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THE CASE FOR ALLOWING JURORS TO SUBMIT WRITTEN QUESTIONS

To the extent that jurors' questions assist in the search for truth, those questions should be asked.

WESTLAW LAWPRAC INDEX

JUD -- Judicial Management, Process & Selection

Juror questioning of witnesses is neither a new nor an innovative concept in the common law and American jurisprudence. [1] Jurors have questioned witnesses in England since the eighteenth century, and the practice has existed in America since 1825. [2]

At common law, those charged with capital crimes were not afforded counsel unless legal issues needed debating. The judge and jury were authorized to ask questions. With the lack of counsel and few procedural and evidentiary rules, criminal trials were solely in the hands of judges. As the English court system evolved, more emphasis was placed on fair procedure. Defense counsel played an increasing role, while the role of jurors as active participants diminished. The emphasis on the quality of evidence, shaped by examination by counsel, relegated the juror to the role of passive, neutral observer. [3]

The practice of juror questioning of witnesses in federal courts dates back as far as 1954. [4] By allowing juror questioning, courts sought to promote clarification of facts and the discovery of truth. At least 30 states and the District of Columbia permit jurors to question witnesses. A few states prohibit the practice. [5] Every federal circuit that has addressed the issue of juror questioning of witnesses agrees that it is a practice that should be left entirely within the court's discretion. [6] In most military hearings, members of court-martial panels have the opportunity to question witnesses. [7]

The first American court to address the validity of jury questioning of witnesses, in 1895, asserted that the practice was not prejudicial to either party in the suit and emphasized that it was a commendable practice since it helped the jury to "properly determine the case before them." [8]

Originally, juror questioning was known as "juror outbursts," which gives some idea as to the formality of the ***17** procedure. If a juror had a question, the juror would simply blurt it out in open court. During the 1950s and 1960s, courts began establishing more formal procedures. The earliest case in which a court created formal procedures for juror questioning was decided in 1926. [9]

Controlling the process

Certain procedural safeguards can reduce or eliminate the risks of jury questioning of witnesses. The demeanor of the judge and how the judge addresses the issue make the difference. The judge decides whether a witness should be asked questions posed by jurors. This applies to both civil and criminal cases. The judge should give preliminary limiting instructions about the procedure being available, what questions will be allowed, and the technical rules involved. He or she should explain that questions are not encouraged but are to be sparingly used. Jurors should be told that they are not advocates, and must remain neutral. They should

also be told that they are not to draw any inference if their question is not asked, because the rules of evidence and rulings by the judge in the case will limit even the parties' questioning, and that they are not to reveal any unasked question to the other jurors.

Jurors should be told that the judge is the "gatekeeper" and determines which questions will be asked, and in what format. Juror questions should be limited to matters attested to during direct and cross-examination, and to clarifying information already presented. The questions should be of the type that a fact-finder, and not an advocate, would ask. They should be factual, not argumentative. Questions should not be asked to express views on the case or to argue with a witness. The juror questions should come only after the witness is finished testifying, but before that witness leaves the stand.

Questions should be in writing, collected by the bailiff and submitted directly to the judge, and never to the witness. Questions should not be discussed with the other jurors and should not be signed. The parties should be given the opportunity to object to the questions, outside the hearing of the jurors, and the questions should be made a part of the record. The judge, and not the attorneys or jurors, should pose the questions to the witness in a neutral, non-intimidating, non-argumentative manner. Each party should have the opportunity to further question the witness on issues raised by the juror questions. The trial court should, in its discretion, withhold juror questioning of witnesses if it will not be beneficial to the case and aid jurors in the execution of their responsibility. Juror questioning is simply an extension of the court's own power to question witnesses in accordance with the rules of procedure.

Observations

I am currently in my fifth year of allowing jurors to propose written questions, and have done so in well over 100 trials.[10] Over that period I have made the following observations: (1) the vast majority (over 90 percent) of juror questions are good questions and many are excellent; (2) most questions seek clarification of testimony regarding topics that have already been touched upon by the witness, including testimony not heard or which was vague or ambiguous; (3) when jurors submit questions that seek to inquire into areas not already covered by a witness's testimony, it is rarely because counsel intentionally avoided inquiry into those areas as part of a trial strategy-instead, it is often because counsel has simply overlooked inquiring into those areas, i.e., "not seeing the forest for the trees"; (4) trial counsel often appreciate the opportunity to get mid-stream glimpses of how the jurors are processing the information coming into evidence and being able to shore up a point they thought they were making, and after experiencing jury questioning of witnesses first-hand, most attorneys approve of and embrace the practice; and (5) jurors universally approve of and appreciate the ability to clear up confusion by asking questions, and, combined with the ability to take notes and having written jury instructions on the law, when jurors are allowed to ask questions they feel very satisfied that they reached the correct verdict.[11] In short, I have found that juror questioning has not led to a breakdown of the adversarial system.

Juror questioning of witnesses is especially helpful: (1) when the trial is lengthy or complex; (2) attorneys are unprepared or obstreperous; (3) facts become confused and neither ***18** side is able to resolve the confusion; (4) to resolve ambiguity in testimony and bring forth additional relevant information; (5) when jurors misunderstand the words used by the attorney or witness, or fail to hear a word; (6) when a witness is difficult or is not credible and the attorney fails to adequately probe the witness, or if a witness becomes confused; and (7) when attorneys for both sides avoid asking the witness a material question because the attorneys do not already know the answer.

Reasons for opposition

Unpredictable testimony. Some attorneys oppose jury questioning of witnesses because they think it will upset their well-laid plans in the construction of their case and its execution. But the attorneys are not the sole arbiters of the scope and content of testimony. The judge can ask questions. And in the judge's discretion, the jury also can ask questions. In addition, live testimony is inherently unpredictable. Juror-inspired questions do not inevitably mar the careful orchestrations of trial counsel. If testimony in court were so predictable, then trial counsel would have no need for carefully-indexed and cross-referenced depositions, and all witnesses would testify via pre-recorded video. The parties do not get to "choose" what the witnesses say when they testify. Nor should they get to decide whether the jury inquires of the witness. In addition, the mere fact that testimony was elicited by a juror's question does not mean that the entire jury will not properly compare and weigh that testimony along with everything else in the trial.

Delay. Some advocates have argued that allowing jurors to submit written questions is inefficient and will result in needless interruption and delay.[12] However, that has not been my experience. The trial is not "interrupted" or "delayed" by juror questions, any more than the trial is "interrupted" by objections from counsel, or "delayed" by requiring counsel to lay the foundation for admitting an exhibit, or by lengthy sidebar discussions. When allowed by the judge, juror questions are an integral part of the trial process. Questioning is likely to save time with improved understanding by the jurors, reduced questioning of other witnesses, and shorter jury deliberations.

Premature deliberation. Another objection has been that the very process of formulating questions invites a juror to begin deliberating before all the evidence has been submitted. But jury deliberation is far more than merely giving consideration to the evidence. Jurors necessarily give consideration to the evidence as it comes in. As individuals, they watch, listen, assess demeanor, and give private consideration to everything that happens in the courtroom. They also inevitably formulate questions in their mind about the evidence. Occasionally, in courts where juror questions are allowed, they articulate those questions to the judge, and sometimes their questions get asked and answered. Jury deliberation is the group process of formulating answers to the questions posed by the evidence and the law. In fact, group deliberations cannot take place effectively unless individual jurors already have begun to formulate questions in their minds about the evidence. When a witness answers an individual juror's questions, it helps to lay the proper foundation for effective deliberations by the jury as a group. Juror questioning of witnesses is no more indicative of a prematurely made-up mind of a juror than a judge's questioning of witnesses in a bench trial is of the judge's premature decision.

Curing confusion

If the jury is confused about the evidence, then jurors should be allowed to ask questions designed to alleviate the confusion. If, after clarifying their confusion, the jury is not persuaded, then they should decide against the party with the burden of persuasion. The idea that justice is somehow served by a confused jury that is not allowed to express its confusion and seek clarity of understanding is flat wrong. If the failure to persuade results from curable juror confusion, then the party with the burden of proof is not the only one who suffers. The entire community suffers because a miscarriage of justice has occurred. And that miscarriage of justice will undermine public confidence in the judicial system as disgruntled parties and lawyers and jurors all become ambassadors of cynicism. To say that the party with the burden of persuasion or proof must make its points clear or suffer the loss at trial ignores the fact that a jury may just as easily rule in favor of the opposing party (the one without the burden) if the jurors are confused about the evidence.[13]

The burden of proof

Some say that the duty of the petit jury is to decide not what the truth is, but whether the party with the risk of non-persuasion has satisfied its burden of proof.[14] Of course, such an artful framing of the question conflicts directly with the common experience of jurors. That is not how jurors think. In deciding whether the party with the burden of proof has met its burden, the jury also must decide what the truth is. How else can they possibly decide that the burden has been met? The "burden of proof" is the burden of proving that something is true.

In deliberations, the jury does more than merely assess the credibility of the witnesses and weigh the evidence. The jury also uses its common experience to assemble the testimony and evidence into a coherent representation of reality. Often, as a necessary precondition for deciding whether the burden of proof has been met, the jury first decides which party has presented the most coherent representation of reality-the one that best accounts for the testimony and the facts in evidence. Indeed, the closing arguments ***19** of counsel are often an effort to influence the jury in deciding which party's version of the truth best accounts for the testimony and the evidence.

It should be no surprise that an experienced advocate-whose relationship with the "search for truth" is necessarily subordinated to his duty to represent his client-would downplay the truth-seeking function of a trial judge and a petit jury in the courtroom. It serves his or her purposes to reduce the truth-seeking function of the judge and jury to the most passive role possible. For an advocate, the search for truth is helpful only to the extent that the truth is on the side of his client. And in a jury trial, the truth serves only one party at best. To quote Judge Marvin E. Frankel, "[T]ruth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time."[15]

If the "search for truth" has no place in a jury trial, then one would expect that statement to have persuasive value in a closing argument to a jury. Counsel could use a portion of closing argument to "remind" the jury that their deliberative duties have nothing to do with searching for the truth. Of course, such an argument would likely offend the sensibilities of most petit jurors who-as the bedrock of the common law-are not generally conversant with the skewed, anti-truth perspective of an advocate.

In short, jurors are naturally and commonly concerned with figuring out, based on the evidence and the testimony, what really happened. Certainly, they must do so within the structure of deciding whether the party with the burden of proof has proved his case, but the mere fact that this structure exists does not eliminate the jury's search for enough truth to decide what really happened. Juror questioning of witnesses helps the trial to be more than a mere contest of advocacy; it helps the trial to maintain a proper focus on the search for truth. [16]

Confusion vs. "reasonable doubt"

Criminal defense attorneys frequently object to jury questioning of witnesses because they think juror confusion will inure to the benefit of the defendant by creating reasonable doubt. The premise is faulty-not all juror confusion will result in an acquittal. Further, jurors are instructed on the law: Reasonable doubt "is a doubt based on reason and common sense." [17] Reasonable doubt is not a doubt based on confusion, misinformation, and ambiguity. In the conduct of the most important of a juror's own affairs, would the juror act upon confusion, misinformation, and ambiguity-or would the juror seek clarity by asking questions? The hallmark of the American trial is the pursuit of truth. [18] Such truth-and, in the end, justice-is attainable in all cases, including criminal, only if the jury makes its decision based on reason and common sense.

The search for truth

Notwithstanding the partisan role of the advocates, and the rules protecting various rights, one of the main objects of the litigation process is still the search for truth. [19] To the extent that a juror's question assists in the search for truth, and to the extent that the trial judge exercises his or her discretion to allow it, the juror's question should be asked.

Certainly, there are benefits of juror questioning of witnesses. Questioning facilitates juror understanding, attentiveness, and overall satisfaction, improves communications, and corrects erroneous juror beliefs. Some contend it promotes the search for truth and justice.

When a court allows jurors to pose written questions, the court is neither abolishing the common practice of muzzling jurors, nor is it adding a new practice. The court is exercising its discretion to use a centuries-old, common law procedure to enhance the truth-seeking function of the jury trial. [20] The search for truth is central to the legitimacy of a trial's function. If the trial does not effectively develop the facts and comprehensibly present them to the factfinder, justice is serendipitous. Any concerns that jurors might become advocates for one party or another are alleviated by the role of the judge who decides whether the question should be asked, and if so, then how the question should be asked. [21] In short, when a judge asks questions that have been submitted by a juror, it is a procedure that has historically and traditionally been committed to the sound discretion of the trial court to serve the search for truth. [22] The fact that the question originated with a juror is less important than the fact that the judge deems the question worthy of being asked.

Footnotes

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1 M. Hale, The History of the Common Law of England 164 (C. Gray ed. 1971) (1st ed. 1713) ("[b]y this Course of personal and open examination, there is Opportunity for all Persons concerned, viz, The Judge, or any of the Jury . . . to propound occasional questions, which beats and boults out the Truth").

2 See 3 Sir William Blackstone, Commentaries on the Laws of England 373 (William D. Lewis ed. 1922) (1765) (commenting on the practice in English history); Barry A. Cappello & James G. Strenio, Juror Questioning: The Verdict Is In, 36 Trial 44 (2000) (commenting on the practice in American history).

3 Robert Augustus Harper & Michael Robert Ufferman, Jury Questions in Criminal Cases, 78 Fla. B. J. 8 (Feb. 2004).

4 State v. Witt, 215 F.2d 580 (2d Cir. 1954).

5 Sarah E. West, The Blindfold on Justice is not a Gag: The Case for Allowing Controlled Questioning of Witnesses by Jurors, 38 Tulsa L. Rev. 529 (2003).

6 Emma Cano, Speaking Out: Is Texas Inhibiting the Search for Truth by Prohibiting Juror Questioning of Witnesses in Criminal Cases? 32 Tex. Tech L. Rev. 1013, 1017-18 (2001).

7 Robinson O. Everett, Military Justice in the Armed Forces of the United States, 185-186 (1956).

8 Schaefer v. St. Louis & Suburban Railway Company, 30 S.W. 331 (Mo. 1895). See also Chi., Milwaukee & St. Paul R.R. Co. v. Krueger, 23 Ill.App. 639 (1887); Miller v. Cmmw., 222 S.W. 96 (Ky. 1920); Chi. Hansom Cab Co. v. Havelick, 131 Ill. 179 (1889); State v. Kendall, 57 S.E. 340 (N.C. 1907).

9 West, supra n. 5.

10 I have used most of the innovations suggested by the 2004 "Report and Recommendations of the Ohio Supreme Court's Task Force on Jury Service." In its report, the task force strongly recommended that the following policy be adopted by Ohio courts: "Jurors are entitled to ask questions of witnesses unless the court, in its discretion, finds in a specific case that the process will not contribute to the search for truth." In support of this recommendation, the task force referred to the overwhelmingly positive response of jurors, judges, and the moderately positive response of trial attorneys, to the use of juror-initiated questions during the Ohio pilot project from April until mid-November 2003.

11 In my court, all jurors are mailed an anonymous exit survey to complete and return.

12 Richard S. Walinski, Questioning by Jurors: A Flawed Idea, 19 Ohio Lawyer, 32 (Jan/Feb 2005).

13 Walinski, id., seems to assume that any confusion will always inure to the detriment of the party with the burden of proof, so that there is no risk in confusion to the party without the burden.

14 Id.

15 The Search For Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (May 1975).

16 Carrie Shrallow, Expanding Jury Participation: Is It a Good Idea? 12 U. Bridgeport L. Rev. 209, fn 183 (1991).

17 Revised Code Section 2901.05(D) defines "reasonable doubt" as being "present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his (or her) own affairs."

18 State v. Fisher, 99 Ohio St.3d 127, 2003-Ohio-2761.

19 United States v. Callahan, 588 F.2d 1078, 1086

(5th Cir. 1979); Sims v. ANR Freight Systems, Inc., 77 F.3d 846 (5th Cir. 1996); Morse Boulger Destructor Co. v. Arnoni, 376 Pa. 57, 101 A.2d 705).

20 See, Blackstone, supra n. 2 ("[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. . . .").

21 United States v. Bush (1995), 47 F.3d 511.

22 United States v. Sutton (1992), 970 F.2d 1001, 1005. In the context of expressing reservations about allowing jurors to ask questions in criminal trials, the court also acknowledged in footnote 3, "To be sure, the balance is not completely one-sided. Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the juror's minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror."

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