

Eat the Rich: Juror Questionnaires for White Collar Cases

by Diane Wiley

There have been many cries to “eat the rich” over recent years in relation to white collar crime. We all know the culprits – Bernie Madoff and the rest. This article will focus on questions which defense counsel may want to use in white collar cases, whether high profile or not.

In white collar cases where the case and the defendant(s) are not likely to be known to many of the jurors, the problem is often in convincing the judge to use a juror questionnaire. Since many of these cases are tried in federal court where there is little jury selection, it's very important to make a strong case for the questionnaire. Many potential jurors will have biases and prejudices against the defendant(s) based simply on the kind of crime they are charged with and their general resentment of “rich” or “powerful” people who are accused of abusing their privileges. Don't make the mistake of thinking that since your client “simply” makes less than a million a year or is “only” charged with embezzling \$100,000, they won't be subject to this type of prejudice. The average wage in the US is around \$50,000 a year and that means that half the population makes considerably less than that. Many jurors will undoubtedly believe what we might consider a “small” amount of money to be significant.

In the white collar crime cases that do not receive a high profile in the press, the issues are a little different and it's often harder to persuade the judge to use a juror questionnaire. This isn't as big a problem if you are in a state court where there is a decent amount of time to conduct voir dire, but in federal court or a limited state court, the questionnaire can be the difference between actually knowing something about the jurors or not.

The biggest problem for the defense in high profile cases is that “everybody” does in fact “know” about them. But most of the time, they don't know the details. They know there are charges, they know that there is a lot of money involved and they know about the often excessive, sometimes obscene, lifestyles of the defendants.

The oldsters at the National Jury Project started out working on high profile criminal cases, with political and/or racial issues in the early 1970's. We quickly found ourselves working on high profile criminal cases of all stripes. What is interesting is that the vehemence, and sometimes glee, with which communities (and thus our jurors) turn on those in power who are charged with crimes has not changed. What has changed is the amount of media available and the extent to which jurors, if they so choose, can read from numerous sources and in any amount of detail they want about the defendants. They can look up the indictment, they can find out everything from where the defendant went to grade school to the make and color of his numerous cars. And some of our jurors do this. They become obsessed with the case. They discuss the details with friends and relatives. But most of our jurors don't care to know that much. They see the headlines, the images on TV and file their reactions away under, “This REALLY makes me mad,” or “Another disgusting rich guy fraud,” or “I don't care, it doesn't affect me”. It is generally pretty easy to get a take on the potential jurors who have read a lot and are really opinionated about a high profile case. The hard part is reading those who haven't read that much but are opinionated anyway.

Most judges are now willing to grant juror questionnaires in high profile criminal cases. The issue then becomes, what is the most useful way to construct a questionnaire for white collar, high profile cases. We've all seen 75 page juror questionnaires, but most judges aren't interested in producing that amount of paper. I've found that, on the whole, the amount of time you have to analyze the data and the structure of the jury selection should control how many questions you ask. It doesn't do you much good to have 75

pages of questions for 100 jurors that you receive on the weekend before the selection because you won't have time to analyze them. And if the judge is not used to using questionnaires, submitting an extremely lengthy questionnaire is not likely to convince him or her it's necessary.

If you're in a jurisdiction where juror questionnaires are not typically granted, it's best to file an extensive motion along with the questionnaire. Many judges remain resistant to juror questionnaires and it's best to assume they will have to be persuaded. It's important to outline how a questionnaire can help and what the rationale is for using a questionnaire as opposed to just asking questions in open court. Any impact on jobs or local institutions that have occurred as fall-out from the alleged fraud or other crime should be identified as a possible source of prejudice against the defendant(s). News articles can be attached to the motion, highlighting negative editorial or reader comments about the defendant(s), whether on the web or in the written press, or if you can find it, on television or radio, to persuade the judge to grant the questionnaire. Keep in mind that sometimes comment sections in papers on the internet are discontinued after a period of time, so begin to collect negative news coverage immediately. You should also identify issues relating to the case which jurors might prefer not to discuss in open court. You may want to append lists of questionnaires granted in similar cases or jurisdictions.

The purpose of the questionnaire from our standpoint is to help us identify bias and prejudice, get cause challenges and intelligently exercise our peremptories. In any case, when looking at jurors, we are trying to identify their (1) experiences, (2) assumptions, (3) attitudes and (4) ideology. The questionnaire, in conjunction with voir dire questions, should be constructed to try to address each of these areas as they relate to the specific facts of the case.

Of course, any jury questionnaire has to be tailored to the case and the jurisdiction. In order to prepare a good questionnaire for any case, trial consultants should do a search of local and national news stories that jurors could have read, with attention to the language used to describe the alleged crime(s) and the defendant(s). In many high profile cases, we will have mock trial data which can give us clues about what types of opinions and specific knowledge about the case seem to lead to prejudice. If the case does not have the resources for a mock trial, consultants and attorneys should talk to non-attorney friends about their reactions to the general case facts to identify possible reactions.

There are some questions that will elicit the biases we see against anyone who is or will be perceived as being "rich" or of the "scoundrel" class, regardless of the case. In addition, there are general questions about the industry or business involved and other experiences jurors may have had which will affect how they approach the case and their ability to understand the issues.

Following are some of the questions that have worked well in our questionnaires, many of them general, some more specific. Remember, as always, that there is rarely one question by itself that will tell you whether to strike a particular juror or not. I have left out extra lines for many of the questions. In general, if you are asking for an explanation, you will need two to three full lines for answers.



It's important to identify people who have worked in any of the fields that might be discussed in the case. In one case, the defendants were charged with securities fraud based on how inventory was represented in the books of a company they owned. Thus it was important to identify potential jurors who had knowledge or training that would give them a specialized understanding of the fields involved.

1. Have you ever had any training or work experience in any of the following? Please check all that apply and explain below:

	No Experience	Training	Work Experience
Manufacturing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sales	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Inventory Monitoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Accounting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Bookkeeping	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Auditing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Banking/Finance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Financial Planning	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Investment Banking	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Business Management	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stock analyst/trader/broker	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Securities analyst/trader/broker	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If training or experience in any of the above areas, please explain what your duties are/were and where you work(ed):

Cases involving government contracts have their own separate issues and it's important to identify who in the panel would have worked for a government contractor. Depending on what the potential juror's job duties were, they might become an "expert" in the jury room as to what a company should or shouldn't do as a government contractor.

2. Have you or any member of your family ever worked for a government contractor?

_____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain: _____

Jurors with a general interest in or knowledge of business will often have different takes on the facts in white collar cases.

3. Do you read publications that focus on business news or watch business shows on television or listen to them on radio or the internet? _____ Yes No _____

IF YES:

Business publications or news sections: _____

Business television shows: _____

Business radio shows: _____

Internet business sites: _____

4. Have you or anyone in your immediate family ever been self-employed or owned a business? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

- a. Are you/they still operating the business? _____ Yes No _____

IF NO, why not? _____

b. Please describe the business: _____

c. Was this experience positive _____, negative _____, or mixed _____?

Please explain: _____

In white collar cases which involve alleged frauds against stockholders, it is important to understand the experience, level of understanding and knowledge potential jurors have about investing.

5. Have your experiences with investing generally been:
- positive negative mixed I have no experience

Please explain: _____

6. Have you or anyone you know ever had any negative experiences with an investment counselor or advisor? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain: _____

7. Have you or someone close to you ever lost money on an investment where you thought the loss was caused by someone else's wrongdoing, fraud or dishonesty? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain: _____

8. Have you or has anyone close to you ever lost what you considered to be a significant amount of money on a business or other investment that did **not** involve fraud? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please describe what happened and the outcome: _____

9. With regard to investments, which of the following statements apply to you or your spouse/partner (Check all that apply.)

- I/We have no investments
- A financial planner or stockbroker **advises** me/us.
- A financial planner or stockbroker **manages** my/our investments
- My/his/her employer handles the investment decision making.
- I take the lead in household investment decisions.
- My spouse/partner takes the lead in household investment decisions.

10. Do you or your spouse/partner own, or have either of you ever owned, any of the following types of investments:

	No	Yes	Currently	In the Past
Money Market Account	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
U.S. government bonds	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Mutual Funds	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Real estate (other than your home)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Stock(s) in a <u>publicly</u> owned company	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Stock(s) in a <u>privately</u> owned company	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Stock Options	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Other (please describe):	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>

Case specific questions related to biases which jurors might have which would preclude them from accepting the defense should be included. For example, if the defense is that the cooperating witness is the person who perpetuated the fraud, you may want to ask the following.

11. Do you think that fraud can occur at a corporation without the knowledge of its CEO? _____ Yes No _____

Please explain your answer: _____

If the defense is challenging the results of a government or other audit of a company, jurors who have experience with an audit will have specific attitudes about them.

12. Have you ever been involved with an audit of financial records for a company you worked for? (This could include an IRS audit or an audit by internal or external accountants.) _____ Yes No _____

IF YES, please explain: _____

13. Have you ever been involved in an audit of your personal finances? _____ Yes No _____

IF YES, please explain: _____

If the case relates to the collapse of a business or stock where others in the community were affected, it's essential to ask about that.

14. Were you or anyone you know affected personally by the (bankruptcy of the _____ company)? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain: _____



Besides asking about connections to law enforcement and the courts, it's always a good idea to ask about any connections potential jurors have to other governmental agencies which have any enforcement or regulatory responsibilities.

15. Have you or anyone you know ever worked in any of the following agencies or departments:

Agency	No	Yes	Explain
United States Attorney's Office	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
District Attorney or Prosecutor's Office	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
U.S. Department of Justice	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
State Supreme Court	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Courts/Judicial System (local, state, or federal)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Federal Bureau of Investigation (FBI)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Sheriffs Department	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Police Department	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
State Police/State Troopers	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Securities and Exchange Commission (SEC)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Drug Enforcement Administration (DEA)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Immigration and Naturalization Service (INS)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
United States Postal Inspection Service	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
_____ State Department of Taxation & Finance	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Department of Homeland Security	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Internal Revenue Service (IRS)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	

16. Have you or anyone close to you worked for a company where there have been allegations of wrongdoing by corporate executives? _____ Yes No _____

IF YES, please explain: _____

Whether or not the defendant(s) is well known, it's important to find out what, if anything the jurors know and think about him or her.

17. Have you read or heard anything about (the defendant) ? _____ Yes No _____

IF YES, please describe what you remember reading or hearing about him:

What is your impression of Mr. _____ from what you have read or heard?

18. Mr. _____ is a very wealthy man who led a lavish lifestyle. Do you have any negative feelings or resentments of very wealthy people that might interfere with your ability to be fair and impartial to Mr. _____ in this case? _____ Yes No _____

When asking whether potential jurors know about the case, it is important to include enough detail that jurors who have only seen some information about the case can identify it.

19. In this case, _____ and _____ are charged with a number of counts of conspiracy to commit fraud and to defraud _____ in connection with _____. In addition, they are charged with a number of counts of wire fraud. Mr. _____ and Mr. _____ each deny the charges and have pled not guilty. Have you heard anything about this case or the people involved or did you see or hear any news reports about it or do you know anyone with any connection to the situation? _____ Yes No _____

IF YES: What have you heard or read about this case or the people involved, where did you hear or read about it and what stands out in your mind about the situation?

20. The government alleges that the defendants defrauded the shareholders of _____ of millions of dollars. Do you believe you might have difficulty being impartial and objective in a case involving such allegations? _____ Yes No _____

IF YES, please explain: _____

21. Is there any reason why you think you might have difficulty being completely impartial in this particular case or is there any other reason why you feel you couldn't or shouldn't sit as a juror in this kind of case? _____ Yes No _____

IF YES, please explain: _____

Judges will sometimes allow the following question which gives you insight into jurors' values.

22. Please name the famous person you admire most and explain why. (Please name an individual whom others would be likely to know).

Any questionnaire for a criminal case should include basic questions about attitudes towards the criminal justice system.

23. Do you have any problem with the legal proposition that the prosecutor must prove that a defendant is guilty beyond a reasonable doubt or he or she must be found not guilty? _____ Yes No _____

Please explain: _____

24. Do you have any problem with the legal proposition that a defendant must be presumed innocent unless and until the prosecution can prove he or she is guilty? _____ Yes No _____

Please explain: _____

25. Do you have any difficulty presuming that Mr. _____ is innocent right now? _____ Yes No _____

IF YES, please explain: _____

26. Under the law, every defendant has the constitutional right to not testify in his or her own defense. If a defendant does not testify, the jury may not consider that fact in any way in reaching a decision as to whether the defendant is guilty or not guilty.

Would you be able to find a defendant not guilty who did not testify, even if the government did not prove beyond a reasonable doubt that the person was guilty?

_____ Yes No _____

IF YES, please explain: _____



Some jurors will not want to talk about some of the issues in the questionnaire in front of other jurors if there is a need for follow-up questions. The length of many of these cases will preclude some jurors from serving. We generally end our questionnaires with the following questions.

27. Is there any subject covered in this questionnaire that you would prefer to discuss in private instead of in front of the other jurors in open court?
 _____ Yes No _____

What question or questions are those? _____

28. The Court and the parties estimate that the trial in this case will last approximately ___ weeks. Every effort will be made to accommodate special needs of individual jurors. Jurors will be paid an attendance fee of \$___ per day (for the first 30 days of trial, and \$___ per day thereafter.)

Jury service is one of the highest duties and privileges of a citizen. The participation of people like you is essential to the proper administration of justice. The Court recognizes that not everyone can serve on a case of this length. However, mere inconvenience or the usual financial hardships of jury service will not be enough to excuse you. You must show that service in this case would cause an unacceptable amount of personal hardship.

Would you have a serious hardship if chosen for this case?

_____ **YES**, I would have a serious hardship if chosen for this case.

_____ **NO**, I would have not have a serious hardship if chosen for this case.

IF YES, please explain your hardship in detail: _____

29. I affirm, under penalty of perjury, that I have given complete and honest answers to all of the questions above.

 Signature Date

For more information about juror questionnaires in general, including jurisdictions where they have been used, sample questionnaires and motions, see JURYWORK: Systematic Techniques (Krauss, Elissa, West Group, 2d Ed., 1978, updated annually).

Diane Wiley is a pioneer in the field of trial consulting, a founder of the National Jury Project and President of the Midwest Office in Minneapolis. Diane has extensive experience in assisting attorneys and prides herself on making her work available to attorneys on cases both big and small across the country since 1973. She has written numerous articles and chapters for legal publications and teaches at seminars. Diane's email address is dwiley@njp.com and the National Jury Project's website is www.njp.com.

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Editor's Note

2011. That happened fast! But we're ready (more or less). We're doing new things here at *The Jury Expert* in 2011. And we are excited about them. In our next issue, we'll have professional layout so you won't have to put up with my amateurish efforts any longer. (You are no more relieved than I!) And. Also in our next issue, we expect to have a new web design that will just amaze you. It will be beautiful. Trust me.

Also in 2011--we are introducing a new sort of respondent to the articles we publish from academics. So far, we have always had trial consultants respond to those pieces with thoughts on how they would (or would not) use the research findings in court. Now--we are adding in trial lawyers. Have you wished you could have your [tactful] say? Now you can. Just send me an email (rhandrich@keenetrial.com) and let me know you would like to respond to a *Jury Expert* article. You can see a how-to from Mark Bennett (a Houston criminal defense lawyer) in this issue. We thought it would be interesting to see how the thoughts of trial lawyers diverged and/or converged with the thoughts of trial consultants. So line up, oh gentle readers. Show us what you've got.

So in this issue of *The Jury Expert* you will find ways to do what you do better, smarter, and more efficiently. You will find ways to keep up with what's new, pack your bag (lightly), craft a SJQ for white collar crime cases, do better voir dire, consider how bifurcation interacts with hindsight bias, and get practical and useful tips for cheap DIY trial graphics. Just our effort to help you maintain your resolutions to do what you do better, smarter, and more efficiently.

Welcome to 2011. Welcome to another year of terrific content and thought-provoking commentary from *TJE*.

[Rita R. Handrich, Ph.D., Editor](#)

On Twitter: [@thejuryexpert](#)



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Editors

Rita R. Handrich, PhD — Editor
rhandrich@keenetrial.com

Kevin R. Bouilly, PhD — Associate Editor
krouilly@persuasionstrategies.com

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