

Seminar: Top 10 Issues Facing New Lawyers – Boardwalk Seminar 2017
Date: 4/28/17 – 4/28/17
Time: 2:30pm – 3:00pm
Topic: Essentials for Pre-Trial Memo and Voir Dire
Location: Harrah’s Resort, Atlantic City, NJ

Issue: **INCLUSION OF OPEN ENDED VOIR DIRE QUESTIONS PURSUANT TO NEW JERSEY SUPREME COURT COMMITTEE OF JURY SELECTION DIRECTIVE 4-07**

Presenter: Oliver T. Barry, Esq.

Despite published caselaw stating compliance with Directive 4-07 is mandatory, as a practical matter most trial judges do not want to take the time to conduct meaningful voir dire because, frankly, it takes significantly longer to ask each prospective juror narrative questions. It is critical that the request and caselaw supporting open-ended questions during voir dire are laid out in the pretrial memorandum. There are a few points that should be stressed: (1) open-ended questions are mandatory; (2) failure to comply with the directive mandates automatic reversal; (3) open-ended questions must be asked separately and cannot be lumped in as part of the omnibus or biographical questions; and (4) the questions should be posed on a case-by-case basis and be specific to the issues of the case. A sample portion of the pretrial memorandum language used by Barry, Corrado, & Grassi, P.C. is included below for reference:

SAMPLE PRETRIAL MEMORANDUM SECTION

VOIR DIRE – OPEN ENDED QUESTIONS

*Plaintiff requests the court include separate open-ended questions be posed individually to each prospective juror as required by the New Jersey Supreme Court Committee on Jury Selection Directive 4-07, attached hereto as Exhibit [“?”]. Failure to comply with the directive is presumptively unfair and mandates reversal. Erga v. Chalmers, Docket No. A-2632-12T4, 2012 WL 3437401, at *4 (N.J. Sup. Ct. App. Div. July 16, 2014)(A copy of this unpublished opinion is attached hereto as Exhibit [“?”]). Open-ended questions should be designed to elicit a narrative response and be separate and apart from omnibus or biographical questions. See Heredia v. Piccinnini, Docket No. A-5714-14T1, at *8 (N.J. Sup. Ct. App. Div. Feb. 15, 2017)(stating that follow up omnibus and biographical questions calling for something other than a yes or no, while*

Listed below are four sample “open-ended” questions plaintiffs request be asked at side bar separate from the remainder of any and all appropriate voir dire questions. Directive 4-07 is mandatory, Gonzalez v. Silver, 407 N.J. Super. 576, 590-91(App. Div. 2009), but does not require a rigid script and encourages questions to be asked on a case-by case basis. Id. at 596. Plaintiff submits that questions one pertains to a major issue in this case, the lack of visible property damage to plaintiff’s vehicle, and is necessary so that counsel may explore any implicit biases on this issue. Question two is necessary so that counsel may explore potential bias towards homosexuals. Questions three and four pertain to exploring

potential jurors' thought processes and belief systems as contemplated by the directive.

- 1. Please tell us what you think about car crashes resulting in little or no property damage to a vehicle where the person suffers serious injuries?*
- 2. What are your feelings about same-sex couples?*
- 3. Please identify a person who you greatly admire, excluding family and friends, and explain what about them makes you admire them.*
- 4. Please tell us why you think you would make a good juror in this case and give an example.*

After raising in the pretrial memorandum, it is important to reiterate the request for open ended questions verbally during the pretrial conference. And it may be necessary to remind the judge during voir dire to pose separate open-ended questions to prospective jurors. It is a difficult line to walk, but if done correctly and with the proper supporting caselaw it goes a long way towards getting meaningful information about your prospective jurors. And, at worst, it protects the record for a potential appeal. See Gonzalez, 407 N.J. Super. At 596 (stating that counsel has a duty to raise objection to the jury selection process).