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Jurors Should Ask More Questions During Trials

By **Matthew Wright**
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Matthew Wright

Picture a courtroom near the end of a two-week civil jury trial. It is a securities class action, where shareholders in Acme Corp. challenge General Merchandise Inc.'s acquisition of Acme. Acme's directors are defending the deal that they negotiated with General Merchandise. The key issue in the case is whether the sale price for Acme was fair. The jury has already heard several days of fact and expert testimony, much of which involves complex financial accounting principles and intercompany debt structuring. There is a lot of math.

The defendants' attorney is nearly finished with a detailed cross-examination of the plaintiff's key witness, Dr. Jane Smith. Smith is a business valuation expert who presents two complex econometric models: one criticizing the merger deal that the Acme defendants approved, and the second advocating an alternative deal that the plaintiff class believes better represents the "fair" value of Acme and the price she believes that the Acme defendants should have negotiated. The attorneys and the presiding judge are all paying keen attention to every question and every answer; it is clear to them that the balance of the case likely hangs in these exchanges about Smith's models.

Now picture the jury. Juror No. 3 is fast asleep and snoring lightly. Most of the other jurors show various degrees of attentiveness; they appear bored, confused or a combination of the two. Until one juror raises her hand during a brief pause in the examination and says, "Pardon me, your honor — I have a question." Suddenly, all eyes in the courtroom (including the formerly dozing juror No. 3) turn to the juror who has raised her hand and requested permission to ask a question of the witness directly. The judge invites her to proceed with her question. The juror asks, "Did General Merchandise ever offer Acme the amount Dr. Smith believes was fair?"

The judge considers the question for a moment, and then asks Smith to answer the juror's question. Smith gamely tries to explain the mathematical rigor of her models and why her valuation of Acme shows that the directors negotiated such a bad deal. But conspicuously absent from her answer is any actual evidence that proves General Merchandise offered, or even was willing to offer, anything other than the actual purchase price. The defendants' lawyer was planning to end on a similar set of questions in a few minutes, but he ends his examination right there — on Smith's (non) answer to the juror's simple, direct question. The juror had gotten right to the heart of matter in dispute by raising a valid question about a key fact.

* * *

Scenes like this one are playing out with increasing regularity in courtrooms across the country. Indeed, this example is very similar to a real-life situation I experienced in a recent jury trial in federal court.

If the purpose of a trial is to seek the truth and determine a just outcome, shouldn't the finder of fact (the jurors) have every opportunity to clarify any evidence or facts that are confusing or obscure to them before their deliberations? Judges are permitted to ask clarifying questions in hearings and at trials — why not jurors?

Jury Questioning Is Not New, but the Practice Is Becoming More Common and Accepted

The conventional wisdom is that jurors are usually thought best to be seen and not heard. It may be surprising to learn that, in fact, most state and federal courts have recognized that permitting jurors to submit written questions, or even to pose questions orally to witnesses on the stand, advances several important goals and promotes both fairness and efficiency in civil trials. Indeed, several states have adopted rules and statutes that enshrine the right of jurors to submit questions (subject to approval by the trial court within its discretion).[1] Appellate courts in 32 states and 12 federal circuits have held that it is within the trial judge's discretion to permit jurors to submit questions during trial.[2]

In 2005, the American Bar Association's House of Delegates adopted the ABA Principles Relating to Juries and Jury Trials, a set of 19 standards that incorporate many of the jury and trial reforms that have evolved in various jurisdictions and that are viewed as an aspirational set of preferred practices. Among other things, the ABA recommended that "[i]n civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses."[3] Citing several opinions issued by federal circuit courts and state supreme courts, the ABA explained that permitting jurors to pose questions can help jurors to better fulfill their truth-finding function and to feel satisfied that they have performed their role as jurors as ably as possible.[4]

Allowing jurors to ask witnesses questions is "neither radical nor a recent innovation."[5] In 1907, the Supreme Court of North Carolina recognized the long history of allowing jurors to ask questions and the potential benefits that the practice provides in the search for truth.[6] The court stated:

This course [of allowing jurors to ask questions] has always been followed without objection so far as the writer has observed, in the conduct of trials in our superior courts, and there is not only nothing improper in it when done in a seemly manner and with the evident purpose of discovering the truth, but a juror may, and often does ask a very pertinent and helpful question in furtherance of the investigation.

The common law roots of jurors posing questions at trial are deeply entrenched. William Blackstone wrote that "[t]he occasional questions of the judge, *the jury*, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled."[7]

Why Some Trial Lawyers and Judges Resist Juror Questions

If American courts have long permitted juror question, why is there a sense among many in the bar that this practice is a radical change? Why do many trial advocates oppose the concept of jurors questioning witnesses? At a basic level, many attorneys are reluctant to surrender what they perceive as their own control over the evidence that they present to the jury. Some disfavor the practice because there is a

fear that it could risk turning jurors into advocates and compromise their neutrality.[8] Some believe that it is difficult for jurors to be active participants involved in the questioning of witnesses, while also serving as detached observers who are asked to pass on the credibility of witnesses and the plausibility of the facts presented.[9] Members of the criminal defense bar are generally the most vocal opponents of the practice, as they contend that it violates a defendant's Sixth Amendment right to an impartial jury and interferes with the presumption of innocence and the burden of proof that the government must carry.

But none of the empirical studies of juror questioning supports the conclusion that permitting juror questioning somehow transforms jurors from neutral fact finders into advocates.[10] Indeed, the research indicates that "juror questioning ... as a recognized trial procedure is complete" and is "an innovation whose time has fully arrived."[11]

A more challenging consideration is that jury questioning creates the risk that jurors will ask prejudicial or otherwise improper questions. This concern is amplified by the perceived dilemma that an improper juror question might impose upon counsel — object to the question and risk alienating the jury, or forego the objection and risk waiving an appealable error. But even this legitimate concern can be effectively neutralized by a trial judge who is sensitive to the issue and manages proper procedures to facilitate and control appropriate juror questioning.

Jurors are instructed at the outset of every trial that there are rules of evidence and procedure that prevent or limit certain types or lines of questioning, and that the court ultimately enforces those rules in an effort to treat both parties fairly. Those rules must extend equally to questions posed either by counsel or by the jury. A judge who permits jurors to pose oral questions during the proceeding might show heightened sensitivity when ruling on an objection to a juror's question by offering further explanation beyond simply sustaining or overruling an objection. A judge can apply even tighter control by requiring jurors to first submit their questions in writing. This gives the judge an opportunity to review the question(s) and pose only those that conform to the evidentiary rules. It also depersonalizes juror involvement in witness examination if the judge asks the question(s) more neutrally on the jury's behalf.

Recommendations

Advocates are trained to ask questions of witnesses that elicit information to support their side; jurors ask questions to help clarify the facts they need to understand to get to a fair result. The author has seen first-hand the benefits of empowering jurors to ask questions during the course of a trial. Not only does it reduce or eliminate juror confusion on issues that may be central to their deliberations, it helps counsel focus on presenting the material that jurors themselves feel they need to understand to reach an informed and just verdict. This promotes clarity, efficiency and more just results at trial. Recent jury research also shows that juror questioning enhances juror democracy during deliberation and satisfaction with the jury process because it promotes an environment of equality and participation.[12] If jurors feel empowered to ask for the information they need, rather than rely on the understanding of other jurors, they can better contribute to the jury's overall discussion and decision-making process.

Advocates should explore the issue of jury questions and procedures for such questioning at the final pretrial conference. If the judge already incorporates this practice in her courtroom, counsel should understand in advance how the judge will instruct the jury with regard to posing questions during the trial. If a judge is initially resistant to the prospect of allowing juror questions, there may be an opportunity for counsel to suggest permitting jurors to submit to the court written questions for

witnesses. So long as the court has an opportunity to review the questions first and determine their propriety, and the court further deems that the question(s) are designed to assist the jury reach an impartial determination of the facts, a judge may be persuaded to adopt the practice. The trial court will ultimately have broad discretion to decide whether or not to permit juror questioning. But judges unfamiliar with the practice are not likely to embrace it unless counsel raises the issue and some of the positive considerations noted above at a pretrial conference.

Ultimately, procedures that promote juror engagement, understanding and reasoned decision-making should be promoted in every courtroom. Permitting jurors to pose questions to witnesses during trial is a practice that should be encouraged by the bench and the bar in order to improve all dimensions of the jury trial process.

Matthew Wright is a partner at McCarter & English LLP.

[1] See, e.g., Arizona: Ariz. R. Civ. P. 39 (b)(10); Ariz. R. Crim. P. P. 18.6(e) (Jurors permitted to submit to the court written questions directed to witnesses or to the court); Colorado: Col. R. Civ. P. 47(u) and Col. R. Crim. P. 29(g) (mandate juror questioning and confer discretion on the court to prohibit or limit questioning in a particular trial for good cause); Indiana: Indiana Evidence Rule 614(d) ("A juror may be permitted to propound questions to a witness by submitting them in writing to the judge."); Nevada: Nevada Short Trial Rule 24 (2005) ("[T]he court will allow members of the jury to ask written questions of any witness called to testify in this case."); Utah: Utah R. Crim. P. 17(i) ("A judge may invite jurors to submit written questions to a witness.").

[2] See 2 Jurywork Systematic Techniques § 16:5 n. 7-9 (citations omitted) (Nov. 2017); see also Fed. R. Evid. 611(a) (instructing courts to "exercise reasonable control over the mode and order of interrogating witnesses").

[3] See id., Principle 13C.

[4] Id.

[5] State v. Doleszny, 176 Vt. 203, 844 A.2d 773, 778 (2004).

[6] State v. Kendall, 143 N.C. 659, 57 S.E. 340, 341 (1907); see also Schaefer v. St. Louis & S. Ry. Co., 128 Mo. 64, 30 S.W. 331, 333 (1895) ("We ... do not see why [asking questions] was not a commendable thing in both the court and the jury ... so that they could properly determine the case before them.").

[7] See 3 Sir William Blackstone, Commentaries on the Laws of England 373 (William D. Lewis ed. 1922) (1765) (Emphasis added.)

[8] See U.S. v. Bush, 47 F.3d 511, 515 (2d Cir. 1995); Ex Parte Malone, 12 So. 3d 60, 65-66 (Ala. 2008).

[9] Id., citing United States v. Johnson, 892 F.2d 707, 713 (8th Cir. 1989).

[10] See, e.g., M. Frank, The Jury Wants to Take the Podium — But Even With the Authority to Do So, Can It? An Interdisciplinary Examination of Jurors' Questioning of Witnesses at Trial, American Journal of Trial Advocacy, Vol. 38, No. 1 (2014); Council for Court Excellence, Jury Service Revisited: Upgrades for the 21st Century (2015); Hon. G. E. Mize and P. Hannaford-Agor, Jury Trial Innovations Across America: How Are We Teaching and Learning From Each Other, 1 J. Ct. Innovation 189 (2008); Hon. Warren D. Wolfson, An Experiment in Juror Interrogation of Witnesses, 12 Chi. B. Ass'n. Rec. (Feb. 1987);

[11] Frank, 38 Am. J. Trial Advocacy No. 1, at 7, 26.

[12] N. Marder, Answering Jurors' Questions: Next Steps in Illinois, 41 Loyola U. Chi. L. J. 727 (2010).