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Professional Malpractice

Medical Malpractice Voir Dire

Use questions that permit insight into the potential juror's thought process

By Alan Medvin and Abbott S. Brown

Long ago, prior to the Supreme Court's pronouncement in *State v. Manley*, 54 N.J. 259 (1969), lawyers in New Jersey conducted voir dire. However, as the Court observed in *Manley*, this process was often abused by attorneys who attempted to try their case during voir dire. As a result, the *Manley* Court instructed that Rule 1:8-3(a) should be revised to have "the voir dire conducted exclusively by or through the trial judges." Thereafter, the pendulum swung in the other direction, and often the voir dire was perfunctory. Although some judges permitted wide-ranging voir dire, other judges rushed through the process as if they were paying the jury by the hour.

The proper balance seems to have been found in May of 2007, when the Supreme Court issued Directive #4-07, which created a substantially new process for voir dire. The new process requires the use of standard general and malpractice-related questions, and the innovation that potential jurors must be asked a minimum of three open-ended questions. This process takes more time, but results in the revelation of considerably more information about each potential juror. This has prompted the question in some quarters: Does the new voir dire process take too much time and provide TMI (too much information)?

The revised voir dire process was the product of the "Special Committee on Peremptory Challenges and Jury Voir Dire," which was appointed by the Supreme Court in 2004, and chaired by the Hon. Joseph Lisa. The Court charged this committee to make recommendations to improve jury selection and peremptory challenges. The "Lisa Committee" issued its report in May of 2005. Most of the recommendations of the Lisa Committee were adopted by the Supreme Court in Directive #21-06. In May of 2007 the Court refined the procedure when it issued Directive #4-07.

One of the key recommendations of the Lisa Committee was the mandatory use of standard questions for all personal injury cases, with additional standard questions for medical malpractice and other cases. Perhaps the most significant innovation of the Lisa Committee was the mandatory use of a standard biographical question, two omnibus qualifying questions, and a "minimum of three open-ended questions." The open-ended questions were explicitly intended to engage the jurors in a conversation, and thereby give counsel the opportunity to observe each juror's demeanor, candor, intelligence, wealth of knowledge, and views of the world and litigation process.

The courts promptly held that compliance with the Directive is mandatory. See *State v. Morales*, 390 N.J. Super 470, 474-473 (App. Div. 2007). More recently, the critical importance of a proper voir dire was explained in *Pellicer v. St. Barnabas Hospital*, 200 N. J. 22 (2009), where a verdict was reversed because of an improper voir dire, and the mandatory nature of Directive #4-07 was confirmed by *Gonzales v. Silver*, 407 N. J. Super. 576 (App. Div. 2009).

In *Pellicer, supra,* a malpractice case which predated Directives #21-06 and #4-07, the plaintiff obtained a verdict of $70,891,781.59. The defendants appealed, contending that conducting the voir dire of potential jurors in open court, rather than at sidebar, exposed the jurors to "prejudicial views that interfered with their ability to decide the issues fairly and impartially." Justice Hoens began the analysis by observing that "The right to a fair and impartial jury is a 'fundamental . . . [one that is to be] jealously guarded by the courts." The Court then explained that "the inquiries needed to uncover hidden bias of a potential juror may be wide-ranging and open-ended." The Court was well aware that the required voir dire may often inquire about sensitive or personal matters. "Those subjects are often ones that a prospective juror might be

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reluctant to discuss candidly if compelled to do so in open court, but as to which candor is essential." However, "our jury selection mechanisms are designed to create the opportunity in which any relevant, preconceived notions will be revealed and explored, and all pre-existing biases will be exposed. In this way, we ensure that the court and the litigants have the information that they need to decide whether a particular individual should not sit as a member of the panel." 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. 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 Court would not permit the verdict to stand. In *Gonzales v. Silver*, 407 N. J. Super. 576 (App. Div. 2009), another malpractice case, the Appellate Division observed that the trial court's voir dire did not "technically comply" with Directive #4-07. Specifically, the trial court "failed to ask three open ended questions of each prospective juror during voir dire, as required by Directive #04-07." Since the case was being reversed on other grounds, the Appellate Division instructed that on retrial the voir dire must "conform to the dictates of the Directives, which are unquestionably binding on all trial courts." 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." 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." The Court supported this conclusion by observing that the Report of the Lisa Committee explained that judges are not required to follow a "rigid script" in conducting voir dire." This point is significant, in that the voir dire can be customized to fit the particular facts and circumstances of the case about to be tried. This concept is consistent with Jury Selection Standard 2, which provides that "with the consent of counsel and the approval of the judge, full use of the model questions in civil trials may be waived." Nevertheless, *Gonzales* makes clear that compliance with Directive #4-07 is mandatory, absent such a waiver.

So where does all of this leave the lawyer who is starting the trial of a medical malpractice case? Two points must be emphasized. First, the attorney must insist on the full process, including the use of the standard basic voir dire questions, the standard medical malpractice questions, and the use of truly open-ended questions. The Court in *Gonzales* observed, "[A]lthough the judge admittedly failed to ask three open-ended questions of each prospective juror during voir dire, as required by Directive #04-07, plaintiff was somewhat complicit in the procedure ultimately employed." Similarly, in the recent unpublished case of *Molan v. Mcdivitt*, A-1600-08T31600-08T3 (App. Div. 2009), the Court denied an appeal based upon an inadequate voir dire, explaining, "Considering this record on appeal, we are reluctant to overturn the verdict where counsel has acquiesced in the selection process." Thus, the first lesson to be learned is that you may have to fight for your right to voir dire. One must make a clear and unambiguous record if not granted a proper voir dire. The failure to do so may preclude a successful appellate review of this issue.

Second, and most importantly, we must use truly "open-ended" questions, i.e., questions that cannot be answered with a yes or no, and that permit insight into the potential juror's thought process. Some examples of truly open-ended questions include: (1) Who are the two people outside of family and friends that you most admire, and two people that you least admire, and why do you feel that way? (2) What would you do to solve the problem of people who do not have medical insurance? (3) What would you do to solve the problems of the homeless? and (4): What do you think are the biggest problems with our system of justice, and what would you do to change it?

Justice Hoens spoke of aspiring to obtain a jury "as nearly impartial as the lot of humanity will admit." The proper use of voir dire may well allow us to achieve this goal. ■