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Attorney-Conducted Voir Dire in Our Recent Trial

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Last month, we tried a three-week long medical malpractice case in Hillsborough County Superior Court, in Nashua, New Hampshire. The case involved a six-and-a-half-year-old girl and medical care she received as a newborn baby. She was born prematurely at home and taken to the NICU at a local hospital. After two days there, she developed a devastating intestinal disease known to kill premature babies.

Despite showing signs that she was suffering from the disease, the hospital never diagnosed her with the disease or treated her for it. The disease progressed to the point that her intestines began bleeding, and she went into cardiac arrest. As a result, she suffered a devastating brain injury and cerebral palsy.

In preparing for trial, our first and most important objective was making sure that we could select a truly fair and impartial jury through *voir dire*. Fortunately, in 2010, New Hampshire joined the vast majority of other states in permitting attorney-conducted *voir dire* -- an opportunity for lawyers to speak directly to the panel of prospective jurors and to ask questions to elicit bias or pre-conceived notions that might make a juror unsuitable to sit on the particular case.

1) The statute

The NH statute implementing *voir dire*, RSA 500-A:12-a, permits counsel to address the prospective jurors to describe the claims, defenses, and other issues in the case, and to question individual jurors about their possible prejudices. Our corollary in Maine is M.R. Civ. P. 47(2)(ii), which, in 2019, was amended to permit prospective jurors to be examined through "direct oral questioning by attorneys . . ."

2) The process

New Hampshire's process for attorney-conducted *voir dire* is as follows:

i. The entire pool is read a list of preliminary questions aimed at whether jurors know / have a relationship with the parties, the witnesses, the lawyers, and can serve during the dates set for the trial.
ii. Then, 22 potential jurors are randomly selected from the pool and placed "in the box" (i.e. in the jury box and/or in seats on the floor in the well near the jury box).
iii. The 22 randomly selected are asked whether they had any "yes" answers to the preliminary questions and there is side-bar discussion with the Court as to whether their answers prevent them from serving.
iv. If jurors are deemed incapable of serving based on their answers to preliminary questions, they are excused and replaced by random selection from the pool until there are 22 "in the box" who have no problems based on the preliminary questions.
v. Then, counsel for plaintiff is permitted to question the 22 "in the box."
vi. After counsel for plaintiff has reached the limit of their requested time for questioning, counsel for defendant is permitted to question the 22 "in the box."
vii. After counsel for defendant has reached the limit of their requested time for questioning, the Court entertains challenges for cause from the parties.
viii. As jurors "in the box" are excused for cause, they are replaced by randomly selected jurors from the pool who have been sitting in the courtroom listening to the questioning by the attorneys.
ix. The new jurors are asked a shortened version of questions by the attorneys.
x. Cause challenges are permitted (and the replacement process continues) until both sides no longer have any cause challenges to make.
xi. Finally, the Court entertains four peremptory strikes per party, one strike per party at a time, until the group "in the box" is down to 14. Of the remaining 14, 12 will be the jury and 2 will be the alternates.

3) The importance of attorney-conducted questioning in seating an impartial jury.

Of course, the purpose of *voir dire* is to ensure an impartial jury is seated so that the parties will have a fair trial, as is their right. The way *voir dire* is supposed to ensure an impartial jury is through questioning that reveals prospective jurors' partiality. Studies have shown that attorney-conducted *voir dire* is more effective at encouraging jurors to reveal bias than if judge-conducted. *See* Salerno et al., "The impact of minimal versus extended *Voir Dire* and judicial rehabilitation on mock jurors' decisions in civil cases," *Law and Human Behavior* (2021) (finding that 42% of all jurors revealed information during extended, attorney-led *voir dire* that would potentially have resulted in their exclusion from the jury, whereas only 2% of those jurors revealed the same biases during limited, judge-led *voir dire*); Andreano, "*Voir Dire*: New Research Challenges Old Assumptions," 95 *ILL. B.J.* 474, 476 (2007) (demonstrating that attorney-conducted *voir dire* led to an atmosphere where prospective jurors were more likely to provide meaningful self-disclosure and thus produce more effective *voir dire* examination).

These studies show that prospective jurors tend to view attorneys as not possessing the same type of authority as a judge. Generally, this results in a greater degree of self-disclosure by prospective jurors and, in turn, a greater ability for the parties and the court to identify and dismiss jurors who cannot be impartial.

It is a common misconception that lawyers want to use attorney-conducted *voir dire* to "argue their case" or otherwise indoctrinate the jurors. While lawyers must educate jurors about the law or facts of their case, the primary goal of attorney-conducted *voir dire* is to identify the jurors who are biased so lawyers can seek to excuse them for cause. Rather than argue the case, the goal is to identify biased jurors and help them admit they are biased.

4) Attorney-conducted voir dire for our trial

Our case had some sensational facts, but our plan was not to try to run from those during *voir dire*. Instead, our plan was to introduce those facts in *voir dire* and generate discussion around them in order to reveal juror bias.

With the help of a professional jury consultant, we created an outline of questions that focused on what we perceived to be the ugliest parts of our case, with the goal of identifying jurors who could not be fair in light of those facts. It's counterintuitive to lawyers to push people away from our position, but that's the point of attorney-conducted *voir dire*: expose the bad stuff to ferret out bias around it.

We began with a pool of slightly over 200 prospective jurors and a selection scheduled to last half a day. The Court allowed each party the time they requested to question prospective jurors. After the 22 initially placed "in the box" were questioned by the attorneys for approximately three hours, the Court entertained cause challenges. As challenges were granted and jurors were excused, the Court brought each new randomly selected juror from the pool up to the side bar for questioning by the attorneys.

The response from prospective jurors to attorney questioning was remarkable. There was no shortage of brutal honesty and little bashfulness. The selection ended up lasting two full days. In the process, the Court excused well over 150 prospective jurors for cause. And finally, after each side exercised peremptory strikes, we seated a jury of fourteen.

The purpose of *voir dire* has always been to identify biased jurors. We know that when jurors feel comfortable enough to tell the truth about their attitudes and beliefs, they will do just that. That, in turn, allows litigants to identify prospective jurors' fitness for the case, and when appropriate, challenge them for cause. This is critical to making sure the right to an impartial jury is effectuated and justice is served.

Meryl Poulin is a trial lawyer at Gideon Asen, LLC, specializing in litigating medical malpractice and catastrophic personal injury cases. Prior to joining Gideon Asen, Poulin was a top oral advocate in her class and a team member on the National Moot Court Competition at Maine Law.

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