



Strategies for Successful Voir Dire

By Lara Giese, Psy.D. and David Perrott, L.L.B., Ph.D.

There are two primary goals of the voir dire process. The first is to weed out jurors who will be biased against your case. The second is to create rapport and trust with jurors. While the former requires careful advance planning of your voir dire questions, the latter requires interpersonal communication skills that make jurors feel at ease sharing personal information with you.

Before devising strategies for achieving these goals, you must not overlook—or leave until the morning of voir dire—the issue of how jury selection is handled in your venue and, more particularly, by your judge. Find out if juror questionnaires are used, how much time is allowed for voir dire, etc. Then strategize how to best use those rules to your advantage.

Crafting your questions

You have two important opportunities to hear from jurors in your case: during the voir dire process, and at the moment they announce their verdict. You can minimize your chances of hearing something you don't want to hear at verdict by maximizing your opportunities during voir dire. This requires thoughtful and careful planning of your voir dire strategy.

Avoid asking trick questions with the intent of later educating jurors (e.g., initially asking jurors in a criminal case how they would vote before they hear any evidence). Nobody likes to be used to prove a point. As such, jurors are often embarrassed upon giving the wrong answer to a question.

Instead, begin crafting voir dire questions by identifying the main themes and issues of your case. Focus on areas of perceived strength, and plant those seeds with the jurors. Concentrate on those issues that may trigger unfavorable juror attitudes, values and emotions and can ultimately lead jurors to reject your case.

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Characteristics of your client's identity, for instance, may cause jurors to think in negative stereotypes. Aspects of your client's behavior may defy a juror's subjective norms for how people should behave. Also, the general subject matter of the litigation may stir up attitudes toward corporate America and beliefs about what types of disputes should and should not be litigated. Trial simulations, focus group research, and community attitude surveys conducted on venue-matched jury-eligible individuals are the best ways to identify the hooks and main trigger issues in your case.

If your budget is limited, a brainstorming session with a seasoned trial

consultant will yield powerful insights. Once you have identified the hooks in your case, carefully choose your bait. Keep in mind that jurors are under enormous social-psychological pressure in open voir dire to answer your questions in a way they think will make them appear to be fair and impartial (unless they are on a mission to be excused from serving). This means that you must pose bias eliciting questions in such a way that jurors can indicate bias without feeling as if they are bad members of society. In other words, you must give them permission to answer those questions honestly.

There are many useful techniques for achieving this objective: oblique wording of questions, use of the "norm of reciprocity,"¹ and prefacing your questioning with remarks to defuse the psychological sting of rejection from the jury.

Frame your initial questions indirectly on a "trigger issue." For example, you might broach the issue of sex discrimination by inquiring whether jurors still believe that there is a glass ceiling in corporate America, or whether biological differences between men and women mean that men are better suited

for some jobs and women for others.

Use selective self-disclosure to make jurors feel comfortable—or even obligated—to do the same. Take advantage of the norm of reciprocity. For instance, describe an emotionally impactful event from your own life that might render you unable to be fair in a certain type of case.

You might then explain to jurors that everyone has had certain life experiences that

could compromise their ability to be fair in certain cases, while not affecting their ability to be fair in others. Tell them that this is a simple fact of life, since we are all thinking, feeling

individuals. This sort of preface should go a long way toward creating a safe space for jurors to admit biases they are consciously aware of, while still viewing themselves as good people.

When a juror responds to your oblique questions in a way that leads you to suspect they will be biased against your case, follow up with a series of questions that incrementally lead the juror to admit that they would be unable to be fair in this case because of their specific attitude, belief or experience. This type of questioning should yield enough ammunition to get that juror excused for cause. At the very least, you will have identified a good candidate for a peremptory challenge.

A word of caution: Stop questioning jurors who are strongly opposed to your case once you have extracted enough information to substantiate a challenge for cause (or to satisfy yourself that you should excuse them with a peremptory challenge). By cutting short your questioning of these jurors, you minimize their opportunity to inadvertently taint or bias other potential jurors. Conversely, use as sounding boards those jurors who you

Minimize your chances of hearing something you don't want to hear at verdict by maximizing your opportunities during voir dire.

¹ The norm of reciprocity is the human tendency to respond to the actions of others with similar actions.

suspect will be challenged by opposing counsel. These jurors will communicate positive aspects of your case to other potential jurors. Lastly, remember to appeal to a juror's self-perception as a fair-minded individual in order to help "rehabilitate" an overly favorable juror whom your opposing counsel will likely try to strike for cause.

Some questions will obviously be more general "feeler" questions that enable you to learn more about the juror, not only about potential reasons why they may be likely to reject your case, but also about how impactful a jury member they will be in the deliberation process. Use open-ended questions to elicit the most information from jurors (e.g., "Can you tell me a little about your experiences with...?" or "What are your feelings about...?").

Your early questions should be non confrontational and easy to answer. Make jurors feel comfortable revealing information about themselves to a group of strangers (e.g., "What's your occupation?"

or "How long have you lived in X County?"). Thoughtful voir dire questions are extremely important because learning about jurors' specific attitudes, beliefs and experiences will permit more reliable decision making in jury selection, rather than trying to simply rely on stereotypes or generic juror profiles.

If you are unable to direct the voir dire questioning yourself, take advantage of any opportunity to submit questions for the judge to ask that are designed to reveal adverse case-relevant experiences and attitudes. Also, consider filing a motion for use of a supplemental juror questionnaire whenever possible. Even if your motion is denied, you will at least have had a good opportunity to reveal sensitive aspects of your case to the judge.

Juror profiling

The most reliable means of profiling jurors who are likely to accept or reject your case is to conduct case specific research, such as a large-sample trial simulation or a juror profile telephone survey.

Absent an empirically-based juror profile or consultation with an experienced trial consultant, the best you can do is to rely on your own past experience with the case issues, experience with the venue, and generic juror profiles.

Generic juror profiles give you general information. They tell you, for instance, that plaintiff-oriented jurors tend to be less educated, of lower socioeconomic status, liberal, disgruntled, disenfranchised, and more emotional than analytical. They tend to blame others rather than themselves when bad things happen to them (in psychology terms, this is referred to as an external locus of control). They have also experienced recent personal hardship.

In contrast, generic juror profiles of defense-oriented jurors tend to fall at the opposite end of the spectrum. These jurors are more educated, of higher socioeconomic status, more analytical than emotional, and more conservative. They also take personal responsibility for what happens to them (internal locus of control). And they typically have management or supervisory experience.

These profiles, however, are mere generalities, and are likely to be true "on average." They are more predictive of juror orientation in a canonical civil case in which the plaintiff is the aggrieved underdog, while the defendant claims it did nothing but abide by the rules. The underlying theory is that jurors who are at the margins of mainstream society, who are disempowered and disenfranchised, are more likely to empathize with an underdog plaintiff. Jurors who are well integrated into mainstream society, who are able to understand and have profited from the "rules of the game," are more likely to empathize with the defendant.

The more the facts of your case deviate from this canonical scenario, the less likely it is that generic profiles will predict who will accept or reject your case theory. In more complex cases, the opposing parties may each have characteristics likely to elicit empathy from canonic "plaintiff" and "defense" jurors. Or there may be several

Focus on areas of perceived case strengths, and plant those seeds with the jurors.

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different types of jurors who are favorable to one side of the case for very different reasons. For example, we assisted with jury selection in a contractual dispute in which both parties' case theory was that they were the underdog, cheated by a more savvy and powerful company. Here, the defense thought that traditional plaintiff-oriented jurors would be favorable to their case. Their jury selection strategy focused on ascertaining very case-specific attitudes and experiences to discern whom among these classic plaintiff-oriented jurors would empathize more with one side or the other's particular story.

In patent cases, two issues are pivotal:

1. the emotional issue of what constitutes ethical business practice, and
2. the cognitive consideration of jurors' relative ability to make fine discriminations.

Plaintiff-oriented jurors in such cases are "big picture," "gut level" decision-makers with little business experience in a competitive marketplace. In contrast, greater intelligence, the ability to make fine distinctions, and more business experience all tend to be associated with defense-oriented jurors.

In addition to discerning whether prospective jurors are favorable or unfavorable to your case, it is extremely important to consider their *potency*. Broadly speaking, some jurors are persuaders. They wield considerable influence in the jury room, even if they are not the foreperson, and will be strong allies or foes of your case. Others are participants. They will have opinions about the case and will vocalize them in the jury room, but will be less influential than persuaders. There are also those who are mere passive followers. Watch the whole panel carefully from various vantage points. Better yet, have a trial consultant watch for you. Jurors' nonverbal and verbal cues will yield information about how extroverted, analytical, emotional, neurotic, adventurous and open-minded they are.

It's also important to note how individual jurors react to what others are saying. Do they speak out of turn? Do they seem reluctant to speak at all? If so, are they shy, or trying to keep a low profile? What do they bring with them to the jury box

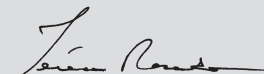
(e.g., what books, magazines, etc.)? Which jurors seem to be bonding with each other (e.g., in the box, in the hallway, etc.)?

Establishing rapport

Establishing rapport with jurors during voir dire is critical to jury selection. You must show respect to jurors during this process. Be mindful of potential jurors who are in unfamiliar territory and who are uncomfortable. They may be disinclined to become the focus of attention in voir dire. Be sure to smile at them. Make eye contact. Show that you are listening and interested in what they have to say. Don't look down at your pad to prepare for your next voir dire item while a juror is still answering the question you posed initially. Lastly, it is especially advantageous to establish rapport with jurors you believe will be adverse to your case. Such rapport not only makes it easier for them to reveal (intentionally or otherwise) their biases to you, but also gives you the benefit of a positive interaction with them if they end up on the jury.

From the Editor

In this, our last issue, I want to acknowledge my committee members for their devotion to *The Jury Expert*. **Kevin Bouly**, my assistant editor, has been responsible for the nuts and bolts of much of the editorial work. His vision and focus have made this publication what it is today. **Debra Worthington** has kept us in touch with the latest findings in jury research, and her long-term vision for the publication has kept us motivated. More recent additions to the team, **Kevin Stirling** and **Kristin Modin** have substantially enhanced the quality of the content and resources available to our readers. **Ralph Mongeluzo** was instrumental in helping us reach a wider audience. **Elise Christenson** has greatly improved the readability of our publication and kept us consistent with her incredible attention to detail. **Renee Larson** has professionally designed each issue and improved the overall look of the publication. Thanks to all of you for your behind-the-scenes work. It has been an honor to work with each one of you.



Consider engaging a trial consultant

There are powerful advantages to retaining a trial consultant to assist you with the voir dire process. Research has shown that an observer (particularly a trained observer) of an interaction is better able to detect deception than is an active participant in the interaction.

The skills for successfully picking a jury are not taught in law school. These skills—understanding nonverbal communication, interviewing techniques, group dynamics and social interaction—are taught in psychology, sociology and communication departments.

Additionally, an experienced trial consultant has picked many more juries and observed many more trials than an experienced trial lawyer has. Some trial consultants, in fact, are in trial as often as two or three times a month. Finally, as a successful

trial lawyer, you are preoccupied with preparing to advocate. In contrast, a trial consultant is solely focused on strategizing to secure the most favorable jury for you to advocate to.

Dr. Lara Giese is a senior trial consultant with TrialGraphix, a national litigation consulting firm that provides expertise in discovery, trial consulting, and presentations to legal professionals. Dr. David Perrott is also a trial consultant with TrialGraphix. They may be reached at 800-444-6766. For more information on TrialGraphix, visit www.trialgraphix.com.

Quick Courtroom Tips

By
Bob Gerchen

Begin Witness Preparation Before Deposition

So many attorneys are willing to spend all sorts of time prepping witnesses for trial, but they don't take much time to prepare them for depositions. If you wait until after the depo to prepare the witness, you can be too late.

Sure, it's time-consuming. Sure, it's inconvenient. And it's not realistic to be able to prep every single witness at length before depositions. But why wait until *after* your key witnesses have committed to testimony in deposition to prepare them?

Depositions are the verbal equivalent of Chinese water torture. The same questions, over and over. No referee. And it's unfair. It's like a beginning Golden Gloves boxer going 12 rounds with Mike Tyson. He's going to take a beating.

Help out your witnesses ahead of deposition, and help out your case.

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*For more information about Bob Gerchen's book, **101 Quick Courtroom Tips for Busy Trial Lawyers**, visit www.CourtroomPresentationTips.com.*

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The American Society of Trial Consultants (ASTC) is extremely proud of *The Jury Expert* and believes that its content needs to be shared with an even broader audience. This is most efficiently and cost effectively accomplished by posting on the ASTC website the practical tips, strategies and jury research previously covered in the print version of this publication. What was available to hundreds will now be available to millions.

This July 2007 issue of *The Jury Expert* is the last edition that will be published in its traditional paper format. Refunds to subscribers will arrive in place of the August issue. Look for some of the same great content you've been seeing in *The Jury Expert* on the ASTC webpage at www.astcweb.org in the coming months.

Sincerely,



Chris Dominic
President,
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Med-Mal Study: Most Claims End in Non-Payouts

By Kevin Stirling, M.B.A.

A seven state review of closed medical malpractice insurance claims conducted by the Justice Department's Bureau of Justice Statistics

(B.J.S.) has determined that the majority of those claims ended without any financial compensation being paid to individuals claiming medical injury. However, when insurance payouts were made, the study also found that the size of financial settlements increased as claims progressed through the legal system,

with the largest payments typically going to claims closed after a trial.

The study examined nearly 43,000 closed medical malpractice claims filed between 2000 and 2004 in the states of Florida, Illinois, Maine, Massachusetts, Missouri, Nevada and Texas, all of which are required by state law to submit data on closed claims to a central state agency which then forwards the claims information to the B.J.S. These states were selected for the study

because they utilize comprehensive medical malpractice insurance claims databases, some of which track records back to the 1990s.

Payouts vary according to when case is closed

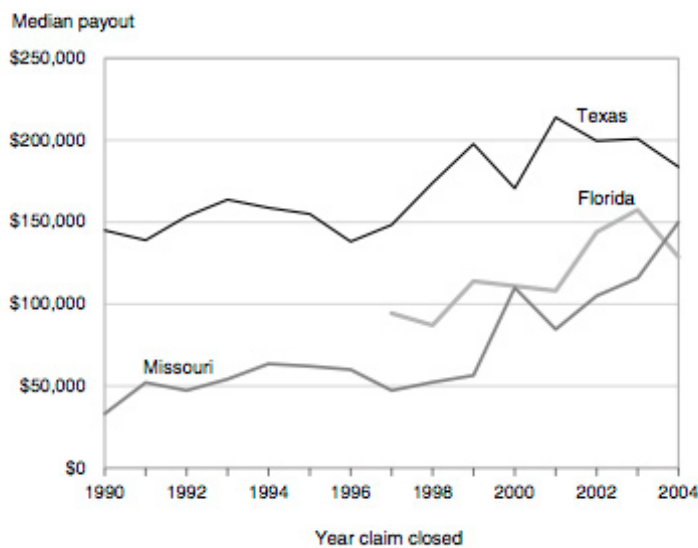
Overall, the study found that payouts were generally lowest for claims closed prior to the filing of a lawsuit and highest for claims closed after a trial. According to the report, insurance claims that were decided by trial in Florida, Nevada and

Texas typically resulted in payments by insurance firms that were at least two and a half times larger than claims that were settled prior to trial.

In terms of financial settlements, the study demonstrated that timing was a factor in the scope of settlement awards, as claims that closed after a trial closed were

ultimately more costly for insurance firms to defend than claims settled at or prior to a trial. In Florida, Nevada and Texas, nearly 95 percent of medical malpractice claims were settled prior to a trial decision by a jury or judge.

Trends in payouts in medical malpractice insurance claims in states with any health care provider data



Note: Insurance payouts were adjusted for inflation in 2004 dollars using the CPI and rounded to the nearest thousand. Texas data are limited to medical malpractice insurance claims with insurance payouts of more than \$10,000. Maine had too few cases for analysis.

Table 1

Payouts were generally lowest for claims closed prior to the filing of a lawsuit and highest for claims closed after a trial.

Size of insurance payouts has increased

In general, claims resulting in payments are seeing the dollar amounts increase in size. According to the study, the median damages paid to medical malpractice

claimants have increased dramatically since the 1990s. One example cited involves Missouri, where the median insurance payouts grew from \$33,000 in 1990 to \$150,000 in 2004—an increase of more than 350 percent. This trend was evident around the nation, as median payments also increased by 57 percent in Massachusetts, 49 percent in Illinois, 36 percent in Florida, 26 percent in Nevada and 27 percent in Texas, according to the data (see Table 1).

Claimants who suffer permanent injury receive largest awards

The report also found that claimants who suffered lifelong major or grave permanent injuries often received the largest insurance settlements, while those claimants who suffered temporary or emotional injuries received the smallest. One example the study mentioned involved claimants in both Florida and Missouri with major or grave permanent injuries typically receiving median payments ranging from \$278,000 to \$350,000. Conversely, claimants in these same states who suffered temporary or emotional injuries received median payments, often between \$5,000 and \$79,000.

When claims are filed

The report determined that many claimants, particularly in Florida, Missouri and Texas, were unhurried in their efforts to initiate legal proceedings after sustaining an injury, and often waited 15 to 18 months before filing medical malpractice claims with insurance companies. Once the claims were filed, the process then continued an estimated 26 to 29 months longer, until the claims were eventually settled and closed.

Several factors may influence the apparent delay regarding when claimants initiate a claim. They include statute of limitations restrictions as well as the need to determine specific medical, work-related, and pain and suffering expenses.

Other key findings from the B.J.S. study include:

- The majority of medical malpractice claims were brought against physicians or surgeons.
- Most injuries occurred at hospital

inpatient facilities.

• Few medical malpractice claims resulted in payouts of \$1 million or more (see Table 2).

• Females comprised more than half (54 percent to 56 percent) of insurance claimants.

Few medical malpractice insurance claims resulted in payouts of \$1 million or more, 2000-2004

State and type of health care provider	Percent distribution of insurance payouts			
	Under \$100,000	\$100,000-\$249,999	\$250,000-\$999,999	\$1 million or more
Any type of health care provider				
Florida	42.7%	23.5%	28.4%	5.5%
Maine	45.7	22.4	24.4	7.4
Missouri	46.9	25.1	24.6	3.5
Texas	32.7	28.2	28.5	10.6
Physicians and surgeons only				
Illinois	20.6%	18.7%	43.7%	17.1%
Massachusetts	21.1	17.8	43.8	17.3
Nevada	32.4	20.1	39.0	8.5

Note: Based on closed medical malpractice insurance claims that resulted in a payout. Insurance payouts were adjusted for inflation using the Consumer Price Index (CPI) in 2004 dollars. CPI is available at <<http://www.bls.gov/cpi/home.htm>>. *Includes only medical malpractice claims with insurance payouts of more than \$10,000.

Table 2

- An estimated 95 percent of medical malpractice claims settled prior to trial.

For more information about the report, please visit the National Criminal Justice Reference Service website: <http://www.ncjrs.gov/app/Publications/Abstract.aspx?ID=237952>.

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Time to Rethink 3M?

By Laura Rochelois

When it comes to pitching the use of trial graphics, there's not much out there that gets more play than the well-known 3M Study.¹ The 1986 study sponsored by 3M and conducted at the University of Minnesota proclaimed in bold letters on the first page of the published paper that presentations using visual aids were "43 percent more persuasive" than those without. As if that wasn't good enough, participants in the study were more likely to describe presenters who used visual aids as "clear," "concise," "interesting," and as having appropriate "supporting data," among other accolades. It sounds great at first blush, and there's no doubt that the study, sponsored by the leading manufacturer of overhead transparencies, is still a favorite in sales presentations and brochures.

However, when you look closely at the paper, which was not published in a peer-reviewed journal, it feels a bit like one of those global warming reports we hear about where any unhappy effects likely to result from the scientific gobbledygook have been offset by a political operative's tacked-on title: "Evidence for Climate Change Inconclusive." In this case, the problem is the reverse: the data is not quite as conclusive as the bold-faced proclamation in the introductory sentence. If only we knew what it means to be "43 percent more persuasive."

Fortunately, author Doug Vogel didn't stop with the 3M study. In 1996, he and colleague Joline Morrison set out to drill down on the findings described in that paper and published their results in *Information & Management*.²

This second study never makes the "43 percent" conclusion. Its results are far more useful and specific, not to mention better substantiated, than those reported in the 3M Study.

This later study looks at a variety of factors relating to the use of visual aids and their effects on both "perceptions of the presenter" and "components of persuasion," the latter of which it defines as:

1. attention,
2. yielding,
3. comprehension, and
4. retention.

The use of visual aids alone appears to have no direct effect on the first two components, attention and yielding, but has a strong positive effect on comprehension and retention. Interestingly, the use of visuals *does* tend to produce a higher regard for the presenter on the part of subjects, which, in turn, correlates with improved attention and yielding. This, of

course, begs the question of which presenter qualities (professionalism? conciseness?) most effectively dial up the attention and yielding levels of an audience. But the interesting thing is that good visuals contribute directly to two components of persuasion: comprehension and retention. Now that's useful.

Morrison and Vogel also slice and dice various optional features of visual aids in multiple ways, yielding some useful findings. For example, it may surprise you to know that color visuals are not only prettier than black-and-white; they actually contribute to greater comprehension and retention of the subject matter being conveyed. Similarly, while well-done animation significantly improves comprehension, redundant or marginally relevant art and animation are at

Color visuals are not only prettier than black-and-white; they actually contribute to greater comprehension and retention of the subject matter being conveyed.

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¹ Vogel, Douglas R. (1986). "Persuasion and the Role of Visual Presentation Support: The UM/3M Study." *Working Paper Series*. The other study that gets a lot of airtime and is also quite old and untested is the Wharton Study: Oppenheim, Lynn. (1981). "A Study of the Effects of the Use of Overhead Transparencies on Business Meetings."

² Morrison, Joline. (1998). "The impacts of presentation visuals on persuasion." *Information & Management*, 33 125-135.

best ineffective and at worst harmfully distracting to viewers.

Research on effective visual communication in the courtroom should ask a number of additional questions:

- What exactly is a good versus a bad visual aid?
- What are the effects of the fact-finder's demographics or cultural background on his or her visual perception and susceptibility to persuasion?
- How do various courtroom factors, social and environmental, affect visual persuasion?

My point is not that trial graphics that aren't based on peer-reviewed research aren't worth the bother. In fact, in our age of 24/7 multimedia edutainment, I'd consider visual aids indispensable in any setting where the goal is to make a persuasive presentation, if for no other reason than because people expect it. But we need to get past the limited beginnings of the 3M Study. If visual persuasion is to come of age as a science, it must be based not on old saws and advertising taglines, but on something we should know a thing or two about: evidence.

A look at the greater weight of the available evidence suggests a few effective ways to incorporate visual persuasion into your next case:

First, respect the limitations of the brain. The eye receives 10,000,000 bits of information every second. The brain processes 40 of these bits (.0004 percent). We hear 100,000 bits of information every second and are able to process 30 (.03 percent).³ The central organizing principal in creating visuals is to eliminate everything that isn't necessary. Start at the macro level and remove all nonessential case themes, then all visuals that aren't critical, and finally all unnecessary elements in each visual. Find the core of your message and focus your creative energy there.

Second, leverage the power of multimedia.

Once you have determined your core messages, use words and pictures together to improve meaningful learning.⁴

That's the theory part. Here's the practical part: it turns out that, according to Mayer, putting words and images on the same screen causes (you guessed it) cognitive overload. A more effective strategy is to let the speaker do the telling and the screens do the showing. Of course, real-time narration also leaves room for on-the-fly improvements, a handy thing during the unpredictable, shifty beast we call trial.

Other researched-based ways to reduce cognitive load and improve meaningful learning include keeping like items together (for example, incorporating key information into the main field rather than placing it in a corner) and breaking information into digestible parts. Design decisions also contribute to meaningful learning, since effective color choice, layout, camera angle and motion, to name a few,

can reinforce emphasis, hierarchy and focus of information, cutting cognitive load and reorienting it in the right direction.

So, must successful trial graphics designers earn advanced degrees in neurology, psychology and ophthalmology? I hope not. But neither can we afford to ploddingly recycle unsupported mythologies dating from the dawn of our profession. To become experts who can create real value for our clients, we have to know something they don't. And to do that, we have to do our homework.

Redundant or marginally relevant art and animation are at best ineffective and at worst harmfully distracting to viewers.



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³ Norretranders, Tor. (1998). *The User Illusion: Cutting Consciousness Down to Size*. New York: Penguin.

⁴ Mayer, Richard. (2001). *Multimedia Learning*. Cambridge: Cambridge University Press.

What You Should Know About Jury Reform

Part IV: Jurors Asking Questions During Trial

By Debra L. Worthington, Ph.D. and
Teresa M. Rosado, Ph.D.

Previous jury reform columns in *The Jury Expert* discussed the effects of juror note-taking, juror notebooks and preliminary jury instructions. Drawing on the research from the National Institute of Justice, the National Center of State Courts, and other resources, we review another jury reform: jurors asking questions.

This reform is being used in both civil and criminal courts. Jurors will generally submit written questions to the judge for review. Counsel has the opportunity to object to each question at sidebar or outside the presence of the jury. Once approved, the judge typically presents the questions to the witness.

The practice of letting jurors ask questions is permitted in some form in most states and the 10 federal circuits that have considered it, but the practice is considered to be one of the more controversial jury reforms and is not widespread.

The practice of letting jurors ask questions is considered to be one of the more controversial jury reforms.

Theory and Research

This reform measure has been the object of much research.¹ Taken as a whole, research in this area suggests that juror questions:

- Increase overall satisfaction with the trial process
- Increase juror confidence
- Provide useful feedback for attorneys
- Do not extend the trial
- Are not overly disruptive or burdensome to the court
- May shorten deliberations
- Can improve courtroom dynamics.²

Field research indicates that prosecutors (80 percent) tend to favor the technique more than defenders (30 percent).³ However, once defense attorneys have actually been exposed

to the technique, they tend to view it more favorably (50 percent). Another pilot program reported that 92 percent of jurors were positively predisposed

towards asking questions.⁴ Many of these jurors reported that asking questions made them better decision makers and increased their feelings of involvement. In addition, the surveyed judges reported that it did not prolong the trial. Similar results were found in pilot programs in Massachusetts, Ohio, Tennessee and New Jersey.⁵

In Practice

As noted above, many jurisdictions permit the use of juror questions at trial. However, judges

¹ Dann, B. M., Hans, V. P., & Kaye, D. H. (2004, November). *Effects of selected jury trial innovations on juror comprehension of contested mtDNA evidence*. *National Institute of Justice Journal*, No. 255. Washington, D.C.: National Institute of Justice. Retrieved July 17, 2007 from http://www.ojp.usdoj.gov/nij/journals/255/trial_innovations.html; Dann, B. M., & Hans, V. (2004, Spring). Recent evaluative research on jury trial innovations. *Court Review*, 16; Dodge, M. (2002). Should jurors ask questions in criminal cases? A report to the Colorado Supreme Court's Jury System committee.

² *Id.*

³ Dodge, M. (2002). Should jurors ask questions in criminal cases? A report to the Colorado Supreme Court's Jury System committee.

⁴ Conner, J. A. (2000). Los Angeles trial courts test jury innovations. *Defense Counsel*, 67, 186.

⁵ Cohen, N. P., & Cohen, D. R. (2003). Jury reform in Tennessee. *Memphis Law Review*, 34, 1. Conner, J. A. (2000). Los Angeles trial courts test jury innovations. *Defense Counsel*, 67, 186. Frank, J., & Madensen, T. (2004). Survey to assess and improve jury service in Ohio (Appendix B). In *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service*. Report on pilot project allowing juror questions (2) (2001). New Jersey Supreme Court's Civil Practice Committee.

are sometimes reluctant to allow jurors to ask questions. Shari Diamond and her colleagues report, "Some judges believe that jurors may submit inadmissible questions that the judge cannot answer or allow a witness to address, that the jurors may be offended when their questions are not answered, and that jurors may come up with their own answers that will unfairly prejudice one party or the other."⁶

Field research has shown that jurors appreciate having the opportunity to ask questions and few abuse the privilege, asking approximately seven questions per trial.⁷ In most cases, when jurors do choose to pose a question, it is "serious, concise, and relevant to the trial proceedings."⁸ The judge's review of questions ensures that any irrelevant or prejudicial questions are not asked of a witness, primarily allowing those that focus on clarifying testimony. Importantly, there is no evidence that questions negatively impact the adversarial process or juror deliberations, nor does research suggest that jurors are offended if their questions are not asked.

The National Center of State Courts outlines arguments for and against jurors asking questions:

Advantages

- Questions may signal areas of misunderstanding or in need of clarification.
- Greater understanding of witness testimony increases juror comprehension and increases the probability that the testimony will be weighted appropriately during deliberations.
- The opportunity to ask questions may result in increased juror attention and engagement.

- The ability to ask questions may result in greater juror satisfaction.

Disadvantages

- Jurors may not understand why their questions are not asked or may become angry if their questions are not addressed.
- The process of asking questions may extend the trial.
- Some jurors may move from the role of fact finder to that of advocate.
- If the judge does not ask a question, jurors may believe that the witness testimony should receive less weight during deliberations.⁹

Improving Your Advocacy

Some attorneys have been reluctant to embrace juror questioning because it appears to take away a lawyer's control of the case. This view of passive learning on the part of the jury, however, does not reflect what we currently know about

how jurors learn and process information. Active jury practice supports interactive learning and juror questioning is one tool that encourages more attentive jurors and allows them to better

perform their duties as factfinders.

If your state allows juror questioning, consider requesting this procedure for your next trial:

- Discuss the possibility of allowing juror questions with opposing counsel and the judge at a pretrial conference.
- Provide the judge with a sample procedure for juror questioning.¹⁰
- Ensure that the proposed procedure gives the jurors a reasonable opportunity to submit the questions they have throughout the trial.

(Continued on p. 12)

In most cases, when jurors do choose to pose a question, it is "serious, concise, and relevant to the trial proceedings."

⁶ Diamond, S. S., Rose, M. R., & Murphy, B. (2004). Jurors' unanswered questions. *Court Review*, 20, 20-29. Retrieved July 17, 2007 from: <http://aja.ncsc.dni.us/courtrv/cr-41-1/CR41-1Diamond.pdf>.

⁷ Mott, N. L. (2003). The current debate on juror questions: "to ask or not to ask, that is the question." *Chicago Kent Law Review*, 78, 1099.

⁸ Jurors' Submission of Questions to Witnesses: Frequently Asked Questions (2007). Available online: The Center for Jury Studies Retrieved July 17, 2007 from <http://www.ncsconline.org/Juries/InnQuestionsFAQ.htm>.

⁹ *Ibid.*

¹⁰ General guidelines may be found on the National Center for State Courts Website: <http://www.ncsconline.org/Juries/InnQuestionsFAQ.htm>.

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Juror questions will give you insight into what the jurors are thinking during the trial, as well as provide opportunity to clarify confusing responses, elicit greater detail and deepen juror understanding. Keep in mind that the kinds of questions jurors ask may also indicate whether they have been doing some independent research on the Internet about your case or the parties involved.

In a Nutshell

As seen above, there does not appear to be a significant downside to allowing jurors to ask questions at trial. Importantly, the disadvantages listed above do not appear to be supported by empirical and survey research. For additional information on this reform, you can access state-by-state rules at the American Judicature Society website¹¹ and the National Center of State Courts outlines the typical procedure for allowing jurors to ask questions at trial.¹²

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¹¹ http://www.ajs.org/jc/juries/jc_improvements_questions_laws.asp

¹² <http://www.ncsconline.org/Juries/InnQuestionsFAQ.htm>

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