

Juror Questions: Why Attorneys Should Embrace Allowing Jurors To Ask Questions of Witnesses

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In 2005, the American Bar Association's American Jury Commission¹ published a set of 19 jury principles to improve jury practice. One of the principles was that the court and parties should promote juror understanding of the facts and the law. Among the recommendations the committee made to improve juror understanding of the facts was allowing jurors to ask questions of witnesses in civil trials.

Most states leave it up to the individual judges' discretion to allow jurors to ask questions of witnesses in civil trials, either through case law, statute, or with no specific rule mandating or prohibiting such a practice. As of July 1, Illinois becomes the most recent state to specifically allow juror questions². According to the National Center for State Courts State of the State Courts survey³, several states, such as Arizona, Colorado, Indiana, and Wyoming, mandate that jurors be allowed to ask questions during civil trials. A number of states, including Georgia, Minnesota, Mississippi, and Nebraska, outright prohibit jurors from asking questions of witnesses at trial⁴.

Perceived Benefits and Drawbacks of Juror Questions

Nancy S. Marder⁵ and Diamond, Rose, Murphy, and Smith⁶ provide thorough literature reviews and explanations as to the possible benefits of allowing jurors to ask questions, as well as concerns voiced by judges and attorneys on the topic. The following is a brief summary of some of these arguments.

¹American Jury Project (2005). *Principles for juries and jury trials*. Chicago, IL: American Bar Association. Retrieved from http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/principles.authcheckdam.pdf

²Tybor, J. R. (2012). New rule will allow jurors to submit questions in civil trials. Press release: Supreme Court of Illinois. Retrieved from <http://www.state.il.us/court/media/PressRel/2012/040312.pdf>

³Mize, G. E., Hannaford-Agor, P., & Waters, N. L. (2007). *The state-of-the-states survey of jury improvement efforts: A compendium report*. Williamsburg, VA: National Center for State Courts. Retrieved from http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendiumFinal.pdf

⁴Hannaford-Agor, P. (2008). Judicial nullification? Judicial compliance and non-compliance with jury improvement efforts. *Northern Illinois University Law Review*, 28 (3), 407-424.

⁵Marder, N. S. (2010). Answering jurors' questions: Next steps in Illinois. *Loyola University Chicago Law Journal*, 41 (4), 727-752.

⁶Diamond, S. S., Rose, M. R., Murphy, B., & Smith, S. (2006). Juror questions during trial: A window into juror thinking. *Vanderbilt Law Review*, 59 (6), 1927-1972.

Potential benefits include:

- Answers to juror questions can improve comprehension – Jurors have an opportunity to clear up any confusion they may have regarding the facts of the case or clear up any misunderstandings right away, while the witness is still on the stand, so that it doesn't impact the way they understand the rest of the trial.
- Being allowed to ask questions can encourage jurors to pay attention – Much to the chagrin of attorneys, jurors are not passive viewers of a trial who process information and think about the case only after all of the testimony is heard. Jurors actively process information from witnesses (both verbal and non-verbal), exhibits, and attorneys. After days of testimony, however, jurors may become fatigued or their minds may drift. Being allowed to ask questions may incentivize jurors to pay close attention to the entire proceeding.
- Questions posed by jurors can give attorneys insight into how jurors are processing the case – Questions can show attorneys which areas they need to address more thoroughly and clearly.
- Getting questions answered in court may prevent jurors from turning to outside sources – If jurors can get answers to the questions they have during trial they may be less likely to use outside sources, such as the Internet, newspapers, dictionaries, etc., to get answers to questions they think are important.

Fears and potential drawbacks to juror questions:

- Allowing jurors to ask questions takes up too much time – Judges and attorneys fear that allowing jurors to ask questions will add a significant length of time to a trial.
- Attorneys will lose control over their trial strategy – Attorneys carefully hone their case, and often have a decent idea of what the other side is going to present. Sometimes attorneys intentionally leave out or downplay certain information, and fear the loss of control of their case if jurors are allowed to ask for more information on these topics.
- Jurors may react negatively if their question is not answered – There is fear that jurors will become angry, embarrassed or offended if their question is not answered, and may draw incorrect inferences from it.
- Allowing jurors to ask questions may affect their ability to remain neutral until it is time to deliberate – Judges and attorneys fear that jurors may weigh the responses to their own questions as more important than other evidence they hear at trial.

The Process

Generally, the process courts follow in allowing juror questions of witnesses follows the recommendation of the American Jury Commission. The judge instructs the jurors at the outset of trial that they will be allowed to ask questions of witnesses. In some instances the judge explains that some questions would not be admissible. After a witness testifies, the judge allows the jurors to submit any questions they may have in writing to the bailiff. The judge reviews the submitted questions with the attorneys, and the questions are put into the record. Attorneys have the opportunity to object to any questions they deem to be inappropriate. Once the judge rules on the admissibility of the questions, the judge asks the questions of the witness. If necessary, the judge may choose not to read a juror's question verbatim, but instead may re-word it to be neutral or in the proper form. Once the witness answers all of the admissible questions from jurors, the attorneys may have the opportunity to use follow up re-direct and re-cross examination, but only on issues brought up by the questions.

Selected Research

Over the years, several research studies and pilot tests have addressed the issues surrounding allowing jurors to ask questions. Most of these studies involve feedback from jurors, judges, and attorneys about the process, perceived value, and perceived fairness of the process. Three such studies are described below.

Larry Heuer and Steven Penrod⁷ examined the impact of allowing jurors to take notes and ask questions in both civil and criminal trials through two experiments, one conducted in Wisconsin state courts, and the other involving both state and federal courts in 33 states. Heuer and Penrod provided a pre-instruction to be read to jurors before trial. They found that, on average, jurors asked 2.3 to 5.1 questions per trial, which came to less than one question per hour of trial. They found that when jurors were allowed to ask questions, jurors felt more informed about the evidence, thought the questioning of witnesses had been thorough, and were more confident they had sufficient information to reach a verdict. According to judges and attorneys jurors did not ask inappropriate questions, and jurors did not report being embarrassed or angry when their questions were objected to. They also found that jurors did not draw inappropriate inferences from unanswered questions. Jurors remained neutral, rather than becoming advocates, when they were allowed to ask questions, and did not rely more heavily on the answers to their own questions than the rest of the trial evidence. However, jurors, attorneys, and judges did not report increased satisfaction with the trial or verdict when jurors were able to ask questions compared to when they were not.

Attorneys in the study reported that their greatest fears regarding juror questions were not realized: information they deliberately omitted was not brought up, questions did not interfere with their trial strategy or cause them to lose command of their case, nor did they prejudice their client. After the trial, both judges and attorneys in cases where jurors were allowed to ask questions said they were more in favor of allowing jurors to ask questions than did those judges and attorneys on trials where

⁷Heuer, L., & Penrod, S. (1996). Increasing juror participation in trials through note taking and question asking. *Judicature*, 79 (5), 256-262

juror questions were not permitted. Although some of the other possible benefits of allowing jurors to ask questions were not realized (questions did not alert attorneys to issues that needed further development or increase participant satisfaction with the trial), they concluded that the fears judges and attorneys had about allowing jurors to ask questions did not come to fruition.

The Arizona Filming Project, conducted in Pima County, Arizona⁸ provided a unique opportunity to examine the questions jurors ask of witnesses as well as jurors' reactions. In this study, the researchers were allowed to videotape fifty civil trials and everything that happened in the jury room during the trial and deliberations. Researchers were given copies of the questions the jurors asked, and thus were able to analyze the jurors' discussions that led to the questions, the questions themselves, and what, if anything, the jurors said about their questions after they were addressed by the court and/or witnesses. In each of these cases, the judge pre-instructed the jurors regarding questions to witnesses, which included language explaining why some questions could not be answered. Jurors asked questions of 44% of the live witnesses in the 50 trials that were part of the study, and the number of questions for a particular witness increased with the length of the witness' testimony. On average, allowing jurors to ask questions added just over 30 minutes per trial, which included the time the judge spent reviewing the questions with the attorneys, asking the questions of the witnesses, and attorney follow up questions. Given the total length of the trials, this was not a long period of time.

A unique aspect of this study was that juror deliberations and discussions during breaks in trial were videotaped. An analysis of those discussions showed that jurors made mention of 11% of the questions they submitted. Jurors asked questions of nearly half of the expert witnesses. Most of those questions involved attempts to understand their testimony, and only a small number of questions directed at expert witnesses were about their credentials. As far as the type of questions asked:

- 80% of questions were about legal issues,
- 28% asked for clarification or definitions,
- Approximately 17% went to witness character (with just a small number of those regarding being paid to testify),
- 42% of all questions were what the researchers referred to as cross-checking, which is an attempt at judging witness credibility,
- only 8% of the questions were characterized as argumentative, and
- just a small number of questions were about insurance or management of the litigation.

In a second publication as part of the same research project, Diamond, Rose, and Murphy⁹ examined the questions jurors submitted that were not allowed to be asked. Judges allowed 76% of the questions submitted by jurors to be answered, indicating that, for the most part, jurors asked relevant and admissible questions. The types of questions that were excluded the most frequently were questions asking for standards with which to judge the case (22% of disallowed questions), questions asking for definitions or miscellaneous facts (14%), questions about damage awards including insurance (13%), questions seeking information to help determine the character or credibility of a witness (12%), and questions about causation (12%).

⁸Diamond, S. S., Rose, M. R., Murphy, B., & Smith, S. (2006). Juror questions during trial: A window into juror thinking. *Vanderbilt Law Review*, 59 (6), 1927-1972.

⁹Diamond, S. S., Rose, M. R., & Murphy, B. (2004). Jurors' unanswered questions. *Court Review*, Spring, 20-29.

Judges acknowledged disallowed questions just under one-third of the time. Juror discussions and deliberations were analyzed to examine jurors' reactions to disallowed questions. They found that most of the time jurors did not discuss disallowed questions. The discussions about disallowed questions that did occur tended to be short, though discussions about insurance were longer. Jurors either accepted the lack of response from the judge or did not complain about half of the unaddressed questions.. Only a very small number (4%) of responses from jurors were negative, which does not support the fear that jurors will be resentful or angry if their questions are not answered. Jurors tried to generate their own answers to unasked questions (usually based on other related testimony or their own experiences) in only a small number of instances.

The Seventh Circuit Jury Project Commission¹⁰ conducted a study designed to test several of the ABA American Jury Commission Jury Principles, including allowing jurors to ask questions of witnesses. Juror questions were analyzed in both phases of the study. Jurors were pre-instructed about why and how to ask questions before trial, and in Phase Two an instruction included language regarding what types of questions would be appropriate and that jurors rarely have more than a few questions for any witness. Jurors asked questions in 83% of the trials, on average submitting six questions per day of trial. Just over half of the jurors in these trials reported having submitted questions. Jurors were more likely to ask questions if they were reminded after each witness that they had the opportunity to do so than when they were instructed that they could at the beginning of trial, but then were not reminded throughout the trial. The researchers did not have access to the questions jurors asked, so they relied on jurors' self-reports as to the purpose of the questions they asked. The most frequently cited purposes were to get additional information, to clarify information that was already presented, to check on a fact or explanation, and to cover something that the lawyers missed.

Judge and attorney ratings of the procedure were generally favorable. A strong majority of judges and attorneys (63% and 69% respectively) thought jurors submitted an appropriate number of questions, with a much smaller percentage reporting that too many juror questions were asked (27% of judges and 21% of attorneys). Overall, a majority of judges and attorneys thought allowing jurors to ask questions improved their satisfaction with the trial process, with only a small number of attorneys (and no judges) indicating that their satisfaction decreased. Judges and attorneys were asked to rate the impact of juror questions on fairness, efficiency, and juror understanding. Efficiency took the hardest hit, with 23% of judges and 28% of attorneys indicating that the juror questions decreased the trial's efficiency. All of the judges thought that allowing jurors to ask questions either increased or had no impact on fairness and juror understanding, while a small number of attorneys thought the questions decreased fairness and juror understanding (7% and 2% respectively). Based on these results, the Commission recommended the use of juror questions in future trials.

¹⁰Seventh Circuit Bar Association American Jury Project Commission. (2008). *Seventh Circuit American Jury Project, final report*. Chicago, IL: Seventh Circuit Bar Association.

How Attorneys Can Use Juror Questions to Their Advantage

Although many attorneys have a negative stance on the issue, most who have experienced the process favor it. Attorneys shouldn't fear juror questions and, in fact, there are ways attorneys can use juror questions to their advantage. First, juror questions provide invaluable insight as to how members of the jury comprehend the testimony they are hearing, or what they're having difficulty understanding. This could be particularly important in complicated cases, such as patent cases. For instance, it is beneficial to know if jurors are confused about the technology at issue in a patent case while attorneys still have the opportunity to address it through the witness on the stand or upcoming witnesses. Once jurors are in deliberations and realize they are confused they may send questions out to the judge, but at that point it is too late. This sort of confusion early on could impact the way jurors process information throughout the rest of the trial.

Secondly, jurors' questions may give attorneys insight into what jurors think important issues are in the case. Jurors may start asking questions about issues attorneys didn't think would be important. Attorneys can use this knowledge to emphasize, if necessary, this information through the testimony of upcoming witnesses instead of jurors going down the rabbit trail with little information from evidence or witnesses to go on. If the information truly is not a factor in the case, that is something attorneys can address and explain in closing arguments.

How to Ask the Judge to Allow Juror Questions

If the judge does not indicate that he or she will permit jurors to ask questions during trial, attorneys should feel comfortable asking the judge to allow juror questions provided the case is not in a venue where juror questions are prohibited. Juror questions should be addressed in the pre-trial conference in which trial procedure is discussed. In case the judge is resistant to the idea, attorneys should become familiar with the case law in the trial venue, as well as with any court rules or statutes regarding juror questions. There are also numerous empirical studies (those cited above as well as many others) that attorneys can cite in an attempt to explain to judges why allowing jurors to ask questions is a beneficial practice. The Seventh Circuit Jury Project report suggests appropriate pre-instructions as well as final instructions on the issue.

The process of allowing jurors to ask questions of witnesses is becoming more widely accepted, and it will continue to become more commonplace as time goes on. There is no need for attorneys to be afraid of the process. Judges keep close control of the process, and both judges and attorneys who have participated in trials where jurors were allowed to ask questions have found it to be a positive experience. Juror questions are more likely to be helpful to attorneys than they are to be harmful to their strategy. Attorneys should embrace, rather than resist, this process.

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