

# Jurors' Unanswered Questions

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American courts have rediscovered what was familiar at common law.<sup>1</sup> A majority of modern courts now sanction the practice of permitting jurors to submit questions during trial.<sup>2</sup> A procedure that permits jurors to submit questions is consistent with the view that juror questions can promote juror understanding of the evidence<sup>3</sup> and fits with other jury innovations, like note taking and written jury instructions, that aim at optimizing juror comprehension and recall. Nonetheless, the practice of permitting juror questions has not received unanimous endorsement and adoption.<sup>4</sup> Even in jurisdictions that authorize juror questions during trial, the ultimate decision as to whether or not to permit them is generally left to the discretion of the trial court,<sup>5</sup> and it is unclear how pervasive the practice actually is across jurisdictions in which juror questions are authorized.

Some judges have been reluctant to permit juror questions because of concerns that jurors will frequently submit inad-

missible questions that the judge cannot answer or allow<sup>6</sup> a witness to address, that the jurors may be offended when their questions are not answered,<sup>7</sup> and that jurors may come up with their own answers that will unfairly prejudice one party or the other. A unique opportunity allowed us to examine the frequency and nature of jurors' unanswered questions and to assess how jurors responded. We collected all of the questions that jurors submitted during 50 civil trials in Arizona, where jurors are regularly permitted to submit questions during trial.<sup>8</sup> A distinctive feature of the research is that we were able not only to identify the questions that the judge declined to allow, but also to observe juror reactions during trial and deliberations as the jurors learned that their question would not be allowed.<sup>9</sup> This examination both addresses the concerns raised about unanswered juror questions and gives judges who have not yet permitted juror questions a preview of the kind of questions jurors are likely to submit that judges may not be

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## Footnotes

1. 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 bolts out the Truth”).
2. See *Ohio v. Fisher*, 99 Ohio St. 3d 127, 130-132; 789 N.E.2d 222, 226-228 (2003) for a review of federal and state cases.
  3. See, e.g., M. Michael Dann, “Learning Lessons” and “Speaking Rights”: *Creating Educated and Democratic Juries*, 68 IND. L. REV. 1229, 1253 (1993).
  4. See, e.g., N. Randy Smith, *Why I Do Not Let Jurors Ask Questions in Trial*, 40 IDAHO L. REV. 553 (2004).
  5. *Ohio v. Fisher*, 99 Ohio St. 3d 127, 131; 789 N.E.2d 222, 226 (2003).
  6. We use the word “permit” to refer to the practice of letting jurors submit questions during trial; we use the word “allow” to refer to the decision to answer a juror’s question or let a witness to answer it.
  7. See, e.g., Smith, *supra* note 4, at 564 (“When questions are not asked after being formulated by a juror, he/she may become upset with one of the parties, especially the one objecting to his/her questions [even though] the objections to the questions are made outside of the jury’s presence”).
  8. The Arizona rule authorizing the practice of juror questioning in civil cases specifies that “Jurors shall be permitted to submit to the court written questions directed to witnesses or the court. Opportunity shall be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.” Ariz. R. Civ. P. 39(b)(10). Consistent with this language, the standard practice in Arizona is to permit juror questions and jurors were so instructed in all 50 of the cases we studied.
  9. The Arizona Supreme Court authorized the taping of jury discussions and deliberations in these 50 trials as part of an evaluation of another jury innovation: permitting jurors to discuss the case in the course of the trial. The results of that evaluation are reported in Shari S. Diamond, Neil Vidmar, Mary Rose, Leslie Ellis, & Beth Murphy, *Jury Discussions During Civil Trials: Studying an Arizona Innovation*, 45 U. ARIZ. L. REV 1 (2003).

able to allow witnesses to answer.

Before turning to this analysis of the unanswered questions, we briefly review the claimed advantages and disadvantages of permitting juror questions in light of the available evidence.

### ADVANTAGES AND DISADVANTAGES OF JUROR QUESTIONS

The primary claim made in favor of permitting juror questions is that it promotes juror understanding of the evidence. To the extent that jurors are like students in their attempts to understand the material being presented to them at trial, answers to juror questions, like those given to students in a classroom, offer the opportunity to correct sources of confusion, clarify misunderstandings, and improve comprehension and recall. Some support for this proposition comes from a national field experiment in which 160 cases in 33 states were randomly assigned to permit or not permit juror questions.<sup>10</sup> Jurors who were permitted to submit questions rated themselves as better informed than those who were not permitted to submit questions.<sup>11</sup> Similarly, in a Colorado field experiment involving 239 criminal trials, jurors who were permitted to submit questions were more likely to agree that they had sufficient information to reach a correct decision.<sup>12</sup>

Another potential advantage of juror questions is that they can signal counsel, as they do an instructor in a classroom, that some issues need to be addressed further. It is unclear how often this occurs, but judges who have permitted juror questions<sup>13</sup> and attorneys who have tried cases in which questions were permitted<sup>14</sup> report instances in which the juror questions assisted attorneys in presenting their cases clearly. Similarly, judges report that jurors appear more attentive and involved when questions are permitted.<sup>15</sup>

Judges who have experimented with juror questions have generally become more enthusiastic about permitting juror questions after trying out the procedure.<sup>16</sup> Jurors too report satisfaction with the opportunity to submit questions.<sup>17</sup>

Critics of juror questioning have suggested that permitting juror questions might upset court decorum and consume unnecessary court time. Judges who permit juror questions generally address those concerns by instructing jurors at the beginning of the trial that they can write down a question and submit it to the judge through the bailiff. The judge then consults with the attorneys out of the presence of the jury, usually at a sidebar, and determines whether to ask the witness the juror's question. If proper, the judge puts the question to the

witness. Attorneys are permitted to ask any necessary follow-up questions. This procedure handles juror questions efficiently, minimizing the additional time that juror questions may require.

A separate set of concerns, and our focus in this article, is on juror reactions to the questions they submit that are not answered.<sup>18</sup> Do jurors react unfavorably if their questions are not answered, taking offense or experiencing unnecessary embarrassment? Are questions rejected because jurors become argumentative, losing their objectivity and becoming advocates? Do jurors draw inappropriate inferences when the court does not allow a juror question? Juror surveys find no evidence to support these concerns,<sup>19</sup> but these self-reports about socially undesirable reactions may not fully capture what occurs in the jury room. The Arizona Filming Project made it possible for us to examine the questions that jurors submitted during trial that the judge was unable to allow and to assess how jurors actually handled the lack of a response. We begin by briefly describing the Arizona Filming Project and then turn to the unanswered juror questions.

**[W]e were able not only to identify the questions that the judge declined to allow, but also to observe juror reactions during trial and deliberations . . . .**

### THE ARIZONA FILMING PROJECT

The Pima County Superior Court, with the endorsement and support of the Arizona Supreme Court, approved a novel experiment in Tucson to evaluate the Arizona innovation that permits jurors to discuss the evidence among themselves during the trial. The study involved videotaping discussions and deliberations. The project required an elaborate set of permissions and security procedures.<sup>20</sup> In each case in the study, we obtained permission from the judge, jurors, litigants, and attorneys. For each case, the entire trial was videotaped from opening statements to closing arguments and jury instructions. In the jury rooms two unobtrusive cameras and microphones were mounted at ceiling level. An on-site technician taped the conversations in the jury room whenever at least two jurors were present. We drew on the trial videotapes to develop a detailed "road map" for each trial. Quasi-transcripts were created for all juror discussion periods and transcripts were prepared for all deliberation periods. They allowed detailed

10. Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121 (1994)

11. *Id.* at 142-143, Table 13.

12. Mary Dodge, *Should Jurors Ask Questions in Criminal Cases?* at 40 (unpublished report submitted to the Colorado Supreme Court's Jury System Committee, 2002).

13. See, e.g., Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses*, CBA REC. 12 (Feb. 1987).

14. Howard Ross Cabot & Christopher S. Coleman, *Arizona Jury Reform: A View From the Trenches*, ARIZ. J. (July 12, 1999).

15. See, e.g., Mark Frankel, *Jurors Questioning Witnesses*, 60 WISC. BAR BULL. 23 (Feb. 1987).

16. See, e.g., Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 476, Appendix D (1985); for a comprehensive review of findings in several studies, see Gregory E. Mize & Christopher J. Connelly, *Jury Trial Innovations: Charting a Rising Tide*, Spring 2004 COURT REVIEW at 4, 5-6.

17. Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256 (1996).

18. See *supra* note 7.

19. See, e.g., Heuer & Penrod, *supra* note 17.

20. For a detailed description of these procedures, see Diamond *et al.*, *supra* note 9, at 17.

**Judges allowed answers to 76% of the jurors' 820 questions.**

analyses of the content of juror discussions and deliberations. We also obtained copies of all questions submitted during the trial or during deliberations, including those that the judge did not answer or allow a witness

to answer.

The sample of 50 cases consisted of 26 (52%) motor vehicle cases, 17 (34%) non-motor vehicle tort cases, 4 (8%) medical malpractice cases, and 3 (6%) contract cases, a distribution that is nearly identical to the breakdown for civil jury trials for the Pima County Superior Court for the 1996-97 fiscal year and the 2001 calendar year. The tort cases varied from the common rear-end collision with a claim of soft-tissue injury to cases involving severe and permanent injury or death. Plaintiffs received an award in 65% of the cases. Awards ranged from \$1,000 to \$2.8 million dollars, with a median award of \$25,500.<sup>21</sup>

**The Questions that Jurors Submit**

Judges in other jurisdictions who permit juror questions report that the questions jurors submit are generally appropriate.<sup>22</sup> Nonetheless, the rules of evidence bar a variety of questions on grounds of relevance and form as well as more technical bases. It would be astounding indeed if laypersons limited their inquiries to legally acceptable grounds and always expressed their inquiries in legally acceptable terms. Several surveys and experiments with juror questions indicate that judges typically allow witnesses to answer between 72% and 86% of jurors' questions, leaving 14% to 28% unanswered.<sup>23</sup>

In the Arizona Filming Project, jurors submitted questions during 48 of the 50 trials. In half of the trials, they submitted 10 or fewer questions, with an average of 17.5 per trial. Across all cases, jurors submitted an average of less than 1 question (.76) per hour of trial.<sup>24</sup> The number of questions submitted

by the jurors during a trial increased with the length of the trial ( $r = .54$ ).<sup>25</sup> One jury submitted 110 questions, almost twice the number submitted in any other trial. Significantly, the trial in which this occurred was 77.5 hours in length, amounting to an average of 1.4 questions per hour.

Judges allowed answers to 76% of the jurors' 820 questions. The questions that the judges allowed were consistent with the observations from previous reports that jurors generally submit appropriate and relevant questions. For example, the jurors directed nearly half of their questions to expert witnesses, typically attempting to clarify their testimony or to understand the bases for their opinions.<sup>26</sup> The juror questions that judges allowed ranged from simple questions about definitions, such as "What is a tear of the meniscus?" (for a physician) and "What does the 'reasonable psychological probability' mean?" (for a psychologist who testified using the phrase), to more complex attempts by jurors to understand the inferences made by the witness, such as "Is his post-traumatic stress a result of the confrontation, or a result from his childhood? Specifically, could his breakdown be from another accident?" and "Not knowing how he was sitting, or his weight, how can you be sure he hit his knee?" (for an engineer testifying about an accident reconstruction). But what about the questions that the judge did not answer or permit the witness to answer? We turn now to an analysis of those unanswered questions and to jurors' reactions when no response was forthcoming.

**Disallowed Juror Questions**

In 39 of the 50 trials, judges were presented with at least one question that they did not allow a witness to answer. In half the cases, judges rejected 2 or fewer juror questions during trial. Both allowed and disallowed questions occurred more frequently in longer trials.<sup>27</sup> The opportunity to discuss the evidence during trial did not significantly influence the rate of submitting either allowed or disallowed questions.<sup>28</sup>

After examining all of the questions that jurors submitted,

21. Nicole M. Waters of the National Center for State Courts provided figures for all completed jury trials in Pima County, Arizona during the year 2001: 62% were motor vehicle cases, 8% medical malpractice, 23% were other tort cases, and 6% were contract cases. The plaintiff win rate was 64%. Awards ranged from \$2,009 to \$2,472,163 with a median award of \$31,165.

22. Wolfson, *supra* note 13, at 17 ("the great majority of questions were serious, to the point, and relevant") (Feb. 1987); Frankel, *supra* note 15, at 24 ("the questions asked are thoughtful, pertinent, respectful and to the point"). For a researcher's analysis of juror questions submitted during trials and deliberations, see Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question,"* 78 CHI.-KENT L. REV. 1099 (2003).

23. Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231, 252 (1988) (83 percent); Heuer & Penrod, *supra* note 17, at 141, Table 12 (72 percent in civil cases, 86 percent in criminal cases); Paula Hannaford & G. Thomas Munsterman, Final Report for the Massachusetts Project on Innovative Jury Trial Practices at 4 (2001)(77 percent); Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003)("judges reported that jurors' questions were 'generally appropriate.' . . . [and] propounded them to the witness 'as

is' most of the time."); AOC State of New Jersey Jury Subcommittee, Report on Pilot Project Allowing Juror Questions (unpublished AOC Report, 2000) (over three-quarters of the questions were asked), reported in Mott, *supra* note 22, at 1104-1105 (2003); Dodge, *supra* note 12, at 22 (judges in a pilot study allowed 76 percent of the questions submitted by jurors).

24. The length of the trial was the sum of the number of hours for each day of trial from the time the trial began to the time the trial ended for the day until jurors began their deliberations.

25. ( $p < .01$ ). This correlation is based on the 47 cases for which we have both the allowed questions and the disallowed questions. For three cases, we did not have access to the files of jury questions and therefore could identify only the juror questions that the judge allowed a witness to answer.

26. We will focus on the questions that judges allowed witnesses to answer in another article.

27. The correlation between number of disallowed questions and length of trial was .34 ( $p < .05$ ); for allowed questions and length of trial the correlation was .54 ( $p < .01$ ).

28. Jurors instructed that they could discuss the case during trial submitted an average of 4.11 disallowed questions, and jurors admonished not to discuss the case submitted an average of 4.5 disallowed questions ( $t = 0.25, p < .82$ ).

we identified 15 types of questions.<sup>29</sup> The breakdown for the 12 categories that produced instances of disallowed questions appears in Table 1.<sup>30</sup>

Many of the questions that the judges disallowed reflect commonsense ways of reasoning based on information that is excluded under the rules of evidence. Thus, a number of these questions centered on a search for a comparison that could assist the juror in evaluating the plausibility of the plaintiff's claims. The first and most frequent category consisted of what we termed "Standards"—questions that sought information on how others might view the present circumstances, essentially inviting witnesses to give jurors a standard by which to judge the case (n = 43 questions).<sup>31</sup> We subdivided this category into requests for legal and other standards. Examples of requests for legal standards were inquiries such as, "Who was cited in this accident?" or "Is the defendant required to have his vision and hearing tested in order to renew his driver's license, and has he done so?" In all such questions, jurors sought to know whether one of the parties had done something legally improper that bore a relationship to the conflict being decided. Examples of other standards asked witnesses about how the same or similar

circumstances affected people other than the plaintiff who were, or could have been, involved in the incident that led to trial. Thus, several juror questions asked about whether other passengers in a plaintiff's vehicle were also injured (or whether the defendant was injured). Likewise, in a case involving an alleged infliction of emotional distress, jurors asked a non-party witness how the defendant treated other people with whom he came in contact. These two types of standards questions accounted for about one-fifth of all disallowed questions.

A second frequent type of excluded question concerned jurors' attempts to obtain information on the character and/or credibility of the witness. Although jurors are charged with evaluating the credibility of witnesses and jurors asked many questions bearing on credibility that the judge allowed witnesses to answer, the jurors also asked disallowed questions that could produce potentially prejudicial information, e.g., "Has [the plaintiff] been in any other lawsuit considering the number of accidents he has been involved in?" (directed to the plaintiff) or called for hearsay, e.g., "Does the [Plaintiff] have any idea why his employer had an Independent Medical Examination conducted [on him]?" Some disallowed questions asked witnesses to offer opinions or to answer questions when no foundation had been laid that the witness had first-hand knowledge or asked the witness to draw conclusions that the jury was charged with making: e.g., "There are differences between your testimony and that of the plaintiff. Which one is telling the truth?"

Charged with compensating the plaintiff in a civil case, jurors sometimes interpreted their mandate more broadly than the law envisions and posed questions that attempted to explore legally irrelevant financial considerations. Consistent with prior analyses of this data set, jurors in civil cases were interested in the insurance status of both the plaintiff and the defendant.<sup>32</sup> For example, jurors may express concern about overcompensating plaintiffs who have already received payments from insurance companies<sup>33</sup> or they may wonder whether the defendant will be paying any award out of pocket. Insurance questions alone constituted 12% of all disallowed questions, with jurors posing 23 questions in 12 trials; in 4 of

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**TABLE 1: TYPES OF QUESTIONS JUDGES DISALLOWED**

Question Type	N	Percent (of total not allowed)
Standards	43	22
Legal standards	27	14
Other standards	16	8
Character or credibility of witness	24	12
Legally irrelevant financial issues	25	13
Insurance coverage	23	12
Attorneys fees	2	1
Litigation management	13	7
Definitions and miscellaneous facts	27	14
Cause of the injury	24	12
Parties' mental state	18	9
Predictions about future injury	6	3
Other topics or unclear	17	9

29. Two coders independently categorized the questions, making use of 15 total categories. Overall reliability for these categorizations was modest, weighted kappa = .67 (1.0 indicates perfect reliability, zero indicates pure chance agreement). This value increased as the two coders gained experience and after they discussed disagreements part-way through coding (weighted kappa on a subset of 56 questions coded post-discussion = .74). For the categories listed in Table 1, the coders typically agreed more often than they disagreed: just two had percent agreement rates below 50% (Definitions/Miscellaneous facts, Parties' mental state).

30. Judges allowed witnesses to answer all juror questions in three

categories that are not represented in Table 1. The questions in these categories were generally directed toward the experts and involved 1) extent of injury or damage, 2) basis for diagnosis or treatment, and 3) credentials or experience of the expert.

31. See also Mott, *supra* note 22, at Table 3, 1125 (identifying a similar set of juror questions, which she labeled "common practices").

32. Shari S. Diamond & Neil Vidmar, *Juror Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

33. *Id.* at 1909; jurors do not intuitively recognize the collateral source rule.

**[T]here may be some value from the jurors' point of view in providing at least a perfunctory acknowledgment of each unanswered question . . . .**

these trials, jurors submitted multiple inquiries (2 questions in two cases, 4 in one case, 7 in another), sometimes asking essentially the same question in different guises (e.g., "Does the plaintiff have insurance coverage?" and "Who paid the chiropractor bill?"). Jurors also occasionally asked about attorneys' fees, generally recognizing that the plaintiff would not receive the full amount of any compensatory award they made.

A fourth source of disallowed questions consisted of inquiries about how the lawsuit itself had been or was being managed (n = 13 questions, 7% of all disallowed)—for example, "When did you initiate this lawsuit?" and "How did you come up with your damage figure?" (directed at plaintiffs in different cases).

We also identified instances of questions close to the central controversies in the cases (i.e., establishing what happened, negligence, liability, damages, etc.), but which, for a variety of possible reasons, the judge did not allow. Fourteen percent of questions asked a witness for definitions or to explain some fact about what happened (e.g., "Was the impact in a forward or rearward direction?"; "How many people were in each car?"), but were not allowed, presumably because no foundation had been laid that the witness had firsthand knowledge and, thus, was competent to answer the question. In 24 cases (12%), jurors asked for information that might illuminate the cause of the plaintiff's injuries (e.g., "Can we see a picture of what the plaintiff looked like before the accident?" or "What percent of your current problems are a result of this accident?"); and in 18 cases, their questions touched on the mental state of the parties, including questions about potential negligence, recklessness, or intent (e.g., "How long did the plaintiff wait at the intersection before entering?" or whether a defendant had posted a sign warning of a potentially dangerous condition). In 6 cases, the jurors asked witnesses to forecast what the plaintiff's injuries would be like in the future (e.g., how long it might take a psychotherapist to relieve an anxiety disorder).

A variety of reasons in addition to those we noted above may explain why some questions were not posed to witnesses.<sup>34</sup> In some instances, the question was asked too late or too early so that it was offered at the end of testimony by the wrong witness. When a later witness testified who could address the issue, one of the attorneys generally followed up. Other disallowed questions called for speculation; were expressed in a form that made them objectionable, e.g., "Are you being paid to testify here today?" (asked of an expert); or

were simply unclear about what the juror was asking, e.g., a juror wanted to know "What does 'bodiard' the witness entitle the lawyer to do?" (The juror probably meant "voir dire" but was unable to accurately repeat the phrase he had just heard and wanted to understand.) In other instances, the question would have been appropriate for one witness, but not for another, and it was not clear when the question was submitted and which witness was the target of the question. Finally, on a few occasions, the question was directed to an appropriate witness and submitted at the appropriate time and the question appeared to be admissible, but the witness was not allowed to answer it. For example, in one case a juror wanted to ask the plaintiff how long he was stopped at the stop sign before the collision occurred. The plaintiff had already testified that he had come to a stop and an issue in the case was how fast he had been going when the collision took place.

#### *When No Immediate Answer Was Given*

We turn now to the aftermath of these questions: how the judge and the jury responded to the questions that the judge did not allow the witness to answer.

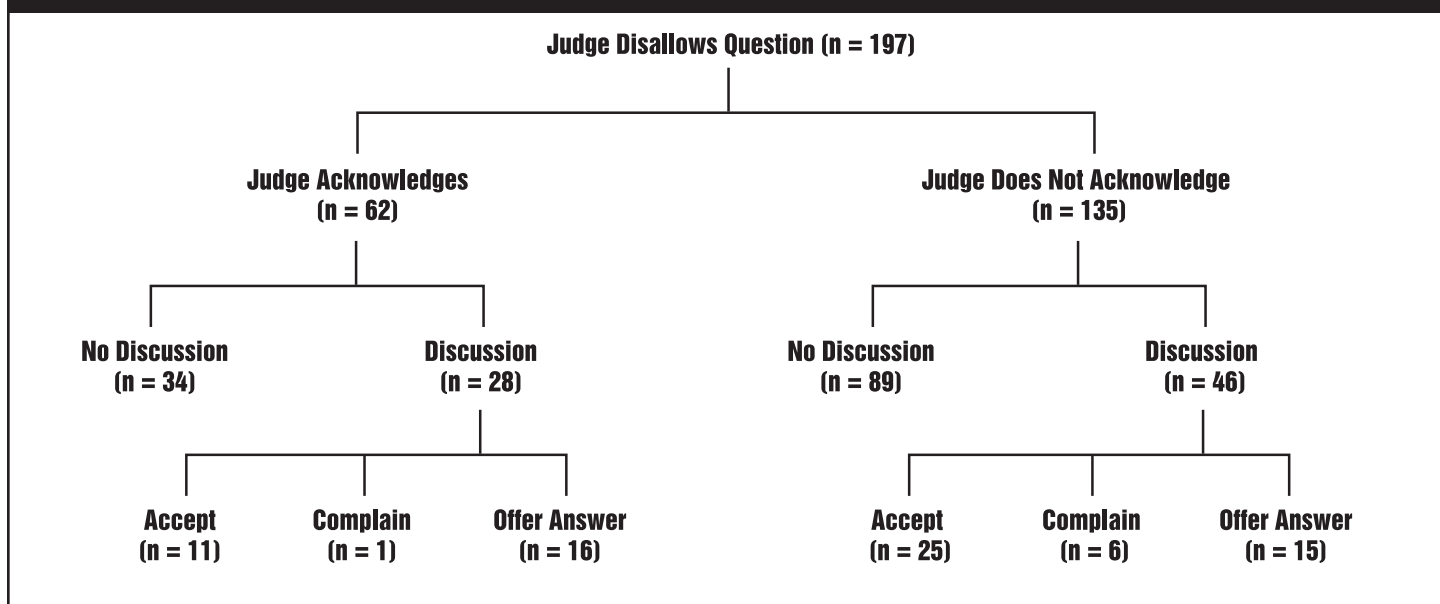
*Judicial Responses:* The judge formally acknowledged less than a third (32%) of the 197 juror questions that were disallowed (see Figure 1). The tendency to acknowledge or not acknowledge questions was typically, but not always, consistent within the same trial. In 14 trials, the judge acknowledged no juror question (range: 1 to 16 questions); in 11 cases, the judge acknowledged all of the questions in some way (range: 1 to 6 questions); and in 14 trials the judge acknowledged some but not others (e.g., in one case, the judge explained that insurance was not relevant to the jurors' decision but said nothing when jurors wanted to know if anyone else in the plaintiff's vehicle had been injured).

Acknowledgment of the jurors' questions took many forms. Judges sometimes said only, "Some questions were objected to for one reason or another," or "Some questions cannot be answered." In several instances, the judge informed the jury that one of the submitted questions would be more appropriate for a later witness or would be addressed in later testimony. In another instance when jurors asked a witness to solve a conflict between his testimony and that of another witness, the judge explained that it was the jury's job to make decisions about such conflicts. Finally, judges also explicitly cited the law in explaining why a question would not be permitted, saying, for instance, that a given issue was not "relevant" or, in one case, that the "Federal Rules of Evidence" did not allow the question. Explanations about legal constraints on questions could be short (e.g., "The jury cannot consider insurance in its decision"), but occasionally involved lengthy recaps about the specific issues the jury was to solve (e.g., who was "legally obligated to make payment for [the plaintiff's] medical bills and . . . repair of the vehicle"), including reminders that who paid the bills was "outside your relevant area of inquiry as

34. We did not have access to the sidebar conversations in which the attorneys had the opportunity to voice objections, and we have not attempted to identify the rationale for excluding each of the disallowed questions. We note, however, that the judges were

typically generous in permitting witnesses to answer juror questions even when the wording of the question was somewhat awkward or unartful. We suspect that such instances occurred when the question did not draw an objection from either attorney.

**FIGURE 1: JUROR REACTIONS WHEN A QUESTION IS DISALLOWED**



far as the decision that you have to make in this case.”

The judicial tendency not to acknowledge disallowed juror questions explicitly or to explain why they were not being posed to the witness may be attributable to two factors. First, the judges in all of these cases gave the jurors a pre-instruction on juror questions, warning them that not all of their questions could be addressed:

If I decide the question is proper, an answer will be provided at the earliest logical opportunity. Keep in mind, however, that the rules of evidence or other rules of law may prevent some questions from being asked. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

Jurors were thus on notice that some of their questions would not be answered. In addition, an explicit response to an irrelevant question might unnecessarily require the judge to expose the rest of the jury to that question. As we shall see, there may be some value in providing at least a perfunctory acknowledgment of each unanswered question when the occasion arises.

*Jurors’ Reactions When Questions Were Disallowed:* After an issue is raised by a juror and the juror’s question is not answered, the issue may simply be dropped and not discussed among the jurors at all, or it may receive further attention from the jurors. That further attention can take one of three forms. First, a juror may mention having posed a question, note that

there was no answer, and accept the lack of an answer without complaint or even with understanding (e.g., by asserting that the issue must, in fact, be irrelevant). Second, consistent with the worries of those apprehensive about juror questions, the jury may chafe at the non-response, casting the judge’s decision in a negative light. Finally, jurors not given an answer to their question may consider what the answer actually is. We coded all responses into categories to reflect these responses.<sup>35</sup> Figure 1 describes the frequency of these responses.

The most common reaction from jurors was no reaction at all, either during the trial itself or during deliberations. Jurors referred, in one way or another, to only 38% of their disallowed questions. Jurors were somewhat more likely to discuss a question that the judge acknowledged than to discuss a question when the judge had said nothing: 45% of acknowledged questions received some mention, whereas only 34% of unacknowledged questions did so.<sup>36</sup> In most instances, however, whether or not the juror’s question was acknowledged, any discussion that followed was limited. Typically, conversations lasted no more than 10 “turns” (a turn ends when another juror speaks). The exceptions arose when the topic was insurance or attorneys fees, when conversation continued for up to 80 turns. One additional case that drew an extended discussion occurred when the jurors submitted several questions on the same topic without receiving an answer.<sup>37</sup>

When jurors did mention an unanswered question, almost half (49%) of the time the jury either explicitly accepted the

35. We coded as follows: 1 = no discussion; 2 = explicit acknowledgment that the information is unnecessary or irrelevant; 3 = wistful or begrudging acceptance of the lack of information (e.g., acknowledging they were unlikely to get an answer but still wanting to know—we combined this category with no. 2 to describe the jurors as accepting the non-answer); 4 = explicitly negative reactions (e.g., explicit annoyance, complaint, or statements insisting the information is relevant); 5 = attempts to give or suggest an answer to the question (including by not countering an

answer developed during a previous discussion period—to count, the answer or its relevance to the case had to be undisputed by other jurors). Two coders demonstrated high reliability in assigning text to these categories, weighted kappa = .79.

36.  $F(1, 157) = 2.77, p < .10$ . This test statistic reflects controls for the fact that cases differed in the extent to which judges acknowledged juror questions (“non-independence of observations” in statistical parlance).

37. The case is discussed in more detail in the text at note 39.

**Although jurors appreciate the opportunity to submit questions, they rarely express disappointment or even surprise when the judge does not supply them with an answer.**

lack of response or expressed no complaint and swiftly turned to other topics for discussion.<sup>38</sup> In some of these reactions, jurors reminded others that the judge said the information was not relevant or pointed out, as one juror did, that “it doesn’t do any good to guess.” In others, they explained to their fellow jurors why they had submitted a question but then expressed neither satisfaction nor dissatisfaction or commented in some other neutral

way. In short, all such jurors appeared to “move on,” irrespective of whether they might have preferred to have an answer.

Overt annoyance or displeasure with the judge’s failure to pose the question was exceedingly rare (see Figure 1): we identified just seven responses (4%) from three cases as explicitly negative; four of these seven complaints came from a single jury and involved a single issue; two others came from a different jury; and the remaining one from a third jury. The jury expressing four complaints was deciding a case involving the potential negligence of a business. The jurors wanted to know if the law required the business to post a sign in the establishment and whether a sign had been posted, believing that the answers might signal negligent behavior. The judge did not acknowledge the jurors’ two related questions, either the first time or the second time they were submitted. Although persistent, the “complaints” were phrased in mild terms (e.g., one juror said that she was “shocked” that the judge would not answer the questions).<sup>39</sup> In both of the other cases involving juror complaints, a single juror simply expressed the belief that the information that had been requested was relevant, even if the judge had ruled otherwise. For example, a juror asked if either of the two motorists involved in a collision had received citations, and the judge said that the question was not relevant. A juror expressed the opinion that it would be pertinent to find who’s at fault. The disagreement here may be with the terminology. Arguably, a citation in the accident is relevant, but is excluded because it is both hearsay and potentially prejudicial.

Finally, we identified a number of instances in which jurors attempted to answer a question the judge had not allowed. We found 31 such occurrences (involving 16% of all disallowed questions). In 12 instances, jurors suggested answers by drawing reasonable inferences directly from the evidence. For example, one case involved someone seated in the rear of a vehicle who claimed he was injured in an accident after hitting the car’s front seat. A juror submitted a question about whether it was likely that the other passenger riding in the

back would also have hit the front seat. When this juror mentioned the unanswered inquiry to her fellow jurors during discussion, another juror informed her that the laws of physics (to which experts had testified) applied equally to all passengers. Jurors drew on their own experience or beliefs to address 10 additional unanswered questions about insurance or attorney’s fees.<sup>40</sup> For example, a juror who submitted an unanswered question about insurance speculated that the plaintiff probably did not pay much for the accident because he probably had disability insurance.

The remaining answers to inquiries came from jurors’ personal experiences or expertise or from a combination of personal expertise and reasoning based on what they had heard in court. For example, the judge in one case did not allow a witness to answer a question about the muscular side effects of a steroidal medication a plaintiff had been taking. Later in deliberations, when the juror who submitted the question reintroduced it, mentioning that it had been left unanswered, another juror explained that the steroid in question was an anti-inflammatory, not an agent that affected muscle tone. In a few instances, jurors’ guesses about answers reflected conclusions one of the parties likely wished to avoid. For example, a juror in one case asked why a plaintiff was no longer working in the area in which she had been trained; the juror later wondered if the reason was because the plaintiff had done “something bad” in her prior job. Nearly all (30 of 31) of the unanswered questions that jurors discussed involved the kinds of issues and responses that naturally occur during deliberations even if a juror has not submitted a question on the topic. In only one instance did a juror draw a conclusion from the fact that the judge did not answer the juror’s question. In an automobile accident involving claims for both personal and property damage, a juror asked whether the plaintiff’s vehicle had a particular design feature and the judge did not acknowledge the question. The juror said, “I got no answer, so evidently it’s not [part of the design].” No acknowledged juror question, whether the acknowledgment was perfunctory or more complete, produced this kind of inference.

Juror attempts to address the unanswered questions varied substantially across the types of questions posed. When jurors discussed unanswered questions they had submitted about standards, jurors attempted to answer only 15% of them. In contrast, when they discussed unanswered insurance questions, jurors attempted to answer 79% of them (11 of the 14 they discussed at all). Jurors also suggested answers to both of the inquiries about attorney fees (concluding in one case that attorneys “usually” got half the award, and in the other that it could be anywhere between 25% and 45%). These responses to questions on legally irrelevant financial topics account for almost half of the answers (42%) that jurors offered one another when a question was disallowed. As we have previously observed, talk and speculation in the jury room about the insurance of the parties are common even when jurors do

38. Twenty-five (25) of these occasions occurred during discussion periods and 11 during deliberations.

39. The legal issue was not dealt with in the jury instructions at the end of the trial, and the jurors discussed it during deliberations as

well as during the trial.

40. Jurors were able to answer three additional unanswered insurance questions by examining bills that were included among the case exhibits.

not submit questions about insurance,<sup>41</sup> reinforcing the notion that jurors should be specifically instructed on the irrelevance of insurance in tort cases.<sup>42</sup>

### Summary of Findings

As our survey of juror questions during trial indicates, more than three-quarters (76%) of the questions that the jurors submit are legally appropriate. Jurors not only appreciate the opportunity to submit questions, but also formulate relevant questions to assist them in evaluating the evidence. Our analysis of the questions jurors submit that judges do not allow under current evidentiary rules reveals that those questions are likely to concern topics like legal standards and insurance, topics that reflect commonsense ways of reasoning and common knowledge but that evidentiary rules preclude jurors from obtaining information about in reaching their verdicts.

Although jurors appreciate the opportunity to submit questions, they rarely express disappointment or even surprise when the judge does not supply them with an answer. The preliminary instruction that judges in Arizona use informs jurors that they will not always be able to receive answers to the questions they submit, and popular lay understanding of how trials work probably prepared the jurors to accept that outcome for most of their unanswered questions. Thus, the concern with juror reactions to unanswered questions did not materialize. We did observe a few occasions when jurors expressed annoyance with the failure to respond to a juror question. Significantly, only one instance of expressed annoyance occurred when the judge gave even a perfunctory non-specific acknowledgment that the question could not be allowed. Although jurors were somewhat more likely to discuss an unanswered question when the judge acknowledged it, that discussion was generally brief, except when the topic was insurance or attorneys' fees.

Finally, when the judge did not allow the jurors to obtain an answer directly, a minority of the juries did attempt to answer their own questions. In doing this, the jurors technically violated the pre-instruction admonition not to attempt to answer questions that the judge declined to allow.<sup>43</sup> Importantly, many of the same questions and answers that jurors supplied may have emerged even in the absence of a juror question formally submitted by a juror during the trial (i.e., during the normal course of deliberations in which jurors regularly use one another to resolve sources of ambiguity).<sup>44</sup>

### Implications for Procedures Used When Juror Questions Are Permitted

The procedures used when jurors are permitted to submit questions generally give counsel the opportunity to object to a juror question outside the hearing of the jury and permit attorneys to ask appropriate follow-up questions when a juror ques-

tion is answered. There is also agreement that the jurors should be told in advance that it will not be possible to allow some of their questions to be asked. As the results here show, jurors generally understand and accept the legitimacy of these procedures.

*Cautionary Instructions:* Less agreement exists on the standards for the instructions that jurors should receive about how and when they should submit their questions,

other than the question should be submitted in writing. A current Standard of the American Bar Association<sup>45</sup> supports juror questions for witnesses, but suggests that a series of cautionary instructions be given, including a warning that "Questions should be reserved for important points only"; that "The sole purpose of juror questions is to clarify the testimony, not to comment on it or express any opinion about it"; and that "Jurors are not to argue with the witness."<sup>46</sup> The instructions received by the jurors we studied did not include any of these warnings. The 820 questions we reviewed in these 50 cases, including the 197 that the judge did not allow, provided no instances of jurors submitting frivolous questions and only a few that could be characterized as argumentative. (E.g., a juror submitted a question for the plaintiff asking how he would work full-time after the trial. The plaintiff was claiming that the accident had temporarily impaired his ability to work and the jurors were skeptical about that claim.) Indeed, almost all of the questions appeared to reflect serious attempts to understand the evidence and to help the jurors assess how it could assist them to evaluate the competing claims of the parties.

Even without such cautionary admonitions, jurors censored their own potential questions. On average, the jurors discussed almost 2 potential questions per case (1.7) that they then decided not to submit. Their restrained behavior suggests that jurors need not be cautioned that they should limit their instructions to important ones. The danger of including such cautionary instructions is that they will have a chilling effect on jurors' questions, discouraging jurors from attempting to resolve the areas of confusion that the opportunity to submit questions was designed to help them deal with. A similar issue also arises with the recommendation from the Civil Trial Practice Standards that juror questions be signed.<sup>47</sup> In Arizona, jurors are instructed not to sign their name when they submit a question on the assumption that jurors should not have to worry about appearing ignorant when they are experiencing some confusion.

**The 820 questions we reviewed . . . provided no instances of jurors submitting frivolous questions and only a few that could be characterized as argumentative.**

41. See Diamond & Vidmar, *supra* at note 32.

42. *Id.* at 1910 for a description of potential jury instructions on the topic of insurance.

43. Jurors are told: "If a particular question is not asked, do not guess why or what the answer might have been."

44. Again, it is significant that almost half of the answers jurors

offered concerned the topic of insurance or attorneys' fees. See generally Diamond & Vidmar, *supra* at note 32.

45. Civil Trial Practice Standard Part One: The Jury, Standard 4 (1998).

46. *Id.* at 4b. (i), (ii), and (iii).

47. *Id.* at 4b x.



*Acknowledging Juror Questions:* One decision that judges who permit juror questions must make is what if anything to say to a jury in response to a question that cannot be answered. As we have seen, judges often rely primarily on their pretrial instruction informing jurors that “the rules of evidence or other rules of law may prevent some questions from being asked” and say nothing further to the jurors. That approach avoids exposing the other members of the jury to a question that is irrelevant or otherwise improper. Although jurors generally do not complain about this implicit rejection of a question, jurors do seem to appreciate it when judges offer even a perfunctory acknowledgment that a submitted question cannot be addressed without describing the question itself. Moreover, that response prevents a juror from drawing an inference about the answer to the question from the judge’s silence.<sup>48</sup> In a few other instances, a series of questions submitted on the same topic stimulated the judge to be more direct and specific. For example, jurors in one case submitted several questions asking who owned the property where the injury occurred. After the third question was submitted, the judge told the jurors, “A couple of you, Ladies and Gentlemen, asked questions concerning [the location]. Although these are things you may wonder about, for the purpose of what you have to decide today, it doesn’t make any difference.” The jurors never referred to these questions in their discussions during trial or during their deliberations. The approach that

this judge adopted recognizes that the jurors can be given assistance in identifying relevant information. In other situations, jurors may need further assistance in understanding why a question cannot be addressed.

#### *An Ancillary Value*

Are unanswered jury questions merely an incidental cost of permitting jurors to submit questions? Some additional observations suggest that even the disallowed questions have some ancillary value. In one case, the jurors’ early questions suggested that they were trying to assess the negligence of the defendant when the defendant had already conceded negligence. The jurors’ questions provided an occasion for the judge to correct that misimpression in the course of denying the jurors’ request for the irrelevant information. Thus, even the unanswered questions, which the judge shares with the attorneys in deciding whether the question will be allowed, can signal potential sources of juror confusion that the judge or the attorneys may be able to address.

Similarly, the natural interest of jurors in insurance arises whether or not jurors pose a question about it.<sup>49</sup> A juror question about insurance, however, provides a natural occasion for a collaborative instruction from the judge that recognizes the reasonableness of the jurors’ interest and helps jurors understand why they should not be focusing on insurance.<sup>50</sup> A full collaborative instruction would accurately explain why insurance is

48. Judicial silence led to an unwarranted inference in one case described *supra* at p. 26.

49. Diamond & Vidmar, *supra* note 32, at 1884.

50. *Id.* at Section V for a full description of collaborative jury instructions.

irrelevant (e.g., it tells nothing about negligence or how much damage was caused) and would let jurors know that any speculation about how much insurance the parties have, or even whether or not they have any insurance, would be inaccurate.<sup>51</sup>

## CONCLUSION

Most of the recent innovations in jury trials recognize that jurors are active decision makers and adjust trial procedures to reflect that reality. Whether or not jurors are permitted to submit questions during trial, we know that questions are occurring to them as they try to understand the evidence in anticipation of being charged with reaching a verdict. Permitting jurors to submit their questions during trial provides the opportunity to learn what those juror questions are and to address them when possible. As this research indicates, even when judges tell the jury that they cannot allow a witness to answer a juror's questions, the jurors generally accept the decision easily and move on. The need to leave some juror questions unanswered offers no justification for missing the opportunity to assist jurors in reaching well-grounded decisions.



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51. *Id.*

## Resource Page: Focus on Jury Reform continued from page 42.

Peter M. Tiersma, *Jury Instructions in the New Millenium*, Summer 1999 COURT REVIEW at 28.

Linguist and law professor Peter Tiersma provides practical guidance on making jury instructions understandable. The article includes a helpful list of legal words often used and words that could be more appropriately used with a jury.

Robert G. Boatright & Beth Murphy, *How Judges Can Help Deliberating Juries: Using the Guide for Jury Deliberations*, Summer 1999 COURT REVIEW at 38.

Boatright and Murphy explain, based on research in 12 jury trials, how jurors can benefit from additional

background information about how to go about the work they are to expected to do.

### A FEW, FINAL ARTICLES

Symposium Issue: The Jury at a Crossroad: The American Experience, CHICAGO-KENT L. REV., Vol. 78, No. 3 (2003).

<http://lawreview.kentlaw.edu/articles/78-3/CONTENTS%2078-3.html>

This symposium issue contains 10 articles discussing the role of the jury—past, present, and future. Topics covered include social science research on race and juries, ways to improve the voir dire process, and the

jury's historic and present role in statutory interpretation.

Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Jury Discussions During Civil Trials: Studying an Arizona Innovation*, 45 U. ARIZ. L. REV. 1 (2003).

<http://www.law.duke.edu/fac/vidmar/AzLR.pdf>

This article provides an in-depth evaluation of the Arizona innovation permitting juries to discuss the evidence during the trial. The evaluation was based on an experiment that involved the videotaping of actual jury discussions and deliberations.