, or family member, or a close personal friend, ever had any experience, either so good or so bad, with a doctor or any other health care provider, that would make it difficult for you to sit as an impartial juror in this matter?

2. If the law and the evidence warranted, could you award damages for the plaintiff even if you felt sympathy for the doctor?

3. Regardless of plaintiff's present condition, if the law and evidence warranted, could you render a verdict in favor of the defendant despite being sympathetic to the plaintiff?

4. Have you, any family member, or close personal friend ever worked for:
   - Attorneys
   - Doctors, Hospitals or Physical Therapists
   - Any type of health care provider
   - Any ambulance/EMT/Rescue

5. Have you, or any members of your family, been employed in processing, investigating or handling any type of medical or personal injury claims?

6. Is there anything that you may have read in the print media or seen on television or heard on the radio about medical negligence cases or caps or limits on jury verdicts or awards that would prevent you from deciding this case fairly and impartially on the facts presented?

7. This case involves a claim against the defendant for injuries suffered by the plaintiff as a result of alleged medical negligence. Do you have any existing opinions or strong feelings one way or another about such cases?

8. Have any of you or members of your immediate family ever suffered any complications from [specify the medical field involved]?

9 Do you have any familiarity with [specify the type of medical condition involved] or any familiarity with the types of treatment available?

10. Are you, or have you ever been, related (by blood or marriage) to anyone affiliated with the health care field?

11. Have you or any relative or close personal friend ever had a dispute with respect to a health care issue of any kind with a doctor, chiropractor, dentist, nurse, hospital employee, technician or other person employed in the health care field?

12. Have you or any relative or close personal friend ever brought a claim against a doctor, chiropractor, dentist, nurse or hospital for an injury allegedly caused by a doctor, dentist, nurse or hospital?

13. Have you or any relative or close personal friend ever considered bringing a medical or dental negligence action but did not do so?

14. Have you or any relative or close personal friend ever been involved with treatment which did not produce the desired outcome?

# MODEL JURY SELECTION QUESTIONS

## Standard Jury Voir Dire

## Criminal

[Revised as Promulgated by Directive #4-07]

1. In order to be qualified under New Jersey law to serve on a jury, a person must have certain qualifying characteristics. A juror must be:

   - age 18 or older
   - a citizen of the United States
   - able to read and understand the English language.
   - a resident of _____ county (*the summoning county*)

   Also a juror must not:
   - have been convicted of any indictable offense in any state or federal court, and
   - must not have any physical or mental disability which would prevent the person from properly serving as a juror. Please consider that the Judiciary will provide reasonable accommodations consistent with the Americans with Disabilities Act.

   Is there any one of you who does not meet these requirements?

2 a. This trial is expected to last for _____. Is there anything about the length or scheduling of the trial that would interfere with your ability to serve?

   b. Do you have any medical, personal or financial problem that would prevent you from serving on this jury?

   c. Do any of you have a special need or require a reasonable accommodation to help you in listening, paying attention, reading printed materials, deliberating, or otherwise participating as a fair juror? The court will provide reasonable accommodations to your special needs but I will only be aware of any such needs if you let me know about them. My only purpose in asking you these circumstances relates to your ability to serve as a juror. If you have any such request, please raise your hand and I will speak to you at sidebar.

   [Note: If a juror makes a request, contact the ADA Coordinator to see if the TCA can meet the request right away (*e.g.*, a portable speaker system available immediately) or if the juror's service should be deferred so that the TCA can arrange the accommodation timely (*e.g.*, an ASL interpreter that may require three or four months' reservation in advance).]

3. *Introduce the lawyers and the defendant.* Do any of you know either/any of the lawyers? Has either/any of them or anyone in their office ever represented you or brought any action against you? Do you know Mr./Ms. (names of defendant)?

4. *Read names of potential witnesses.* Do you know any of the potential witnesses? [Note: List witnesses' names here or attach a separate sheet.]

5. I have already briefly described the case. Do you know anything about this case from any source other than what I've just told you?

6. Are any of you familiar with the area or address of the incident?

7. Have you ever served on a trial jury before today, here in New Jersey or in any state court or federal court?

8. Have you ever sat as a grand juror??

9. Do you know anyone else in the jury box other than as a result of reporting here today?

10. Would your verdict in this case be influenced in any way by any factors other than the evidence in the courtroom, such as friendships or family relationships or the type of work you do?

11. Is there anything about the nature of the charge itself that would interfere with your impartiality?

12. Have you ever been a witness in a criminal case, regardless of whether it went to trial?

13. Have you ever testified in any court proceeding?

14. Have you ever applied for a job as a state or local police officer or with a sheriff's department or county jail or state prison?

15. Have you, or any family member or close friend, ever worked for any agency such as a police department, prosecutor's office, the FBI, the DEA, or a sheriff's department, jail or prison, either in New Jersey or elsewhere?

16. As a general proposition, do you think that a police officer is more likely or less likely to tell the truth than a witness who is not a police officer?

17. Would any of you give greater or lesser weight to the testimony of a police officer merely because of his or her status as a police officer?

18. Have you or any family member or close friend ever been accused of committing an offense other than a minor motor vehicle offense?

19. Have you or any family member or close friend ever been the victim of a crime, whether it was reported to law enforcement or not?

20. Would you have any difficulty following the principle that the defendant on trial is presumed to be innocent and must be found not guilty of that charge unless each and every essential element of an offense charged is proved beyond a reasonable doubt?

21. The indictment is not evidence of guilt. It is simply a charging document. Would the fact that the defendant has been arrested and indicted, and is here in court facing these charges, cause you to have preconceived opinions on the defendant's guilt or innocence?

22. I have already given you the definition of reasonable doubt, and will explain it again at the end of the trial. Would any of you have any difficulty in voting not guilty if the State fails to prove the charge beyond a reasonable doubt?

23. If the State proves each element of the alleged offense(s) beyond a reasonable doubt, would you have any difficulty in returning a verdict of guilty?

24. The burden of proving each element of a crime beyond a reasonable doubt rests upon the prosecution and that burden never shifts to the defendant. The defendant in a criminal case has no obligation or duty to prove his/her innocence or offer any proof relating to his/her innocence. Would any of you have any difficulty in following these principles?

25. Would you have any difficulty or reluctance in accepting the law as explained by the court and applying it to the facts regardless of your personal beliefs about what the law should be or is?

26. Is there anything about this case, based on what I've told you, that would interfere with your ability to be fair and impartial?

27. A defendant in a criminal case has the absolute right to remain silent and has the absolute right not to testify. If a defendant chooses not to testify, the jury is prohibited from drawing any negative conclusions from that choice. The defendant is presumed innocent whether he testifies or not. Would any of you have any difficulty in following these principles?

    [Note: The defendant has the right to waive this question. The defendant's decision in that regard should be discussed during the voir dire conference.]

## **Biographical Question**

*The following questions should be asked of each potential juror, one by one, in the jury box:*

You have answered a series of questions about criminal trials and criminal charges. Now we would like to learn a little bit about each of you. Please tell us the type of work you do; whether you have ever done any type of work which is substantially different from what you do now; whether you've served in the military; what is your educational history; who else lives in your household and the type of work they do; whether you have any children living elsewhere and the type of work they do; which television shows you watch; any sources from which you learn the news, i.e., the newspapers you read or radio or TV news stations you listen to; if you have a bumper sticker that does not pertain to a political candidate, what does it say; what you do in your spare time and anything else you feel is important.

[Note: This question is intended to allow and encourage the juror to speak in a narrative fashion, rather than answer the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. If the juror omits a response to one or more sections, the judge should follow up by asking, in effect: "I notice you didn't mention [specify]. Can you please tell us about that?"]

## Omnibus Qualification Questions (Two)

1. Is there anything, whether or not covered by the previous questions, which would affect your ability to be a fair and impartial juror or in any way be a problem for you in serving on this jury?

2. Is there anything else that you feel is important for the parties in this case to know about you?

## Examples of Open-Ended Questions - Criminal

1. How do you feel about testimony of law enforcement officers as opposed to testimony by other witnesses who are not law enforcement officers? For example, do you think a law enforcement officer is more likely, less likely, or as likely to tell the truth as a witness who is not in law enforcement? What makes you feel the way you do about this?

2. What do you think about the principle that the defendant on trial is presumed to be innocent and must not be found guilty unless each and every essential element of an offense is proved by the State beyond a reasonable doubt? Would you have any difficulty follow that principle? What makes you feel the way you do about this?

3. What was your reaction when you first heard me explain the nature of the charges against the defendant in this case? Is there anything about the nature of the charges that will make it difficult for you to consider the evidence, the arguments of the attorneys, and my instructions on the law, with an open mind? What makes you feel the way you do about this?

4. Do you have any feelings about the fact that the defendant was arrested and charged with a criminal offense in an indictment? Do these circumstances cause you to have any preconceived notions about the defendant's guilt? What makes you feel the way you do about this?

5. Do you understand that a defendant in a criminal trial does not have to prove his or her innocence, does not have to present any evidence, does not have to testify, and does not even have to be present during the trial if he or she chooses not to be? How do you feel about these principles of our legal system? Will you be able to abide by them in deciding this case?

6. Do you believe the criminal justice system is fair and effective? Please explain.

7. How do you feel about the so-called war on drugs? For example, do you think the amount of resources the government devotes to enforcing the criminal drug laws and prosecuting suspected offenders is too much, not enough, or about right? Do you think resources could be more effectively used in other ways to address the drug problem? Why do you feel this way?

8. What do you think about our drug laws? Are they too strict or too liberal? Are the penalties too harsh or too lenient? Do you think that marijuana should be legalized for recreational or medicinal uses?

9. How do you feel about gun control laws?

10. Do you believe that you will make a good juror for this case? Please explain.

## Sample Additional Criminal Voir Dire Questions

1. Have you or any family member or close friends ever been involved in a domestic violence situation, whether or not the incident was reported to law enforcement?

2. Have you or any family member or close friends been affected by the use of illegal drugs (alcohol)?

3. Have you or any family member or close friends been the victim of a sexual assault, whether or not it was reported to law enforcement?

4. Are you the member of any religious or other organization whose beliefs are such that it would violate those beliefs if you had to judge the guilt or innocence of another person?

5. It is anticipated that explicit sexual language will be used by witnesses during the course of the trial. Will that fact, or the fact that a witness may use sexually slang or other detailed descriptions of sexual acts interfere with your ability to be a fair and impartial juror.

6. One or more of the witnesses in this case will be children. Is there any juror that believes that children are less likely than adults to tell the truth?

7. Have you or any family member or close friends ever been accused of any type of sexual offense?

8. Have you or any family member or close friends ever been accused of committing a crime against a child?

9. It is alleged that the victim and the defendant in this matter are not of the same race. Would that affect your ability to be fair and impartial?

10. During the course of the trial, the defendant (various witnesses) will utilize the services of an interpreter. Would that affect your ability to be fair and impartial?

11. Have you or any family member or close friends ever suffered from and mental disease or defect?

12. The defendant in this case intends to rely on the defense of insanity. Would that affect your ability to be fair and impartial?

13. Would you be more likely to believe or disbelieve a person's testimony because of the fact that the person was a member of the clergy or had studied to be a member of the clergy?

14. Have you or any family member or close friends ever had any experiences with law enforcement, positive or negative, that would influence your ability to be fair and impartial?

15. Have you, a family member or close friend ever worked for or performed work as a consultant for the State of New Jersey, a county or local government entity?

16. Have you, a family member or close friend ever filed for bankruptcy?

17. Would the fact that someone has filed for bankruptcy or been in bankruptcy cause you to have any bias or prejudice against a person or sympathy for a person?

18. Would you be more likely to believe or disbelieve a person's testimony because of the fact that the person had filed for bankruptcy or been in bankruptcy?

19. Do you believe that if a child delays disclosing that he/she was the victim of a sexual offense for a long period of time, that this is pertinent in evaluating the credibility of the child/victim? (Child Sexual Abuse Accommodation Syndrome.)

20. Are you a member of any group or organization that promotes the right of an individual to possess or carry firearms? If so, please discuss.

21. Have you, a family member or close friend ever been charged with an alcohol related crime or motor vehicle offense?

22. Have you, a family member or close friend ever been the victim in a motor vehicle collision where a driver had consumed alcohol?