New Jersey Association for Justice - Boardwalk Seminar 2017

THE ART AND LAW OF JURY SELECTION

I. The Cultural Zeitgeist and Jury Selection in the 21st Century; Submitted by: Kevin M. Costello, Esq.

A. INTRODUCTION

I cite some sources when I can so that you can do your own investigation, and so you know I didn't make this stuff up.

On the other hand, some of it *is* "me" source, given the number of trials that I've done over the years (especially the more recent ones). If I'm not quoting a source, assume I'm quoting "me" on stuff. Hard-won wisdom and all that.

My goal here is to get you to *think* about these things, not follow hard and fast rules (cause, as you'll see there *are* none). As always, there's no "right" answer that always applies. The solution that works for one person on a Monday won't work for the same person on a Tuesday, etc. Use all of this, some of this or none of this as you think best, but at least *think about* this.

B. THE BEST KEPT "NON-SECRET" IN THE COURT RULES

One of our other panelists is going to go into detail regarding the opportunities afforded you by *Rule* 1:8-5 and, more importantly, *how* to go about utilizing this resource, so I won't say more about the substance. I just have this to say about this rule on a *practical* level:

It's *mostly* useless in New Jersey, given the way the county courts deal with trials. The reality is that we don't have enough Judges to conduct trials with the degree of certainty necessary to make utilization or *Rule* 1:8-5 worthwhile *most of the time.* Why?

The answer is a combination of two factors. The first of these is that, owing to the fact that there are too many judicial vacancies spread across the State (and even when we're fully stocked, there just aren't enough Judges appointed to the Civil Division for a modern case load). Secondly, in *most* employment cases, the substantial efforts and temporal investments in utilizing Rule 1:8-5 *for each trial call where you might try the case* simply isn't worth it. That's the truth, and it's the practical reality.

So unless you have the happy confluence of having a substantially valuable case that merits the work of going through the 1:8-5 exercise *for each trial call,* and you *also* have the reasonably strong sense that "this is going to be the day you actually try the case" (notwithstanding court promises in support of or to the contrary), it's probably not worth it.

All of *that* having been said, some of what I say hereafter assumes that you have the opportunity to take a look at potential jurors *before* they actually become jurors. The rest of it is devoted to handling *what you get as and after you pick*.

C. SELECTING THE "LEAST BAD" JURORS IS THE KEY TO WINNING

IN THE 21ST CENTURY

1. Isn't That Depressing?

Yup. The more extensive answer, of course, is *why* that's such a true statement. The reality of life in the 21st century is all about information overload, which wouldn't, in and of itself, be a *bad* thing if *even most of the information were actually accurate and helpful.* One could imagine a Utopia where the logarithmic increase of information available to the average person that began with the advent of the worldwide web in the mid 90's actually resulted in a better, smarter world, where people made heroes out of scientists, actually *listened to them* when they tried to tell people about issues that affect their votes and their futures, where people believed that knowledge and education were laudable ends onto themselves, etc.

That's a nice world, but that's not the one we got.

The one we *got* was the most pervasive proof of the oft-cited adage that human beings will always play to the least common denominator, which is a fancy way of saying that, given time, humans can screw up *anything*. The world has yet to disappoint P.T. Barnum. The world we *got* through the internet is a world of useless, time-consuming and distracting (from anything worthwhile doing) social media nonsense, porn, self-lauding and meandering blogs, ads, cute cate videos and information *posing* as "scientific" or "fact-checked" when it's *nothing of the kind.*

I'm not saying that the worldwide web ruined news, but before the web, the amount of energy and time it took to make sure that news reporting was thorough, accurate and unbiased meant that there were only a few outlets, and those outlets needed to "get it right." It was only with the advent of cheap information software and a free and unregulated highway on which to deliver it that "fake news" (as in, copied without being verified and passed as original, as in coming from a biased source where the bias is hidden, etc.) became a "thing." Today, you're fortunate if, in picking a "news source," the source is doing no worse than *plagiarizing* what *someone else* actually took the time to fact-check. If you are unfortunate, the person is simply lying, guessing or selling something.

As a consequence of all of that, the human mind that has access to the web has continued to evolve in homeostasis *with* the web, meaning that, like any irritant in our environment that we evolve to ignore, the human mind has grown harder to penetrate with *actual valid information*, because that information is simply part of the modern "background noise" of all that *useless* information. And while this is a "generational" thing, where young people are more susceptible to "missing something important" than people "over a certain age" (I'm thinking of yours truly and of my contemporaries), we all *know* that even many of us (the 50 and older crowd) have also, to a degree, grown accustomed to the scrolling

news *summaries* on the bottom of the screen, ignoring most of what we hear on even legitimate news channels because it's simply a rehashing of the same news in a now 24 hour news cycle, etc. We unfortunately now *assume* that anything someone wants to tell us through electronic media is *probably* something we don't want to hear. We have to trust ourselves to "catch" key words, the mode or manner of presentation, the source, or something else, for us to actually *spend the time* looking it over.

So that's a 'thing" for *everyone*.

The motto: don't assume that people know the "truth" about current events that might effect bias, passion or prejudice in jurors, because they might have gotten bad information.

2. When You Can't Use *Rule* 1:8-5, Observe the Rule of 6

This is a rule of thumb that I've come to use because it works for me. I didn't create it, and it's been "out there" in the trial bar, in one incarnation or another, for years.

There are, I've observed (well, first, when I was a puppy, I was *told,* but as I became experienced, *then* I observed) about 6 different personality types that you tend to see in potential jurors. When you *don't* have the time to pre-research potential jurors, you've got to count on what is, notwithstanding recent additions and changes, a still-inadequate voir dire process (even when the Judge holds to the 4-07 directives and allows open ended

questions). But you get what you get, so with the answers to what are (hopefully) some open-ended questions given at sidebar when necessary to promote honesty, and delivered to a Judge that exudes patience with the open-ended answering process (and not, as some Judges do, *hostility* specifically designed to *discourage* jurors from being candid), here are the personality types with which you end up, and from which you have to choose.

Remember these "types" are not *all* the person is about; by "classifying" the person, you're not reducing their entire lives to one sentiment. On the other hand, what you're trying to do is figure out what parts of their personality or life experience are most likely to influence their participation in *your trial*.

a. "Sympathetic"

These jurors are dominated by their sense of empathy, but this can cut *both ways.* Know your case. Empathy can *work against you* if the *employer* has the type of personality (or some of his or her witnesses do) that engenders "sympathy" for their plight, whatever it was ("how was *I supposed to know* that so and so was harassing the plaintiff?"). Also, if your case involves a difficult evidentiary pathway to establishing liability, a sympathetic juror might never get to the place where you want them to be sympathetic to your client (damages) if they don't really *understand* the pathway by which they arrive.

Can this personality type be useful? Definitely. But be

careful, because it's a double-edged sword.

b. "Practical"

This person doesn't necessarily care to analyze the evidence and doesn't necessarily have a great deal of empathy that's going to operate for or against you. This person just wants to "cut to the chase" and figure out what seems or feels "right" (or, you hope, "just"). This kind of juror can work for you if you feel that you've got a fairly "obvious" case either in terms of liability or damages, and can be especially useful in cases where you can invoke the "lizard brain" approach (which works especially good in discrimination cases that have a broad range of cultural appeal and/or in CEPA cases where but for the grace of God goes the juror and the whistleblower stands between the "bad guy" and the unknowing public). This is a juror that responds particularly well to how a verdict is going to make things better for "other people," not necessarily your client.

So you'll want this person if your case appeals to that mentality.

c. "Analytical"

This person might also be practical, but they're not going to let their practicality interfere with their "analytical process." Some people who are *very analytical*, almost compulsively so, are also exceptionally intelligent, so this is a person you want if you think that the defendant is trying to be clever in hiding

something that you can help the jury "discover," with the appropriate and hoped-for reaction when the jury realizes that the defendant tried to fool them or trick them. The "analytical" person is helpful to *guide others* to the intended destination, but of course, you can already see where this person might be a problem for you if your case is as much or more about empathy and understanding than it is about a self-evident scientifically compelled conclusion based upon the evidence. Put bluntly, if it's a credibility battle (which becomes, inevitably, a personality battle) between two critical witnesses, and the person has got to use their "gut" to find your answer, an analytical person might either become "vapor-locked" or simply *refuse* to reach any result, no matter how emotionally or socially "just" the solution might "feel," if they can't get there *analytically.* A "he said, she said" case is one to which an analytical juror might "tune out," thus making it hard to get that majority of 5 to 1 or 6 to 0.

d. <u>"Conventional"</u>

This is a difficult term to pin down because the word can mean so many things. For *me*, the word describes a juror who doesn't go in for ideas, concepts, procedures or anything else that lies at the "fringe" of their cultural (and other) experiences. It doesn't mean, necessarily, that the person is *politically* "progressive" or "conservative" (and that's a

dangerous way to view the word "conventional"). The way to think about a "conventional" juror's impact on your case is if you've got either a novel theory of law that the Judge has let through on a summary judgment motion or a motion to dismiss, but which has either been largely (or completely) untested, where you have a client who has contended discrimination might fall under a category that seems alien (and thus potentially repellent) to the "conventional" thinker, or where you have an expert (either on liability or damages) that's pushing for what feels like a "just" conclusion, but whose "process" requires leaps of scientific, logical, cultural or other imagination for which a "conventional" juror is simply unprepared.

Avoid this person when you have those situations.

e. "Persuasive"

Usually, this person is in a professional capacity that requires them to "sell" goods, services, opinions, positions, perceptions, etc. Common personality types dominated by their desire to persuade others are members of our own profession, business executives, consultants, sales folk of every description, etc. "Creative" people (see #6 below) can *also* be persuasive, but their "creativity" tends to lie *only* in the direction of *how* to persuade. "Persuasive" people who are also "creative" don't tend to think of themselves as "creative" except as it applies to their ability to "persuade."

These jurors can also be a bit vain, even to the point that they'll attempt to influence others on your jury not to the conclusion that they themselves think is the most *just,* but because they want the sense of "winning" people to their view. The danger of such a person is, of course, therefore, also the asset. If you can get the "persuasive" person to believe in your case, you've got a strong advocate come deliberation time. If the person *doesn't* believe in your case (or worse, they don't really *care* about the right conclusion, but only in "winning" the argument in the jury room), they might argue *for the wrong conclusion,* even if they *know* that it's the wrong conclusion, just because they want to "win" the argument for their own self-gratification.

The best way to handle a potentially "persuasive" person is to make sure that you've got the sort of case that a salesperson would themselves "buy" as a commodity if you were selling it to them. A good salesperson doesn't mind being *sold* on something, as long as they *respect* the person and process by which the "sale" takes place.

f. <u>"Creative"</u>

This person can share many characteristics with others and isn't *necessarily* a self-avowed "artist." They might not even *think* of themselves as "creative," but this is a person who is either in a "creative" profession or who has "creative" hobbies. This is why it's so important to make sure that the Judge follows

through on asking about how they spend their spare time and what their hobbies are.

These people can be allies if you've got to get to a verdict by unconventional pathways. This is the person who is potentially *ready* to accept all the things that the "conventional" person *isn't.* This person *might* also be "sympathetic," or they might be quite the opposite, and be coldly analytical, because the intelligent impulses that guide their creativity are the same ones that force them to be as analytical as possible. So don't assume that "creative" people are *also* "bleeding hearts" or empathetic. They might be obverse. What you *should* assume is that a person who professes to be creative (and thus, at least in their own mind, probably is) is likely to be *unconventional,* because they spend more of their time imagining what most people don't, and, therefore, they might be more willing to see through an otherwise pretty solid defense smoke screen, pierce what might otherwise seem to be formidable defenses, find the "secret door" that lets you get to a just verdict down a less likely pathway, etc.

3. How to Pursue Open-Ended Questions to Make Sure You Can Identify These Types

a. Don't let the Judge cheat

Some Judges have now accepted the reality of the 4-07 directive, and thus they'll ask all of the necessary biological and qualification questions, but they'll follow *only the letter* of

the directive, not the *spirt* of the directive, which is to *encourage juror frankness and honestly.*

How do Judges do this? If you've tried enough cases, you've already seen it.

They'll ask the open-ended questions and questions to elicit "lists" of things in response (like asking how jurors get their news, what their hobbies are, what internet sites they tend to visit, etc.) in an *increasingly* perfunctory way, encouraging *increasingly perfunctory* responses from the jurors. Remember, jurors don't want to be there. Each juror in your panel is *counting* on being one of the *majority* of the panel that *isn't* seated. They therefore think of their time as a precious commodity that they don't want to waste, and if they sense that giving inaccurate but similar *answers* to jurors they've already seen answer certain questions is a faster way to get done, they'll do that; especially if the Judge *appears to be accepting that and sanctioning it and encouraging it by rushing through that process.*

If the Judge asks about where they get their news sources to the first few jurors who give actual lists (NPR, MSNBC, such and such website, etc.), but the Judge seems to be happy to rush through that questions and seems impatient to get the answer and move onto the next question (perhaps by not looking up, by speaking in a monotone fashion, etc.), then perhaps the next juror decides to say the same thing (after all, it seems to make the Judge happy,

doesn't it?), and the next thing you know, you're getting the answer "you know, internet sites and various TV channels"). How useful.

I get that it's not possible to tell the Judge to adopt a certain demeanor, but you have to ask the Judge, if it seems like the answers are getting perfunctory or if the Judge is hurrying through, to encourage thoughtful and complete responses by modifying the question for later jurors who seem to be trimming down their responses. Prepare to argue, politely, if the Judge doesn't agree with you, and remind the Judge that since you yourself can't conduct the voir dire, you're depending on him or her to get you complete and honest answers, even if it takes an extra 30 minutes to go through the whole panel, so that you can make educated decisions about using preemptory charges or making requests to excuse for cause.

b. Don't let the Judge ever ask "can you be fair?'

No one wants to *admit an actual bias.* Oh, sure, people will "admit" a bias (they might even believe that they have one) if they think that's going to get them recused, but you don't *get those* jurors, because they just cut their own throats as potential jurors for you. It's the people who refuse to admit *actual biases* about whom you have to worry.

Now, of course, this *could* cut both ways, but it's not really

a fair world and it's certainly not a fair media, and so any biases that a juror is likely to have are far more likely to cut *against* whatever it is your case is about than *for* whatever your case is about. This means that, the number of preemptory challenges being equal, the defense will have fewer people it needs to "prune" for potential *biases for you* than *you* will need to "prune" for potential biases *against you.*

If you're going to have to prune, you might as well know what the hell you're pruning, so try to discourage the Judge from getting impatient with an explanation (probably at side bar) to an open ended question by saying "Well, all I want to know is, can you be fair?" Sometimes, the Judge is doing this because they're truly vexed and feel like this is the *right* thing to do, to nail down, one way or the other, whether the juror is going to be excused for cause. Or perhaps the Judge even thinks that he or she is framing a potential preemptory challenge for one side or the other to "just move on." The obvious *problem,* of course, is that the Judge has just potentially *intimidated* the juror (who just "got the message" that the Judge's patience has run out) into saying "yes," regardless of the truth. Maybe they say it with a hang-dog expression, maybe they lower their voice when they say it, maybe they hesitate, but all the same, you may have just gotten a dishonest answer.

Instead, when the Judge starts to ask "can you be fair?",

take the risk of politely interrupting and asking the Judge to instead request that the juror explain any concerns they have that might impact their ability to follow the law and judge the facts based upon whatever it is they just said, these concerns being concerns that might prevent the juror from reaching a fair and unbiased *conclusion* (rather than from being an unfair and biased *person).*

Some Judges don't like being interrupted, and the Bonfire of the Vanities and the lottery of judicial personalities may make this technique dangerous, but when you can use it without it costing it more than it gains you, you should, politely and respectfully, and your adversary will likely appreciate it (or certainly, they can't object to it) even if the Judge seems irritated by the request.

4. Get Rid of The Ones you Hate, and Live With Some That you Don't Love

For the reasons foregoing and hereafter, the modern panel is a minefield. You don't have many challenges and you can't conduct a true voir dire, so even if you get a well-done voir dire from a Judge with plenty of open-ended questions asked the right way, you still have to approach jury selection with the idea that you're going to *strike* the ones you truly don't like, but *live with* the ones that you don't really "love."

Dealing with one of the 6 dominant personality types and

classifying them in your notes might help you decide, based upon the particularities of your case as applied to those personality types, who falls into which category. For example, maybe you've got a case, the logic of which is self-evident, but the credibility issues are complex. In that case, you're going to be much more concerned about getting good *analytical* people, free of biases, and be prepared to *live with* middle of the road jurors who are empathetic. On the other hand, if your case is the opposite, and depends largely upon an empathetic evaluation of credibility where there's not a lot of analysis to perform, you definitely don't want a biased *empathetic* person, but you could probably live with a potentially biased *creative* person.

D. IMPARTIALITY IS ACTUALLY IMPOSSIBLE

1. *That* Got Your Attention, Right?

After all, isn't the word "impartial," or some synonym of it, *repeated* throughout the voir dire process and in every jury charge? Isn't that what we *want* the jury to be?

Well, yes and no. "Yes" when your case is about reaching a conclusion through an analytical process that requires a juror *not* be empathetic to the defense. "No" when we think that jury empathy and a sense of "social justice" (and how this can affect *them and those they love,* the "lizard brain" approach) is what it's going to take to prevail.

But besides that, it doesn't really *matter,* because, as we

all sort of know when we're being honest, *no one* is entirely free of biases.

Issue 72 of the *Oregon State Bar Bulletin* in May of 2012 related a Harvard study of the "Implicit Association Test" (IAT), a test developed by Harvard in conjunction with the University of Virginia and the University of Washington. It's a fascinating test because it reveals what we all sort of *know* but don't want to discuss, especially when, as lawyers, we've been (supposedly) trained to *never* apply biases to our reasoning (or permit or encourage others to do so). "Free of any bias, empathy, passion or prejudice," or some version of that, is *repeated* in every voir dire and in every jury charge.

The IAT recognized a fundamental truth of human evolution. I myself have always been a fan of being *really honest* about what makes the human animal the human animal, and about *recognizing* the compelling truths of simian and hominid evolution that lead to homo sapiens 75,000-100,000 years ago. Human beings were a work in progress for nearly two million years *before* we became human enough to resemble our modern selves, and even *after* we reached that final state of "homo sapiens," we've spent out 95% of our time in a "pre-historic" state of existence, without the benefit of advanced application of reasoning, development of complex tools, the ability to record or perpetuate categorical information, or anything resembling a settled "society."

That's a lot of time to be "human" (or nearly so) without having access to the internet and mocha latte. It's important, therefore, not to *forget this* in what we do. The very *idea* of recruiting the "limbic system" (the "lizard brain") in argument is an exercise in recognizing the fundamental reality that human beings are *animals before* we're "advanced, ethical, spiritual persons." The old expression that every human being is 9 meals away from barbarism is true. Take away everything that a human being comes to rely on (comfort, security, food, shelter, etc.), and the human being is reduced to animal-like behavior PDQ (a friend of mine is fond of joking that in the aftermath of the Zombie Apocalypse, a "zombie" is anyone "coming near my stuff"). Notions of being "un-biased" are replaced by *everything* being about bias.

Why? Because *being biased is how we survive.* The ability to distinguish friend from foe and the ability to quickly categorize people in this brutally simple way was often what made the difference between living and dying, between cooperative existence and violent opposition. For much more of our biological history than not, and even today in many parts of the world, human beings grouped together based upon bloodlines, clan, ethnic, religious and linguistic affinity, etc. Even today, in many parts of the world, it's not *possible* for most people to judge the "human" based upon what that human *does,* because it's still all about *who the*

human is, relative to the observer. We might *say* that we're otherwise, and that our Country is based upon behaving otherwise, and we might as lawyers *urge* that we all *be* otherwise, but it's just not the reality. It's not comfortable. Its' not *human.*

If *bias* is implicit, therefore, in human existence, what about stereotypes, prejudices and discrimination?

Well, if you *recognize* this reality, and you're foolish if you don't, that doesn't mean that our work is now rendered moot, because discrimination is "ok" now and forever. Bias which leads to stereotypes and discrimination is simply that "quick categorization" instinct working at a primitive level. For *most people,* it's not really conscious, and it's *those people* that you can *reach.* By appealing to the better nature of those people, you can get them to recognize that we all *aspire* not to be prejudiced or biased in how we judge other people, and, thus, you can *win them over* to the idea that discrimination is particularly abhorrent in America, in New Jersey, in today's culture, etc. By *allowing* people to *forgive themselves* and to *be forgiven* for being "human," by *acknowledging* that all people have biases but that we can't let those biases prevent us from *being Americans* (or New Jerseyians, or civilized or whatever word you choose), you're far *more likely* to get those jurors to you then if you hit them over the head with the idea that no one is *allowed* to have biases or prejudices.

On the other hand, we all know that there are people who not

only are *consciously* biased, even *persistently* so in the face of information that suggests that they shouldn't be or mustn't be, but that they're *proudly so* (especially in light of the ugliness that emerged after the most recent presidential election). *Those people* are *almost always* your enemy, but we know that in some cases, that bias might not matter. For example, you think you've got a racist on the jury who *also* happens to be empathetic to your white CEPA whistleblower suing a white employer. *Now* what do you do? Do you say to yourself, morally, that the person's racism is so repugnant that you don't want them as a juror even though you don't think that their racism is going to play a role, and that their potential empathy whistleblowers will?

Tough moral question, but since the Ethics Rules require that you zealously advocate for your client, the answer is self-evident.

Recognize biases as *inevitable* outgrowths as human evolution. It's why nepotism will *never* be illegal in this or in any other state, because *most business* is done that way. Instead of hitting people over the head with the theoretical ("ivory tower") notion that "everyone should be color blind, gender blind, orientation blind, etc.," *recognize* the reality in yourself, in them, and even, where appropriate, in the defendants, but then talk about the *"rules" by which we've become more than the animals we once were*, and how, particularly in America and in New Jersey, we aspire to the *highest conduct.* No one (not the jury, not you, not any party)

will ever be *perfect*, but "doing the best we can" means recognizing our human impulses and going the other way when we need to.

After all, isn't that how we raise our kids? Understand their humanity. Forgive it; then *motivate them* to be the most just they can be *in spite of it.*

2. "Millennials verses Generation Z"

a. "Post-millennial" or the "iGeneration" (iGen)

Also called "Plurals" or the "Homeland" generation, this is the demographic cohort *after* "Millennials." While there's no precise dates for when "Gen Z" starts or ends, demographers and researchers have typically gone with the mid 1990's at the earliest, but of course, there's no consensus yet about when this generation will *end.* Since we've run out of letters in the alphabet, I'm curious to see what the next name will be.

What differentiates Z folk from "millennials" – besides time, of course – is that while millennials frequently and comfortably *use* communications, media and digital technology, they are not as *integrated* with these technologies (as a factor in their daily lives) as are those of gen X. Generally, when you've got millennials, people generally born between the late 70's and the mid 90's, you've got folk who have either become, or are in the process of becoming, a "civic" minded generation (using *modern* notions of what that means). One could argue that of all the generational markers, the "Greatest Generation" (the generation

that lived through and fought World War II and the Korean War) are still likely the most "civic-minded" generation from a "bedrock" type perspective, but your chances of getting one of those people on the jury have diminished to as close to zero as makes no difference. "Baby Boomers" fall over so many social, cultural, religious, political and other attitudes that it's hard to pin them down, because, at least numerically in terms of who might be on your jury, they're are still so numerous.

Some demographers have attributed to the "millennial" generation the characteristics of feeling "special," "sheltered," "confident," (perhaps unduly so), "team-oriented," "pressured" and "achieving." This from demographers William Straus and Neal Howe. Other demographers, however, disagree, arguing that these characteristics are convenient "stereotypes" and are "over-deterministic." Psychologist Jean Twenge is more harsh with millennials, suggesting that they're predominately entitled and narcissistic, and doubts that they'll turn out to be "civic-minded," but rather much more self-interested and only "civic-minded" in small groups. *Pew* research seems to indicate that millennials in adulthood are more detached from institutions and more networked with friends, leading to the suggestion that the "me and mine" moniker might be more compelling than the idea that they'll become "civic-minded" on a communal, state, national or global level.

Now be careful of all that, because, before we even get to gen Z, you also have to accept that there are cultural and ethnic biases implicit in the entire discussion above, inasmuch as "millennials" and the "iGen" subject to these studies and scholarly works are, almost universally, *American* (or at least Western-industrialized), and of at least low to middle income socio-economic status. To be blunt, people who immigrate here from countries where survival (or escape from percussion, violence or oppression) is a day to day occupation, for whom shelter, food, health and education are issues of privilege (or not), *don't neatly fit into* the above conversation, because none of the prerequisite conditions that "created" millennials or Gen Z pertain. Millenials and Gen Z people didn't ever have to *wonder or worry* about where their next meal came from, whether they'd have a roof over their head, whether they'd be drafted, forced to take drugs and handed a gun, whether they'd have a bomb strapped to them, etc.).

b. Generation Z

Gen Z people are predominately the children of Generation X, but some of them also have millennial parents. Overwhelmingly, demographers agree that the iGen doesn't believe in an "American Dream" because "Generation X", the most influential parents of Gen Z, demonstrate the *least credence* in the *concept* of the American Dream, among adult generations. In short, they believe what they're taught, and that makes them cynical.

Since Gen Z starts as early as 1993, according to some demographers, so you're starting to get them on your jury panels *right* now, and you'll get more of them soon.

Now, it's time for some honesty about being employment and civil rights lawyers. Our personal injury colleagues have something solid and of "gravitas" (to quote Kiefer Sutherland) that they can show a jury about the harm done and about the immediate responsibility of same. That's not to say that their work is ever easy, because having begun my career as a personal injury trial lawyer, I know it isn't. Getting a jury to bite on the idea of medical causation is often very difficult, and getting them to find sometimes abstract theories of negligence is as tough. Certainly, personal injury colleagues couldn't be faulted for sometimes suggesting that it might be *easy* for us to go in front of a jury, explain the racist words that were used, and ask them if that's ok?

Yet we know that the grass is always greener on both sides and we've both got our troubles.

One of our troubles is that, in arguing to gen Z people, we're trying to argue abstract concepts of what's "right and wrong," "moral and immoral," etc., to people who, at least according to the demographers, *just don't care*. For them, "shit happens." What do they care about Rosa Parks or Harvey Milk or Susan B. Anthony? They can't *relate* to those struggles because this generation has

the most members of historically disenfranchised groups who no longer *feel* the immediate effects of that historical disenfranchisation. More members of generation X (and even some of millennials) experience "first hand" disenfranchisement and discrimination than members of the iGen, whose technological integration has the greatest capacity to *erase* the "us" and "them" barriers.

It's ironic, isn't it? The very thing that appalls people of a certain age about the iGen (their slavish attention to social media, the shakes and withdrawal symptoms they get when we take away their devices, the fact that they communicate with people who are typically not really "there" with them) is also the very thing that may make them the most unsympathetic to the plight of others.

What's the solution? First of all, the "limbic system" ("lizard brain") approach is particularly availing. Since they're selfish, they've got to know that what happened to your client can happen to *them* or to the people that they love (or at least the people on their "friends" list).

Now, a word about "conservatism." I know what you're thinking. You're thinking that people for whom the above statements are true (not really "seeing" color, anymore, being the most tech savvy and youngest), naturally equates to being the most "progressive." Children are our future and all that.

Well, get ready to be surprised. According to the Hispanic

Heritage Foundation, nearly 85,000 students polled (between the ages of 14-18 in 2016) found that *32% of those participants* supported Donald Trump, while *22%* supported Hillary Clinton (31% couldn't care one way or the other). On the other hand, in a 2016 mock election of upper elementary, middle and high school students conducted by *Houghton Mifflin Harcourt*, Hillary *beat* Trump 47%-41%. You could argue, however, that the mock trial competition involved potential social stigmatization of kids that might otherwise have leaned toward Trump (because perhaps their families did), but who had become, in the rancorous political environment of late 2016, shy about admitting it. On the other hand, the Hispanic Heritage Foundation poll, which presumes an anonymous (and therefore most honest) response, might be more accurate.

Generally, the iGen is described as the most fiscally conservative (because they have the bleakest economic outlook), much more money-minded, more entrepreneurial and more "pragmatic." In short, they think their economic prospects are dimmer than even the millennials, and that may be the most important thing to them, notwithstanding the issues in your case.

So in addition to, and building on the idea of, taking the "lizard brain" approach for these people, try to relate how the denial of your client's rights was an *economic* hardship, or how the denial of an *economic* opportunity is the injury, rather than focusing hard on the "dignity" of the "person."

According to everyone, the "dignity" of the person seems to be at its lowest eb in the most recent generation.

E. TO GOOGLE OR NOT TO GOOGLE

1. Ethical Concerns of "Researching" Jurors

Whether you're researching the panel *before* selection or researching the impaneled jurors you got *after* selection (perhaps to understand how you might communicate with them), there are significant ethical concerns that must be considered given the ubiquitousness of the information available over the web and the methods of obtaining it.

Of course, we tell *jurors* not to research lawyers, parties, companies, the site of where something happened, experts, etc., but we have no real practical way of enforcing this edict, and we, along with Judges, spend a good deal of our time, I'm sure, wondering if the jurors are learning on their own when they're not sitting in the box. Think about how you'd feel if you knew the jurors were violating that edict in any way and then apply that to how others might feel if they knew that *you* were "researching" *them.*

We start from the assumption that the word "research" is not, in and of itself, a bad thing; aren't we "researching" the juror by asking *any* voir dire questions? Aren't we doing what the Judge admonishes *them* to do when evaluating credulity, and using our "sense" of their body language, demeanor, tone, etc., to evaluate

their qualities as potential jurors? Isn't that "research"?

2. What do the Courts Say?

Courts around the country have exhibited varying attitudes toward the concept of attorneys performing online research regarding perspective jurors. For example, in the 2013 state court criminal trial of a defendant accused of child sexual abuse, Montgomery County (Maryland) Judge Richard Jorden banned such research during voir dire, saying that it could have "a chilling effect on jury service, by jurors, to know, "I'm going to go to the courthouse… I'm going to be Googled. They are going to find out all kinds of stuff on me.""

Federal Judges have displayed similar reluctance. In a May 2014 survey of Judges conducted by the Federal Judicial Center, nearly a quarter of the respondents admitted that they banned attorneys from using social media during voir dire, but nearly the other three quarters, almost 70% of the entire body, suggested that they never addressed the issue one way or the other. For those that banned it, the primary reason given was respect for juror privacy and "logistical" (whatever that means) considerations. Some were worried about jurors feeling "intimated," harkening us back to the comment in Maryland about "chilling' participation. Others felt that allowing such research would be "distracting" (whatever that means) while some were concerned about the practice prolonging the voir dire process.

About a third of the respondents considered that such online research was simply "unnecessary," reasoning that attorneys could conduct it before court or that the information provided during "regular" voir dire was sufficient.

On the other hand – and apparently, increasingly – courts are recognizing not only a *right* to perform such research, but are even imposing (for example in one jurisdiction, Missouri) an *affirmative duty* to do so. In *Carino v. Muenzen*, a New Jersey medical malpractice case, the Appellate Court considered the plaintiff attorney's request for a new trial after the lawyer had been prevented by the trial Judge from conducting online research on the venire panel. As jury research began, defense counsel objected when he noticed his adversary accessing the internet on this laptop. After acknowledging to the court that he was Googling the potential jurors, and pointing out "we've done it, all the time, everyone does it, it's not unusual," the plaintiff's attorney was stunned when the court refused to allow it. The trial judge felt that allowing such juror research would jeopardize maintaining a "fair and even playing field." 2010 WL 3448071 at *7-9 (N.J. Super 2010).

Although the Appellate Court affirmed the defense verdict on other grounds, it explicitly recognized the right to use the internet to investigate potential jurors during voir dire, and concluded that the trial Judge had acted "unreasonably" in

preventing use of the internet by the plaintiff's counsel, holding that: "there was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or "maintaining a level playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it." *Id.*

There are other examples, but the general sense seems to be that the courts are increasingly *permitting* this type of research, and some are actively *encouraging* it.

It stands to reason, therefore, that no "ethics rule," in New Jersey at least, *prevents* such research, and in fact, my review of the RPC's reveals none that would or should, but we must all be aware that the Rules are loosely written.

Certainly – at least so far – the ethics opinions and rules seem to be universally *permissive* in regard to this research. For example, the *New York County Lawyers Association Committee on Professional Ethics opinion #743* (interpreting New York Rule of Professional Conduct 3.5) made it reasonably clear that "passive monitoring of jurors, such as viewing a publically available blog or Facebook page," is permissible as long as the lawyer has direct or indirect contact with jurors.

Well isn't that an interesting worry? Obviously, the *problem* with "research" online is that *some* research is really what I call "passively interactive." Some online media allows the person posting a blog (or whatever) to "know" who has visited, even if the visitor has not *interacted*. So if an attorney or his or her staff person is researching juror X, and part of that research involves visiting a social media page where the juror recognizes the visit, has an ethics rule been violated? Has a rule of *court* been violated because this constitutes "contact" with a juror? If it really *isn't* "contact" because, on a factual basis, there was no actual "contact" or communication attempted, does the juror's *own passive interpretation* of the visitation as constituting "contact" predominate over the *factual reality* that no actual communication took place?

What's the *court* supposed to do in this instance? If the Judge feels that the juror now feels "chilled," and might infect the rest of the venire panel, should the Judge put the kaibosh on any further "research," on the theory that he doesn't want the panel polluted? Does he have to dismiss the panel in its entirety and then put the kaibosh on research for the next panel? If he does, feeling that it's necessary from practical considerations of getting the trial going, has he now *quashed* the "right" of either attorney to conduct the research on the next panel?

You see, there's no real guideline for this *yet*, and there's danger involved for all parties concerned.

Of course, there's also danger if you *don't* do the research, because your client can certainly tell you that you weren't "zealous" enough (another violation of the RPC's). After all, if the *client* took down the names of the potential jurors (or worse, the actual jurors you got *not* having done any research) and found that the guy who said he could be "fair" in a race case (at least when the Judge asked him) is *also* a subscriber to "white power" websites, what now? If your client loses the case and *he* found what you *didn't*, is that malpractice?

It also goes without saying that failing to monitor the jurors even *during* the trial might mean that you're *missing* conduct by the jurors that would violate the Court Rules for juror activities and/or reveal biases for or against a party.

And what does a "friend" really *mean* anymore? I know what it meant when I was a kid. It meant that you invested some time, found common ground, had your squabbles and your troubles, persevered and prevailed through them, and formed a true bond that transcended the immediacies in life, and endured over time. Really, that's what a "friend" still *is*, but not necessarily to those of the "iGen" (see above), and certainly, not to those who provide or live by social media. If someone has a ridiculously and stupidly long "friends" list, and we apply the Kevin Bacon six

degrees of separation theory, at what point does a "bias" become of concern if juror 6 is a "friend" of a "friend" of a "friend" of a party? Obviously – at least presently – the prevailing and evolving judicial opinions, and the prevailing and evolving ethics opinions, not only *suggest* that you take a look at the jurors (at least the ones you *got,* if not the ones available to you through 1:8-5 before you meet them) both *at the time of their selection* and *during the trial,* or at least, have a staff person do so, because it may or may not help you identify problems and it may or may not help you classify that person in a way that allows you to reach them.

F. IN CONCLUSION

Perhaps few trial attorneys more than Employment attorneys understand the dangers of "over-reductive" "classifications" of human beings as fitting into a particular group. Take with a *massive* dose of salt my conversation about the 6 personality types in Section III and the discussion about generation X, millennials and generation Z in Section IV. To every rule (especially rules concerning human behavior) there are *trends and exceptions.* There is simply too many people, and an infinite number of factors that influence what a person does at given moment, to be *entirely comfortable* "classifying" people.

That all having been said, however, we all also understand

that general trends tend to produce generally reliable results. It's been my general experience, for example, that Eagles fans start getting almost manically optimistic in August and September, very nervous and anxiety-ridden in October, and downright angry and depressed around the holidays (as a Giants fan, I can only distantly relate). I know those Eagles fans are all very different people, and I know not *every single one of them* goes through that process, but that paradigm amongst my good friends and colleagues is more reliable than the weather.

I joke, but you get the point. Generally, taking a look at the personality types that emerge from a *well and thoroughly conducted, patient voir dire*, along with getting a *general sense* of into which generation the person falls, can help you decide, based upon the unique facts of your case and the nature of the parties, whom you "love," whom you "hate," and who you have to "live with" on your panel. It may help you get people off for cause before you have to use your challenges, and it'll help you use your challenges more intelligently.

Whatever you do, as well, don't forget to take a look at the people you've got to choose from (before trial, if the case warrants the attention and if the logistics permit it according to Rule 1:8-5), in *every* trial, once you've got your jury, to see whether or not your classification process was accurate from any clues that that juror might offer. Be *very careful* not to

"communicate" or "interact," either through yourself or through your staff, when you do this. If you have the ability to have a staff person with you at jury selection on a laptop, do it, but make sure that the laptop's results can't been seen by the people sitting behind you or by anyone in the jury box, and if it's possible, make sure that no one in the box even *knows* that your staff person is doing this research. It *will* piss them off (however unreasonable that is) and it *will* make them uncomfortable, potentially turning them against you.

Lastly, in light of all this, don't assume that there are "core rules" for which type of jurors you like and which type of jurors you don't like for classifications of cases. The old adages about disqualifying jurors based upon a certain age, or upon a certain profession, are out the window. It's now much more about who they are in the culture than it is about the obvious classifications upon which lawyers once more reliably relied.

Happy hunting.

II. Batson issues updated in New Jersey; Submitted by Lauren M. Law, Esq. and Benjamin Folkman, Esq.

A. INTRODUCTION

Proper questioning during *voir dire* can identify potential jurors who are fit to participate in the case. New Jersey Court Rule 1:8-3(a) places the responsibility for *voir dire* questioning in the hands of the trial judge rather than the attorneys. "The

parties or their attorneys may supplement the court's interrogation in its discretion." *R.* 1:8-3(a). The New Jersey Supreme Court explained that the basic intent is to have the *voir dire* conducted exclusively by or through the trial judges. In re State ex rel. Essex Cty. Prosecutor's Office, 427 N.J. Super. 1, 12 (Super. Ct. 2012) (citing State v. Manley, 54 N.J. 259, 282 (1969)).

B. Jury Selection and Voir Dire

The potential jurors' responses during *voir dire* also influence the parties' decisions to exclude certain individuals from the panel with peremptory strikes. In re State, supra, 427 N.J. Super. at 6. Unlike strikes for cause, peremptory strikes are strictly limited in number. Each side gets an equal number of peremptory strikes. Also unlike strikes for cause, the parties, rather than the trial judge, control the exercise of peremptory strikes. The parties may employ a peremptory strike to eliminate a prospective juror for any reason at all, except for the discriminatory reasons discussed below.

C. Federal Limitations of the Voir Dire Process

In Batson v. Kentucky, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment "forbids the prosecutor to challenge potential jurors solely on account of their race." 476 U.S. 79, 89 (1986). A defendant asserting the State's improper use of peremptory

challenges under *Batson* must first "make a prima facie showing that a peremptory challenge has been exercised on the basis of race." Snyder v. Louisiana, 552 U.S. 472, 476 (2008). Next, the prosecutor "must offer a race-neutral basis for striking the juror in question." Id. at 477. Finally, the trial court must determine whether the defendant has established intentional discrimination, "in light of the parties' submissions." Id. at 477.

Therefore, Batson provides a three-step process for a trial court to reference in resolving a claim that a peremptory challenge was based on race. The first step can be completed by the complaining party showing a pattern of strikes against minority potential jurors. In the second step, the burden shifts to the opposing party to offer a neutral explanation for challenging the jurors. In the third and final step, the trial court must determine whether the complaining party established purposeful discrimination. Looking at this framework, the first two steps merely "govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim." State v. Thompson, 224 N.J. 324, 339 (2016) (internal citations omitted). The persuasiveness of the justification does not become relevant until the third step when the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. Id.

Since its *Batson* decision, the Supreme Court has extended

this prohibition to the peremptory strikes based on jurors' ethnicity and gender. See Hernandez v. New York, 500 U.S. 352, 355 (1991) (extending Batson to ethnicity-conscious challenges); J.E.B. v. Alabama, 511 U.S. 127, 146 (1994) (extending Batson to gender-conscious challenges). Ultimately the U.S. Supreme Court determined that the State's use of its peremptory challenges to exclude jurors based on race, religion, ethnicity, and gender violated the 6th amendment of the Constitution. In Edmonson v. Leesville Concrete Co., the Supreme Court ruled that a private litigant in a civil trial may not use racially-motivated peremptory strikes any more than a government prosecutor may during a criminal trial ("Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal"). 500 U.S. 614, 630 (1991). The same three-part test applies in criminal and civil matters to prohibit racial, ethnic, and gender conscious peremptory strikes.

D. New Jersey Limitations of the Voir Dire Process

1. Gilmore Analysis

Likewise, the New Jersey Constitution prohibits a prosecutor from exercising peremptory challenges on the basis of race. State v. Gilmore, 103 N.J. 508 (1986). Gilmore also outlined a three-step analysis for trial courts to follow when adjudicating a claim of unconstitutional discrimination in the use of peremptory challenges. In step one the defendant must make a *prima facie*

showing that there is a "substantial likelihood" that a peremptory challenge was based on a constitutionally infirm basis. Id. at 536. In step two the prosecutor must offer an explanation for the strike based on permissible grounds. Id. In Gilmore's third step, the trial court must judge the defendant's prima facie case against the prosecution's explanation to determine whether the defendant has carried the burden of proving that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds. Id. If the trial court determines that the defendant has met his or her burden,

> the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. So too it must quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire -- not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges. Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew.

Id. at 539 (internal quotations omitted).

Gilmore also expanded the impermissible grounds for peremptory challenges in this state. The New Jersey Supreme Court determined that the provisions of the New Jersey Constitution, Article I, Paragraphs five, nine, and ten, likewise prohibited a prosecutor from exercising peremptory challenges on the basis of religious principles, race, color, ancestry, national origin, or

sex. Id. at 524-29.

2. Osorio

In 2009, The New Jersey Supreme Court refined the trial court's obligation to conduct a three-step analysis when considering a challenge to the prosecutor's use of peremptory challenges. In State v. Osorio, the defendant (a Hispanic male) was arrested and charged with various drug-related offenses. State v. Osorio, 199 N.J. 486, 493 (2009). During jury selection, the prosecutor used her first six peremptory challenges to strike African-American and Hispanic jurors. Id. Defense counsel raised a Gilmore challenge, but the trial court summarily rejected the objection without requiring an explanation from the State. Id. After the prosecutor used her very next challenge to dismiss an African-American juror, the court asked for an explanation. Id. at 493-94. The prosecutor claimed that the juror appeared to be sleeping, and the court stated that it was "satisfied" without inviting the prosecutor's justification for the first six peremptory challenges or any response from defense counsel. Id. at 494, 973. Osorio was subsequently convicted on several drug charges. Id. at 492.

In Osorio, the Court reconsidered the rule established in Gilmore and polished its three-step analysis. Now, a defendant satisfies the requirements of the first step of Gilmore by producing evidence sufficient to draw an "inference" that

discrimination has occurred. Osorio, supra 199 N.J. at 492 (abolishing the "substantial likelihood" standard of Gilmore). A proper Gilmore analysis must include a careful weighing of whether the reasons proffered for the challenges were applied even-handedly to all prospective jurors, against a consideration of the overall pattern of the State's use of peremptory challenges and the composition of the jury ultimately empaneled. State v. Thompson, 224 N.J. 324, 331 (2016). That analysis presumes that a defendant will present information beyond the racial makeup of the excused jurors. Id.

The Court in Osorio declined to change step two of the Gilmore framework. The Court explained that step three required the trial court to assess whether the State applied the proffered reasons even-handedly, the overall pattern of the use of peremptory challenges, and the composition of the jury ultimately selected to try the case. Id.

3. Thompson

In 2016, the Supreme Court declined to expand the standard set forth in Gilmore and Osorio. As the New Jersey Supreme Court stated in Osorio, the emphasis must be on properly resolving the issue in a timely manner, ideally during the course of the jury-selection process. Accordingly, the Court in Thompson stated that

> a contemporaneous review is most conducive to resolution of those challenges because a detailed record and the parties' own

> recollections are vital to a proper Gilmore analysis." The development of such a record requires that all strikes by the State and defendant are documented in sufficient detail to facilitate appellate review; it is the trial court's burden to see that that is done.

Thompson, supra 224 N.J. at 331.

E. CONCLUSION

To raise a Gilmore challenge, the challenger must timely object, either during or at the end of jury selection, but before jury is sworn. Additionally, the challenger shoulders the burden of persuasion by a preponderance of the evidence. But the burden of producing evidence shifts between the challenger and the party exercising the strike. Furthermore, the striking party has a rebuttable presumption of acting for permissible reasons.

III. Knowing Your Potential Jurors as Well As Possible When Selecting a Jury (Sometimes Before They Ever Enter the Courtroom); Submitted by Claudia A. Reis, Esq.

A. Getting to Know Your Potential Jurors 10 Days Before Your Trial Date

1. Availability of Juror Lists

a. A List of the general panel of petit jurors shall be made available from the court clerk to any trial party requesting it at least 10 days prior to the date for trial. *R.* 1:8—5.
   i. How do you get the list?
      1. You must ASK for it
   ii. What does the list include
      1. Jurors' names,
      2. Jurors' addresses,
      3. Jurors' occupations (if provided)
   iii. What do you do with the Jurors' List?
      1. Research
         i. Google

ii. WestLaw
iii. Facebook
iv. LinkedIn
v. Twitter
vi. Instagram
vii. For-profit companies
    1. Some companies will actually assist with researching your prospective juror pool.
    2. Some companies such as Spokeo.com or Intelius.com will provide a fair amount of biographical information about potential jurors.
viii. Election Campaign Financing Disclosure Websites
    1. http://www.elec.state.nj.us/ELECReport/SearchContributors.aspx
    2. http://www.fec.gov/finance/disclosure/norindsea.shtml
ix. Other websites such as those that provide information about tax records in particular counties.

2. *Carino v. Muenzen*, 2010 *WL* 3448017 (Law Div., Feb. 27, 2012)(finding that a trial judge abused his discretion during jury selection by precluding a litigant's attorney from conducting internet research about the prospective jurors during *voir dire*).
3. What can you find out?
    i. Addresses/Types of Neighborhoods (conservative/liberal)
    ii. Value of Home
    iii. Spouse/Significant Other/Family
    iv. Employment/Occupation (even if they don't voluntarily identify it)
    v. Political Contributions
    vi. Political Affiliation/Leanings

B. Getting to Know Your Potential Jurors at Jury Selection

1. Purpose of *Voir Dire* Process
    a. *Voir Dire* process is designed to ensure that it produces a "fair and impartial jury."
    b. The *voir dire* practice is geared to elicit meaningful information from prospective jurors so those with a real potential for bias can be excused." NJJ Bench Manual § 4.5; *State v. Bianco,* 391 *N.J.Super.* 509, 517 (App.Div.) (quoting *Administrative Office of the Courts, Directive # 21-06,* "Jury Selection Standards," p. 1 (Dec. 11, 2006), *available at* http:// www.judiciary.state.nj.us/ directive/2006/dir_21_06.pdf), *certif. denied,* 192 *N.J.* 74 (2007).
    c. "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." NJJ Bench Manual, § 4.5.
        i. *Voir dire* is 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." *Administrative Offices of the Courts*, The New Jersey Judiciary Bench Manual on Jury Selection, https://www.judiciary.state.nj.us/jury/jdgs_bench_man_jury_select.pdf ("NJJ Bench Manual") (Dec. 4, 2014), § 4.5.
            1. The process accomplishes that task by requiring jurors to "verbally express biographical information so that the juror's voice is heard, body language can be discerned, and a reasonable assessment of the suitability of the juror's ability to act as an impartial trier of fact is accomplished." NJJ Bench Manual, §3.4.

ii. How are these lofty goals effectuated?
    1. Public Proceeding
        i. *Voir Dire* is required to be a public proceeding to which the public and media are given access absent compelling reasons. *R.* 1:8-3(g), (g)(1).
            1. Presumption of access to access to *voir dire* may 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." The specific interest(s) must be set forth on the record. NJJ Bench Manual, § 4.3 (citing *State v. Cuccio*, 350 *N.J. Super.* 248 (App. Div.), *certif. denied*, 174 *N.J.* 43 (2002)
                a. That does not mean, however, that *voir dire* of individual jurors cannot be conducted on the record at sidebar or in writing. *R.* 1:8-3(g)(2).
    2. Questioning of Potential Jurors
        i. Judges can either read the *voir dire* questions to each prospective juror or provide each such individual with a printed copy of the *voir dire* questions, which shall include all of the standard questions for the case type with the supplemented questions determined to be included at the *Rule* 1:8-3 Conference. NJJ Bench Manual, Appendix 1,

Directive #4-07 ("Directive #4-07").

1. These are the yes/no questions.

ii. The judge shall inform the potential jurors that they will be asked individual questions that necessitate narrative answers.

1. The purpose of the open-ended questions is to

a. "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"; and

b. provide an opportunity by which to assess "juror's reasoning ability and capacity to remember information, demeanor, forthrightness or hesitancy, body language, facial expressions, etc." Directive #4-07(A)(8).

iii. The individual questions can be asked either in open court or at sidebar. NJJ Bench Manual, § 4.7.5.

1. Many judges prefer to ask the individualized questions at sidebar to

avoid juror responses that may improperly influence other jurors.

iv. As each juror is excused, the newly seated juror will be asked the questions.

v. Judges may exercise their discretion and alter the sequence and wording of the *voir dire* questions. NJJ Bench Manual § 4.8.

3. The Bench Manual on Jury Selection "sets forth minimum requirements regarding juror questioning" so that judges are not precluded from doing more. NJJ Bench Manual, § 4.5.

2. *Rule 1:8-3 Examination of Jurors*

a. Meaningful participation requires *Rule* 4:25-7(b) exchange

i. Seven days prior to initial trial date, the parties shall exchange jury *voir dire*.

1. These are questioned intended to determine juror bias.

i. Should include open-ended questions, Directive #4-07(A)(8), as well as supplemental questions intended to elicit a "yes" or "no" response. NJJ Bench Manual, § 4.9.

1. The judge **must** ensure that the questions are balanced and neutral and do to tend to influence the jury in favor of any party. NJJ Bench Manual, § 4.9.

ii. The questions should address case specific issues.

iii. In addition to the biographical question and omnibus qualifying questions, there **must** be at least 3 such open-ended questions. Directive #4-07(A)(8)

1. *See Gonzales v. Silver*, 407 *N.J. Super.* 576 (App. Div. 2009), for the importance of complying with the mandate of asking three open-ended questions.
2. Judges are encouraged to ask more than 2 questions if appropriate. *Id.*
3. Although counsel should be encouraged to agree upon the open-ended questions, agreement is not a requirement to use of any particular question. NJJ Bench Manual § 4.7.6.

iv. Subject to the trial judge's discretion, counsel for the parties may be permitted to participate in some questioning of the jurors but the manner and scope of such participation remains within the discretion of the trial judge. NJJ Bench Manual, § 4.10; *State v. Manley*, 54 *N.J.* 259 (1969); *R.* 1:8-3(f)
   1. Counsel should be permitted, if they so desire, to participate in sidebar discussions with jurors.
   2. Trial judges are vested with the discretion to decide whether to allow attorneys to speak to jurors directly.
      a. "With the court's permission, attorneys should be permitted limited participation in the follow up questions." NJJ Bench Manual, § 4.10.

v. Sample Questions:

1. Do you feel that too many lawsuits are filed, or do you feel that it is too hard for people to sue for real wrongs, or do you think our legal system strikes the right balance? Why do you feel the way you do?
2. Do you think that money damages awarded by juries in lawsuits are generally too high, too low, or about right? Why do you feel the way you do?
3. Do you think that juries should be able to order a defendant to pay money to the plaintiff as punishment for what the defendant did, over and above whatever money the plaintiff lost as a result of what the defendant did? Why or why not?
4. Do you think that employees should be able to sue their employers and supervisors if they feel that they have been treated unfairly in the workplace? What should an employee have to prove to get money damages from his or her employer or supervisor?
5. Do you believe there is such a thing as [type of protected characteristic] discrimination/harassment/retaliation in the workplace? Why or why not?
6. Should someone who believes that he or she is being subjected to [type of protected characteristic] discrimination/harassment/r

etaliation do something about it? Why or why not?

7. Do you think that we need laws that prohibit employers from discriminating against/harassing/retaliating against employees [on the basis of protected characteristic]? Why or why not?
8. Have you or any persons you know ever been discriminated against/harassed/retaliated against? If so, please explain.
9. Have you or any persons you know ever been accused of discrimination/harassment/retaliation? If so, please explain.
10. Is it important to you that your workplace be free from [type of protected characteristic] discrimination/harassment/retaliation? Why or why not?
11. Do you think that an employer should be held responsible for the unlawful discriminatory/harassing/retaliatory acts of its employees? Why or why not?
12. Do you know that it is unlawful for an employer to retaliate against an employee for complaining of something unlawful or improper patient care in the workplace, such as discrimination?
13. Do you agree with that law? If not, why not?
14. Have you or any person you know ever been subjected to retaliation for complaining of something unlawful in the workplace, such as

discrimination? If so, please explain.

15. Have you or any persons you know ever been accused of retaliating against someone for complaining of something unlawful in the workplace, such as discrimination? If so, please explain.