

## Juror Questions at Trial: In Principle and In Fact

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The practice of allowing juror questions during trial, although familiar at common law,<sup>1</sup> fell into disuse over time and has only recently been revived. While the practice remains controversial, experience with pilot programs permitting jurors to submit questions during trial is producing “converts” among judges and attorneys who participate in these trials.

One recent convert is Judge James Holderman, co-chair of the Seventh Circuit Bar Association’s American Jury Project which tested seven ABA Principles between October 2005 and May 2006. Judge Holderman’s initial skepticism about juror questions disappeared after he found through experience that: the procedure worked smoothly; the questions were generally relevant and provided beneficial insights to the attorneys; and the jurors appreciated the opportunity to submit questions. Other Seventh Circuit judges and attorneys reached the same conclusions.

In the Seventh Circuit Project, 14 judges permitted jurors to submit questions in 27 cases. Jurors submitted questions in 20 of the 27 cases. There were no notable differences in length of trial or complexity of evidence and law between the group of 7 cases in which the jurors did not submit questions and the 20 in which they did. The question arises: what influenced whether jurors submitted questions in a particular case?

I interviewed all of the judges who permitted questions and asked them to describe how they went about it. In some respects, all of the introductions were similar. All specified that questions were to be submitted in writing, that the judge would discuss

the questions with the attorneys, and that legal rules might prevent the judge from permitting some questions. In other ways, the instructions differed. Some judges described juror questions as an “opportunity;” others specifically told the jurors that their questions should be aimed at clarifying a witness’s testimony. Some told jurors to write down their questions and give them to the bailiff, without indicating when that would occur; others told the jurors that questions would be collected after each witness finished testifying. Some provided special forms for questions; others did not. With the small sample of cases and the variety of combinations of procedures used, we could not assess how these variations affected the number of questions that jurors submitted. But one difference turned out to be crucial in affecting whether any questions were submitted at all.

The crucial difference between the group of trials in which jurors submitted questions and the group in which no questions were submitted was whether or not the judge mentioned the possibility of juror questions again *after* the initial introduction. In the 20 trials in which jurors submitted questions, 10 of the 11 judges asked the jury after each witness if there were any questions; the 11<sup>th</sup> asked only after the first witness and received questions only for that witness. But the three judges who presided in the seven remaining trials in which no questions were submitted mentioned juror questions only in their initial introduction before testimony began and never again mentioned the possibility of juror questions.

It turned out that when the judges only mentioned juror questions in their introductory remarks, many jurors simply did not realize that questions were an option when the time for questions came. On their post-trial questionnaires, only a third (38%) of the jurors in these cases reported that they were permitted to submit questions. By contrast, among jurors who sat on trials in which the judge mentioned the possibility of submitting questions during the trial, 99% understood that questions were an option. Thus, when judges mentioned that jurors would be permitted to ask questions only at the outset of the trial at the same time that they gave the jurors other important and sometimes complex information and the judges never reinforced during the trial, most jurors did not recall the embedded instruction on juror questions.

The Seventh Circuit test of juror questions demonstrated an important lesson about realistic implementation of innovations. The results show that judges who are interested in offering jurors a real opportunity to submit questions must make sure that jurors know they can do it by giving the jurors a reasonable opportunity to actually submit the questions they have. It is apparent that a single mention of the procedure at the outset of a trial is not sufficient.

The efforts of the various Jury Commissions, Projects, Courts, and Bar Associations to optimize jury trials depend on what happens in the trenches. The courtroom can be a daunting environment, and jurors depend on the judge for guidance. It is thus up to the court to assure that “innovation on the books” becomes “innovation in fact.”

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<sup>1</sup> United States v. Bush, 47 F.3d 511, 515 (2d Cir. 1995)