


2014

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

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Recommended Citation

Mitchell J. 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, 38 Am. J. Trial Advoc. 1 (2014).

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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

Mitchell J. Frank[†]

Abstract

This Article analyzes the practice of allowing jurors to question witnesses. Specifically, the author uses statistical research and relevant, appellate case law to examine the advantages and disadvantages of this practice. Additionally, the author discusses the extent to which jury questioning is actually used, or not, and the reasons that may explain it. An appendix to the Article provides a jurisdictional breakdown outlining whether the practice of allowing jurors to question witnesses is permitted and if so whether the practice is mandatory or at the judge’s discretion.

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Professor Frank wishes to thank Dean Leticia M. Diaz for her support in regard to this Article, and Ariel Niles for her excellent research assistance. He also wishes to thank the following for their invaluable efforts in arranging for and shepherding the survey discussed in Part III herein: Chief Judge Belvin Perry, Jr. of the Ninth Judicial Circuit in and for Orange and Osceola Counties, Florida; Jeff Ashton, State Attorney of the Ninth Judicial Circuit; Robert Wesley, Public Defender of the Ninth Judicial Circuit; Jill Gay and Shirley Washington, Judicial Assistants; Samantha Garcia, Office of the State Attorney of the Ninth Judicial Circuit; and Melissa Vickers, Office of the Public Defender of the Ninth Judicial Circuit.

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Introduction

The defendant testified that he and his young victim went to Taco Bell before he allegedly molested her at his home. His testimony was that he had

expected his daughter, traveling separately, to join them there for a sleepover. The juror wanted to know what the defendant ordered at the restaurant. I asked the question, prompting laughter in the courtroom, but the juror was smarter than all of us—he wanted to know how many meals (two or three?) the defendant ordered.¹

If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop truth. It may sometimes be that counsel are so familiar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time.²

The lawyers spent three years thoroughly litigating every aspect of the substantial personal injury case, followed by three weeks preparing for trial. For the key witness who would likely tip the scales one way or the other, they prepared, edited, and re-edited their questions. At trial, counsel spent a total of ten hours on their direct, cross, and re-direct examinations. When they sat down they silently disagreed on who scored the more telling points, but they agreed on one thing—they had asked all the questions that mattered. They were wrong. And, they were wrong about one other thing. They incorrectly assumed that the jurors they saw occasionally writing during the witness's testimony were writing only notes.

Just moments after the jurors heard, for the third time with this witness, "No further questions, your honor," four raised their hands. Each held a piece of paper, unsigned, with at least one question on it. They wanted answers to questions that had not been asked by counsel, or not well enough. They had at least the right to ask questions of witnesses, and at most the right to have them answered.³ To the likely dismay of counsel,⁴ the jury wanted to take the podium.

¹ Timothy G. Hicks, *The Jury Reform Pilot Project—The Envelope, Please*, MICH. B.J., June 2011, at 40-41.

² *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979).

³ Jurors are subject to the same evidentiary rules that bind counsel in most of the United States; *see* discussion *infra* Part I and Appendix I.

⁴ *See* discussion *infra* Parts III & IV.

These hypothetical jurors are emblematic of those who no longer are willing to sit in monk-like silence for days or weeks, or in rare instances months—never speaking after jury selection except during deliberations with questions for the court or after deliberations to announce either their verdict or that they are deadlocked. They want to actively participate *throughout* the trial by asking questions of witnesses, not just at its end. As a result, trial counsel must now share their heretofore total control of this crucial component of the jury trial because a second set of inquisitors have taken their place in the courtroom.

Although there is sporadic evidence that the practice of jury questioning existed in America as early as 1825⁵ and at other times in the distant past,⁶ the extent to which jury questioning is now permitted and the speed with which it has recently occurred,⁷ warrants describing this as a revolutionary development.⁸ It is in its own way as revolutionary a

⁵ Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions*, JUDICATURE, July-Aug. 2005, at 16 (citing Barry A. Cappello & James G. Strenio, *Juror Questioning: The Verdict Is in*, 36 TRIAL 44 (2000)).

⁶ See, e.g., Stephen R. Kaufmann & Michael P. Murphy, *Juror Questions During Trial: An Idea Whose Time Has Come Again*, 99 ILL. B.J. 294 (2011) (describing a juror's question in *People v. Harrison*, an Illinois case in which Abraham Lincoln defended a young man accused of murder and Lincoln did not object to the question).

⁷ In 1993, it was noted that “no court rules have been found that forbid, authorize, or regulate the procedure [of jury questioning].” B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 INDIANA L.J. 1229, 1253-54 (1993). As Part I and Appendix I of this Article detail, this is decidedly no longer the case.

⁸ Because the main focus of this Article is jury questioning in operation, the history of jury questioning is not within its purview. See, e.g., Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303 (2012); Kaufmann & Murphy, *supra* note 6; Anthony Valen, *Jurors Asking Questions: Revolutionary or Evolutionary?*, 20 N. KY. L. REV. 423, 423 (1993) (“Juror questions have only recently . . . become the subject of widespread experimentation and serious discussion.”); Laurie Forbes Neff, *The Propriety of Jury Questioning: A Remedy for Perceived Harmless Error*, 28 PEPP. L. REV. 437 (2001); Stewart M. Young, *What's Good for the Bench Is Good for the Jury*, 41 COLO. LAW. 61 (2012).

“Traditionally, jurors would never have been permitted to ask questions of a witness or the defendant even during a civil trial.” Elrod, *supra*, at 328 (citing a 1990 “nationwide survey of more than 500 judges indicating that 77% of them never allow jurors to ask witnesses questions”); see also Jeffrey S. Berkowitz, *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial*, 44 VAND. L. REV. 117 (1991); Michael A. Wolff, *Juror Questions: A Survey of Theory and Use*, 55 MO. L. REV. 817 (1990).

change as if American courts adopted the South African model of placing a second set of judges (there, called “assessors”) on the bench to assist the trial judge in rendering a verdict.⁹ And this revolution is notable in two other ways. First, it is not one in the making. To the contrary, it is not only substantially a *fait accompli*,¹⁰ but it has generated a body of case law¹¹ large enough to indicate that it is at least on its way to being considered mature. Second, with rare exception, such as in high profile trials,¹² this has happened with little publicity and even less public debate¹³ such that it can be fairly described as a “silent” revolution. Any silence or tacit acceptance on the part of trial lawyers may not indicate approval.¹⁴

This Article analyzes the current state of jury questioning, including the extent to which it is required or discretionary; how it has—or has

⁹ See Magistrates' Courts Act 32 of 1944 § 93*ter* (S. Afr.).

(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice: (a) before any evidence has been led, . . . summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case . . . to sit with him as assessor or assessors: provided that if an accused is standing trial in the court of a regional division on a charge of murder . . . the judicial officer shall at that trial be assisted by the two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.

Id.

¹⁰ See discussion *infra* Part I.

¹¹ See discussion *infra* Part IV.

¹² See, e.g., Elliot C. McLaughlin, *Haven't Been Following the Jodi Arias Trial? Read This*, CNN (May 8, 2013, 8:19 AM), <http://www.cnn.com/2013/05/04/us/jodi-arias-primer/>. For an excellent example of jury questioning, see the lengthy transcript reflecting numerous and pointed questions asked by jurors of the defendant, aired on the Nancy Grace show on CNN on March 7, 2013. Nancy Grace, *More Jury Questions for Jodi Arias*, CNN (Mar. 7, 2013, 8:00 PM), <http://transcripts.cnn.com/TRANSCRIPTS/1303/07/ng.01.html>.

¹³ The area of legal scholarship reveals a substantial amount of discussion and research on jury questioning. See *infra* Parts II & IV. However, the result appears to be quite different for the general public. A Google search of the term “New York Times” coupled with “questions by jurors,” last performed April 23, 2014, among other searches performed, returned, given the vastness of the Internet, a relative scarcity of results reflecting publicity or public debate about jury questioning. *But see* Lis Wiehl, *After 200 Years, the Silent Juror Learns to Talk*, SARASOTA HERALD-TRIB., July 10, 1989, at 9.

¹⁴ See discussion *infra* Parts III & IV.

not—been used, and of significant importance, why or why not; the degree of correlation between concerns, advantages and disadvantages as predicted on the one hand, and as actually found in statistical research on the other; the body of appellate case law relevant to the particulars of jury questioning and the issues they have raised; and, a new survey on how it is both used and working in criminal and civil cases. Following this Introduction, the extent to which jury questioning is now authorized is discussed in Part I. In Part II, the Article focuses on major surveys and pilot projects which evidence jury questioning's benefits and problems. Part III presents a 2013 survey, performed by the author, of judges, prosecutors and public defenders of the Ninth Judicial Circuit in Florida with the goal of discovering how those with the best vantage point believe jury questioning is (or is not) working, and why. In Part IV, the Article discusses the case law of jury questioning, focusing on problems stemming from its use at trial in varying jurisdictions. After the Article concludes, Appendix I provides a compendium of how the separate states, as well as the United States Supreme Court and the Circuit Courts, treat jury questioning. Appendices II, III, and IV detail the results of the Ninth Judicial Circuit survey.

I. Juror Questioning Is Well Established as an Authorized Trial Procedure— What Would Stand in the Way of its Use?

Save only a small minority of jurisdictions, juror questioning is today authorized by case law, Rules of Procedure (civil and criminal), Jury Instructions, Rules of Evidence or Rules of Court, throughout the United States, in both federal and state courts, either on a mandatory or discretionary bases in both civil and criminal cases.¹⁵ Notwithstanding that the Supreme Court has never ruled on this procedure, having denied certiorari four times on cases where juror questioning was an issue on appeal,¹⁶ juror questioning's ascension as a recognized trial procedure is complete.

¹⁵ See *infra* Appendix I.

¹⁶ See *id.*

In its mechanics this procedure has become relatively generic.¹⁷ An exemplar is found in Florida Rule of Civil Procedure 1.452, "Questions by Jurors":

(a) Questions Permitted. The court shall permit jurors to submit to the court written questions directed to witnesses or to the court. Such questions will be submitted after all counsel have concluded their questioning of a witness.

(b) Procedure. Any juror who has a question directed to the witness or the court shall prepare an unsigned, written question and give the question to the bailiff, who will give the question to the judge.

(c) Objections. Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel an opportunity to object to the question.¹⁸

Regarding this procedure, the more difficult analysis, separate and apart from the existence of authority for jury questioning, is to determine how often it is used nationwide today. Research reveals only one statistical source that indirectly sheds light on this subject—the nationwide Judge & Lawyer Survey conducted by the National Center for State Courts.¹⁹ This survey included data from all fifty states, 4336 federal and state judges, 7209 attorneys (of which 5885 practiced criminal defense, "Civil Plaintiff" or "Civil Defense"), and 5622 criminal trials and 5819 civil trials, the great majority of which took place between 2002 and 2006.²⁰

¹⁷ Cf. New Jersey Rule of Court 1:8-8(d), which states in pertinent part:

The jurors' questions shall be submitted to the court in writing at the conclusion of the testimony for each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination to respond to the jurors' questions and the witness's answers.

N.J. R. Ct. 1:8-8(d).

¹⁸ FLA. R. CIV. P. 1.452.

¹⁹ Gregory E. Mize et al., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, NAT'L CTR. FOR STATE COURTS (2007). The Judge & Lawyer Survey was one of three surveys included in the Report. *Id.* at 27.

²⁰ *Id.* at 4, Table 2.

Juror questioning at that time was the exception. This survey reported that it was used in 14.0% of state criminal trials, 11.4% of federal criminal trials, 16.1% of state civil trials, and 10.9% of federal civil trials.²¹ Although these percentages are low, caution should be exercised in considering them. First, they are based on reports provided between eight and twelve years ago, when fewer jurisdictions authorized jury questioning.²² Second, the survey results do not specify how many trials were reported in each year. If, for example, a high percentage was reported in 2002, when juror questioning was least authorized, that would cause the percentages to be lower. Finally, there is no reasonable or statistical basis to extrapolate from these results any projection of how often juror questioning is being done today.

Because it does not appear that any survey of comparable size and including questions about juror questioning has been conducted since, including but not limited to any follow-up surveys by the National Center for State Courts,²³ equivalent evidence that would help determine current usage of juror questioning is sorely lacking.

There is evidence, however, to help determine why this procedure is being used, and why not. This analysis must begin with the fact that today, by far, the greatest number of jurisdictions give trial judges discretion to use or not use juror questioning.²⁴ But for their authorizing its use in their courtrooms, juror questioning would be nothing more than a concept. What, then, may account for their decisions to allow or not allow it? This question is critical for both the present and future of juror questioning.

A co-author of the Report that included the Judge & Lawyer Survey discussed above, asked the question, "To what extent does the existence or absence of legal authority, and the direction of that authority, affect

²¹ *Id.* at 32, Table 24.

²² See *infra* Appendix I. Authority for a number of jurisdictions catalogued therein arose during or after 2002-2006.

²³ Email from Paula Hannaford-Agor, Director, Center for Jury Studies, to Ariel Niles, Research Assistant (Aug. 28, 2013 16:19 EST) (on file with author) ("My sense based solely on anecdotal evidence is that the practice is very slowly gaining traction in state courts . . .").

²⁴ See *infra* Appendix I.

the propensity of judges to permit jurors to submit questions to witnesses?"²⁵

Examining data from the Judge & Lawyer Survey, she termed the results "quite surprising," especially with respect to civil trials":

•"Language discouraging the practice of juror questions, or opinions that simply fail to express an opinion on the practice, appear to inhibit judges' willingness to permit jurors to submit questions to witnesses in criminal trials, but the practice was used in nearly twice as many trials in states where the case law endorsed the practice."²⁶

•"In civil trials, however, the language of existing case law had exactly the *opposite* effect. One-third of civil trials in states with case law *discouraging* juror questions actually *employed* the practice at trial, while only 19[%] did so when the case law endorsed the practice and only 14[%] did so when the case law was neutral on the question."²⁷

•"The existence of some form of positive law authorizing the practice did not affect the frequency of its use in criminal trials, but did in civil trials."²⁸

•"Clearly, the existence of legal authority for the practice has some measurable impact on actual trial proceedings, but . . . the study found that local community practice has the single biggest impact on actual trial practices for both criminal and civil trials. Trial judges, it seems, take their cues about how best to exercise their discretion primarily from their peers, rather than from more formal legal authority. To some extent, local community practice prevails even in spite of formal legal authority."²⁹

Although trial judges in all "discretionary" jurisdictions certainly have the final authority to allow juror questioning, attorneys do play a role in

²⁵ Paula L. Hannaford-Agor, *Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts*, 28 N. ILL. U. L. REV. 407, 416 (2008).

²⁶ *Id.*

²⁷ *Id.* (emphasis added).

²⁸ *Id.* at 417.

²⁹ *Id.* at 417-18.

the decision. They can do one of three things: stay silent and hope that the trial judge, not hearing any requests³⁰ to use this procedure, will not order its use; ask the court to allow it; or, object to opposing counsel's request to allow it. In the first and third cases, attorneys' objections to juror questioning, whether specific to the case or otherwise, may serve to bar the jurors from enjoying the benefits of questioning.³¹

What bases could there be for objecting, other than for specific and objective tactical reasons? Two likely bases, discussed in the literature on jury questioning, are suggested here, although there certainly are more. They are the fear of losing control, and interference with the attorney's trial strategy. As one judge stated:

A number of reasons probably account for [juror questions generating the most controversy], but the fundamental reason, in my view, is that the suggestion goes to a core concern of the advocate—maintaining control over the case—and of the judge—keeping control over the trial. These concerns generate opposition by the legal fraternity, notwithstanding demonstrated benefits and available safeguards to ensure an orderly trial.³²

Another judge stated, "I suggest the reluctance to expand the powers of totally passive and unenlightened juries stems from three sources: (1) the tremendous inertia of long-standing legal tradition, (2) a basic distrust of juries, and (3) trial attorneys' and judges' fear of loss of control of the trial process."³³

³⁰ Interview with Belvin Perry, Jr., Chief Judge of the Ninth Judicial Circuit for Orange and Osceola Counties, Florida (2013). In connection with the survey found at Part III, the author asked Judge Perry, who had been on the criminal bench for many years, including while juror questions were discretionary with the court in criminal cases, how many times he had used the procedure. Judge Perry thought for a moment, and answered, "None." The author asked Judge Perry how many times he had been requested to do so. He thought for a longer moment, and said, "I never have."

³¹ See *infra* discussion as to benefits of questioning at Part II(A), (B), and (C).

³² See Dann, *supra* note 7, at 1253.

³³ Mark A. Frankel, *A Trial Judge's Perspective on Providing Tools For Rational Jury Decisionmaking*, 85 NW. U. L. REV. 221, 222 (1990). The author is a circuit judge in Dane County, Wisconsin. *Id.* at 221. He cites various reasons why he is in favor of jury questioning. *Id.* at 222. "It is an almost impossible task for even the most conscientious lawyer to anticipate all the relevant and probative inferences a jury may seek to explore in a moderately complex trial. . . . [T]his task [is] insurmountable." *Id.* at 225 n.14.

In a 2000 pilot project³⁴ on juror questioning approved by the New Jersey Supreme Court involving 272 attorneys, its Report stated that “the most common concerns expressed by attorneys were interference with trial strategy and loss of control over witnesses.”³⁵ Another study reported that “[p]reliminary questioning of trial attorneys about juror questions revealed some fear that juror questions would play havoc with attorney trial strategies. However, attorneys who participated in trials with questions reported this was not a problem.”³⁶

Part III includes a 2013 survey that sheds additional light on reasons for the reluctance of judges and, particularly, trial counsel in criminal cases, to allow, request or agree to the use of juror questioning.

II. Purported Advantages and Disadvantages of Jury Questioning: Fact or Fiction?

Since the first research on jury questioning was performed, believed to be in 1983,³⁷ there has been a dearth of neither predictions nor discussion as to the advantages or disadvantages jury questioning would create.³⁸ In considering whether to allow such a significant change in trial

³⁴ JURY SUBCOMMITTEE (OF THE NEW JERSEY SUPREME COURTS CIVIL PRACTICE COMMITTEE), REPORT ON PILOT PROJECT ALLOWING JUROR QUESTIONS 1 (2000), available at <http://www.judiciary.state.nj.us/jurypilot/jurypilot.htm>.

³⁵ *Id.* at 4.

³⁶ Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y & L. 259, 275 (1997).

³⁷ See Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985) (offering results from approximately 100 jury trials overseen by twenty-eight judges in the Second Circuit).

³⁸ See, e.g., Richard W. Creswell, *Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1, 1 (2001); Kara Lundy, *Juror Questioning of Witnesses: Questioning the United States Criminal Justice System*, 85 MINN. L. REV. 2007, 2040 (2001) (“Permitting jurors to question witnesses violates a defendant’s Sixth Amendment right to an impartial jury by transforming the jury into an active, partial decisionmaking body. . . . Although there may be problems with the jury system, juror questioning is not the solution. Trial courts should not continue to violate a criminal defendant’s right to a fair trial. In the future, jurors should remain silent.”); 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); Wolff, *supra* note 8.

procedure, “predictions” and “discussion” should not be sufficient to determine its merit or lack thereof. Fortunately, many of these predictions have been statistically tested. In the two bodies of research next discussed, statistical testing is particularly well correlated to purported advantages and disadvantages.

A. The Penrod and Heuer Studies

Steven Penrod and Larry Heuer have conducted extensive studies regarding jury behavior, both nationally and in Wisconsin, including jury questioning,³⁹ and reported the following statistical findings.⁴⁰

1. Purported Advantages of Juror Questions

“*Juror questions promote juror understanding of the facts and issues and alleviate juror doubts about trial evidence.*”⁴¹ The findings “generally support the view that juror questions serve a clarifying function.”⁴² Jurors also said that they felt somewhat better informed by the evidence and were more confident “that they had sufficient information for reaching a responsible verdict in trials where questions were allowed.”⁴³ And “jurors who were permitted to ask questions were more satisfied that the questioning of witnesses had been thorough, seldom thought that a witness needed to be further questioned, and were more satisfied that the jury had sufficient information to reach a responsible verdict.”⁴⁴

³⁹ The national study included 160 civil and criminal trials with 103 judges from 33 states; completed questionnaires were submitted by 150 judges, 220 attorneys, and 1229 jurors. In the Wisconsin study conducted in state trial courts, responses were received from 63 judges, 95 attorneys and 550 jurors. See generally Larry B. Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409, 409-30 (1989); Larry B. Heuer & Steven D. Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121, 121-50 (1994); Larry B. Heuer & Steven D. Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 29-51 (1994).

⁴⁰ Penrod & Heuer, *supra* note 36, at 274-79.

⁴¹ *Id.* at 274.

⁴² *Id.*

⁴³ *Id.* at 275.

⁴⁴ *Id.*

“*Juror questions help jurors get to the truth.*”⁴⁵ Both the judges and attorneys surveyed “did not expect juror questions to help get to the truth, and after participating in trials where questions were allowed, they reported that the questions were not very helpful.”⁴⁶ The authors posit that this response on the part of the attorneys is not surprising because, given their extensive knowledge of the case, “they will have anticipated most of the questions jurors might pose.”⁴⁷ Although this is likely true, another explanation may lie in the form of professional pride—they did not want to admit that they had missed questions that mattered.

“*Juror questions alert trial counsel to particular issues that require further development.*”⁴⁸ “In both studies, judges and lawyers expected juror questions to provide useful information about the jury’s thinking, but after participating in trials in which questions were permitted, both judges and lawyers agreed that questions did not yield these benefits.”⁴⁹

“*Juror questions increase juror, attorney, or judge satisfaction with the trial or the verdict.*”⁵⁰ “Jurors were quite satisfied with their experiences, and their assessment was not influenced by the presence or absence of juror questions.”⁵¹ Judges and lawyers were reasonably satisfied with the jury’s verdict, with judges somewhat more so than attorneys, and “these assessments were not influenced by the availability or absence of juror questions.”⁵²

2. Purported Disadvantages of Juror Questions

“*Jurors ask inappropriate questions.*”⁵³ “Our observation . . . is that although the jurors did not know the rules of evidence, they asked appropriate questions.”⁵⁴ Neither the judges nor the attorneys disagreed.⁵⁵

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Penrod & Heuer, *supra* note 36, at 276.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

*“Trial counsel will be reluctant to object to inappropriate juror questions.”*⁵⁶ “Both of our studies show that lawyers are not immobilized by such concerns,” as in these studies they objected to 20% and 17% of the questions asked. Judges in the studies, however, both heard argument and ruled outside the presence of the jury, so there should not have been a reason for reluctance.

*“Jurors are embarrassed or angry when attorneys object to juror questions.”*⁵⁷ No evidence supported this perceived disadvantage.⁵⁸

*“If counsel objects and the objection is sustained, the jury may draw inappropriate inferences from the unanswered question.”*⁵⁹ Although not phrased exactly this way in the authors’ two studies, both the judges and attorneys responded that they neither expected nor observed either the surveyed “[j]uror questioning caus[ing] prejudice to my client” or “[t]he juror questioning procedure undermined the goals of the adversarial process.”⁶⁰

*“When jurors are allowed to ask questions, they become advocates rather than neutrals.”*⁶¹ This transition from neutral to advocate was a significant concern.⁶² And, there would be no way to survey this transition directly except to ask the jurors point-blank, for example, “Did you believe you became an advocate when you asked one or more questions of the witnesses?”—a question which was not asked. Instead, this feared disadvantage was found to be unproven based on the fact that (1) verdict data showed that jury questions had no significant effect on the verdicts, (2) jurors and judges “agreed on the verdicts in approximately 70% of all cases,” and (3) “neither lawyer was perceived less favorably as a result of the question-asking procedure (a result that might be expected if the jurors lost sight of their neutrality).”⁶³

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 276-77.

⁵⁹ *Id.*

⁶⁰ *Id.* at 277 (internal quotation marks omitted).

⁶¹ *Id.*

⁶² Penrod & Heuer, *supra* note 36, at 278. The authors cite several decisions to this effect. See, e.g., *United States v. Johnson*, 892 F.2d 707, 713 (8th Cir. 1989).

⁶³ Penrod & Heuer, *supra* note 36, at 278.

*“Jurors overemphasize answers to their own questions at the expense of other trial evidence.”*⁶⁴ The evidence was to the contrary because (1) the jurors were “quite modest in their appraisal of the helpfulness of juror questions,”⁶⁵ and (2) only about ten percent of their deliberation time (an average of fifteen minutes) was spent discussing answers to juror questions.⁶⁶

“Juror questions have a prejudicial effect.” Obviously critical, as phrased this issue encompassed a range of unspecified factors. Favorably for jury questioning, the answer was decidedly in the negative. As the authors explained:

In our studies of jury questioning, signs of prejudice were most thoroughly explored in the national study by using dependent measures such as jury verdicts, judge-jury agreement on verdicts, lawyer satisfaction with verdicts, and juror impressions of the lawyers. The results were clearly contrary to what would be expected if questions had prejudicial effects: Jury questions did not affect the pattern of jury verdicts and did not affect judge-jury verdict agreement, the judges and lawyers did not see such prejudicial effects (even though the lawyers expected them to see them before they had experience with jury questions), and jurors had more favorable views of both attorneys in trials where juror questions were permitted.⁶⁷

In sum, although the purported advantages were somewhat supported by this research, the findings were overwhelmingly contrary to the fears or beliefs that jury questioning would cause *any* of the examined “disadvantages.”

B. The Colorado Jury Reform Pilot Project

The Colorado jury reform pilot project took place in two phases from 2000 to 2001.⁶⁸ Between both phases, the jury reform project received

⁶⁴ *Id.*

⁶⁵ *Id.* at 278-79.

⁶⁶ *Id.* at 279.

⁶⁷ *Id.*

⁶⁸ MARY DODGE, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? A REPORT SUBMITTED TO THE COLORADO SUPREME COURT'S JURY SYSTEM COMMITTEE 1-5 (2002).

responses from 1904 jurors, 199 judges and 424 attorneys.⁶⁹ It was “in part designed to replicate the Heuer and Penrod studies specifically for criminal cases.”⁷⁰ In fact, the testing went substantially farther.⁷¹ In doing so, it provided the most extensive but specific testing of concerns, purported advantages, and disadvantages to date. The results follow.⁷²

1. Do Juror Questions Cause Excessive Delays to the Trial Process?⁷³

Forty-one percent of the jurors submitted at least one question during their trial.⁷⁴ Approximately 86% of the attorneys said that questions were proposed in their trials, and “in almost all of the cases judges did ask the submitted questions.”⁷⁵ This response, one can reasonably state, is startling because jurors are not lawyers. They have no knowledge of the rules of evidence, and their questions, just as the attorneys’ questions, must be unobjectionable or they will not be asked by the court of the witness.⁷⁶ Even trial attorneys may have objections sustained against them as much as five percent of the time.⁷⁷ Although this question tested for delay, its responses strongly support the evidentiary worthiness of juror questions (contrary to claims of irrelevance or inadmissibility under Federal Rule of Evidence 403).

⁶⁹ *Id.* at 9, 51.

⁷⁰ *Id.* at 3.

⁷¹ *Id.* at 2-4.

⁷² Where the percentage results are particularly relevant, they will be recited. Otherwise, the results will be described more generally.

⁷³ DODGE, *supra* note 68, at 15. The findings noted here were from Phase One of the study, which had a far greater number of responses than were received in Phase Two.

⁷⁴ *Id.*

⁷⁵ *Id.*; *cf. id.* at Table 7. In the district and county courts combined, the average numbers of questions (1) submitted per trial was 9.16, (2) asked was 7.15, (3) declined was 2.39, and (4) rephrased and asked was .61. *Id.* Adding (2) and (4) equals an average of 7.76 asked, which for non-lawyers, out of 9.16, is still extremely high.

⁷⁶ See discussion *supra* Part I.

⁷⁷ See discussion *supra* Part I.

Going into the project, the author noted that the concern of excessive time being spent on jury questions “may represent the foremost concern for judges.”⁷⁸ This concern was not borne out. To the contrary, 92% of the jurors, 74% of the attorneys, and a majority of the judges, did “not believe that the delays or interruptions were excessive beyond what was necessary and acceptable.”⁷⁹ The average (mean) time in the questioning process was only 12 minutes, with a median of 5.50 minutes and a mode (most frequently occurring time) of 5 minutes.⁸⁰ By any measure, jury questioning did not cause undue delay to the trial process.

One additional finding here is relevant to the issue broached above in Part I: whether judges' reluctance to allow jury questions is caused in material part by their negative assumptions not (yet) contradicted by experience in doing so. Only 41.4% of the judges who did not employ jury questioning, and therefore based their opinion “on speculation, believed that delays or interruptions caused by jury questions were *not* excessive, while 84.5[%] of those judges who did employ jury questioning found that any such delays were not.”⁸¹ This difference is substantial and a strong indicator, where jury questioning is concerned, that the old maxim, “experience is an excellent teacher,” is true.

2. Did Questions Impact Defendants' Decision to Testify?

The answer, across the board, was that it did not. According to the judges, there was no meaningful difference between the number of times defendants testified in jury questioning cases, called “Questions Presented” cases (QP), and in non-jury questioning cases, called “Questions Not Presented” cases (QNP).⁸² Of the attorneys, 87% said the questioning procedure, when allowed, had no impact on the choice to testify and 81% said that juror questions had “no weight” in the decision.⁸³

⁷⁸ DODGE, *supra* note 68, at 17.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 19, Table 8.

⁸² *Id.* at 21.

⁸³ *Id.*

3. Did the Procedures Successfully Screen Improper Questions?

Judges in most cases were able to identify questions that were inappropriate and screen them successfully.⁸⁴ This is not surprising. As noted previously, objections to jurors' written questions normally are resolved at a bench conference outside the hearing of the jury, but the judge has a full opportunity to hear all objections.⁸⁵

As for the attorneys responding to this question, they were "less optimistic that improper questions were eliminated, with the majority indicating sometimes."⁸⁶ Because the judge will be hearing and ruling on objections made to both jurors' and attorneys' questions, this is a curious response. One possible explanation is that attorneys feel that judges have been reluctant to sustain objections to jurors' questions simply because they were *jurors'* questions. One could have thought the opposite—that because they were not attorneys, and did not know the rules of evidence, judges would be more likely to sustain objections to their questions.

4. What are the Dynamics of Declining Jurors' Questions?

In short, statistically, there were none. "It was rare for a judge or attorney to observe any unfavorable reactions from the jurors after a question was declined. Jurors appeared to accept the ruling and showed no observable negative reaction to the decision."⁸⁷

5. Judges' and Attorneys' Perceptions of Jurors Who Asked Questions

The results showed, perhaps most interestingly, that "from the judges' and attorneys' perspective the jurors appeared to be focused on relevant

⁸⁴ *Id.* at 23.

⁸⁵ See discussion *supra* Part I and note 17 (regarding the typical procedure used by the court and counsel when jurors wish to have questions asked).

⁸⁶ DODGE, *supra* note 68, at 23.

⁸⁷ *Id.* at 24.

issues and stayed on task.”⁸⁸ The majority of attorneys believed that the jurors obtained information pertaining to the case through this process, but only one-quarter thought that the answers produced information that was necessary for them.⁸⁹ And, to varying degrees, both judges and attorneys found that jurors sent signals of various meaning with their questions, for example, “indicate[d] jurors taking sides in the case” or “indicate[d] argumentative or hostile behavior from a juror.”⁹⁰

6. Do Juror Questions Have a Prejudicial Impact?

Almost unanimously, the answer was that they do not. Ninety-seven percent of the judges said the juror questioning procedure followed at trial caused no actual prejudice to any of the parties.⁹¹ Ninety-nine percent of the jurors found that the judge did not favor one side.⁹² And, once again, the statistical results on this issue showed that experience with juror questioning positively enhanced judges' perceptions. When asked if they believed the questioning resulted in actual prejudice, approximately 38% of the QNP judges said “yes,” as compared to approximately only 1% of the QP judges who said “no.”⁹³

7. What Impact Did Questions Have on the Trial?

Overall, 40% of the judges said the procedure was favorable, while 16% said it was unfavorable.⁹⁴ As for the attorneys, the majority said either they did not believe the questions had an effect on the trial, or they had no opinion.⁹⁵

⁸⁸ *Id.* at 26.

⁸⁹ *Id.*

⁹⁰ *Id.* at Table 12.

⁹¹ *Id.* at 27.

⁹² *Id.* It does not appear that the attorneys were surveyed on these particular matters. *See generally id.*

⁹³ *Id.* at 27.

⁹⁴ DODGE, *supra* note 68, at 30.

⁹⁵ *Id.*

8. Comparing Judges' and Attorneys' Favor or Opposition to Juror Questions Before and After Trial

Judges' opinions were essentially unchanged, at approximately 75% favorable both before and after trial.⁹⁶ Attorneys, on the other hand, significantly shifted their opinions, from 40% favorable before to 49% after.⁹⁷ And, for prosecutors, the rise in their "favorable" opinion of this procedure was greater still—from 72% to 90% favorable.⁹⁸ Defense counsel moved from approximately 23% to 30%.⁹⁹

This statistical finding raises the interesting question of why prosecutors have a *much* more favorable opinion of jury questioning. One possibility is that prosecutors may have less time to prepare for trial than private defense counsel, due to having higher case loads.¹⁰⁰ With less time to plan they may be more comfortable than private defense counsel with shifts at trial that are caused, or which they perceive to be occurring, due to the content of jurors' questions. Another possibility is that prosecutors have the heavy burden at trial of proving the charge beyond, and to the exclusion of, all reasonable doubt. They may welcome signals from the jury in the form of questions indicating, as they may perceive it, weaknesses in that proof. Defense counsel, on the other hand, hoping in every case that the prosecution fails in its burden as to at least one element of the crime charged, would not generally be pleased to hear such questions. Rather, they would likely believe that jurors, through their questions, are giving such signals to the prosecution. Additional research as to why this great difference exists would be welcome.

9. Benefits of Other Jurors' Questions

By all reports the benefits were extensive, and the detriments insignificant. Eighty-three percent said that other jurors' questions clarified the

⁹⁶ *Id.* at 35.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Given the well-known and large caseloads of public defenders, likely comparable to those of prosecutors, this would not seem to explain any difference between prosecutors and public defenders. This project did not, however, segregate between public defenders and private defense counsel. See generally DODGE, *supra* note 68.

testimony (17% said no), and 86% said they provided important information (14% said no).¹⁰¹ Statistical evidence for negative effects was sorely lacking—91% denied that such questions caused the juror to “form an opinion about the outcome of the case based mainly on the questions and answer” (9% said they did), and 94% denied the fact that they were questions from other jurors caused them to focus on them to the exclusion of others (6% said they did).¹⁰²

10. Final Deliberations¹⁰³

Juror questions made a positive difference. Those who were in the QP group “were more likely to believe that they had sufficient information to reach a correct decision compared to the QNP group. These findings suggest that when permitted to submit questions jurors have fewer unanswered items on the table during deliberations.”¹⁰⁴

11. Discussion

This pilot project generated little doubt about what the results showed for juror questioning:

The strongest case for allowing the procedure is derived from the jurors' self-reports. The questioning procedure empowers the jurors and actively engages them in the trial—judges and attorneys also agree on this point. Even the opportunity to submit a question is viewed positively by jurors since the process is more inclusive and interactive. Most significant are data that indicate jurors are more satisfied with the trial process and have more favorable reactions to the trial experience. Jurors, overwhelmingly, believe that the opportunity to ask questions should be included in all trials.

The results of the research indicate that allowing jurors to ask questions at trial will have positive effects with few detrimental results. The procedure does not appear to cause any “harm” to the lawyers or the witnesses and the “worst fears” were realized only in the exceptional case.¹⁰⁵

¹⁰¹ DODGE, *supra* note 68, at 40, Table 22.

¹⁰² *Id.*

¹⁰³ *Id.* at 40, Table 23.

¹⁰⁴ *Id.* at 40.

¹⁰⁵ *Id.* at 58.

When tested against statistical evidence, the purported advantages here were substantially factual. The disadvantages, however, were not so fortunate. They were proven at least substantially, and arguably overwhelmingly, to be fiction.

C. Additional Research Findings: Non-correlative, but Still Revealing

Although not specifically correlated with purported advantages or disadvantages of jury questioning, the following research findings help portray how this procedure has functioned or been evaluated by judges or attorneys.

In what appears to be the first research done on jury questioning, an experiment performed at the behest of the Second Circuit in 1983,¹⁰⁶ prosecutors and plaintiffs' counsel were "overwhelmingly favorable in their assessments of this procedure,"¹⁰⁷ while, "in contrast, the responses from defense counsel were much more equivocal."¹⁰⁸ This is consistent with the previously discussed research.¹⁰⁹

A survey of judges from forty-eight states, Washington, D.C. and the Virgin Islands, with 553 responding by the time of publication in 1990, showed the degree to which they allowed jury questioning was extremely low.¹¹⁰ In the category of sixty-six "predominantly civil" judges, the mean allowing this procedure was seven percent, and the median zero.¹¹¹ With eighty-five "predominantly criminal" judges responding, as well as with 123 "mixed" practice judges, the means were 11% and the medians zero.¹¹²

¹⁰⁶ See generally Sand & Reiss, *supra* note 37.

¹⁰⁷ *Id.* at 445.

¹⁰⁸ *Id.*

¹⁰⁹ See discussion *supra* Part II(B).

¹¹⁰ Larry Heuer & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More-Active Jury*, 85 N.W. U.L. REV. 226, 229-30 (1990). This survey was not final at the time their article was published, but the authors believed they had information sufficient to address judges' experience with jury questioning. *Id.*

¹¹¹ *Id.* at 30.

¹¹² *Id.*

A 1997-1998 survey of North Carolina jurors, serving in a state which did not allow jury questioning, found that 57% of the 1303 jurors responding said it would "have helped to be able to ask questions of witnesses," while 43% said it would not.¹¹³ In comparison to results discussed in this Part from jurors who served in trials where they could ask questions, this "favorable" percentage is very low.¹¹⁴ This low percentage may be explained by the fact that these jurors were responding about their wish for jury questioning *ex post facto*, and without ever having the experience of asking questions in their trials.

In a 1997 Texas Supreme Court-sponsored survey, 115 civil court judges responded to the following statement: "Trial courts shall have discretion to permit the use of jury questions to witnesses with maximum procedural protections."¹¹⁵ Only 51.31% said "Yes" and 48.69% said "No/Undecided."¹¹⁶

This finding is surprising, in one respect, because nearly half of the judges responding did not think even *they* should have at least the *discretion* to allow jury questioning. That these *civil* court judges felt this way makes this result even more surprising, in that they could not have based their feeling on the potential disadvantage of their jurors' questions infringing on the defendant's *constitutional* rights. What remains, it seems, is that their feeling of disapproval was a strong one. On the other hand, this result is not surprising because of how long ago, relatively speaking in "juror questioning" years, this survey took place. With juror questioning by no means widespread in 1997 and research showing that judges perceive it more favorably when they have experience using it,¹¹⁷ one may have expected significant hesitation in their survey responses here.

Juror questioning research arising out of the Arizona Filming Project, a 1998 study in which fifty civil trials were videotaped, including juror

¹¹³ Brian L. Cutler & Donna M. Hughes, *Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Juror Survey*, 19 BEHAV. SCI. & L. 305, 313 (2001).

¹¹⁴ See discussion *supra* Parts III(A) & (B).

¹¹⁵ R.N. Singh et al., *Reforming the Jury System: What Do the Judges Think?*, 63 TEX. B.J. 948, 952 (2000).

¹¹⁶ *Id.*

¹¹⁷ See research & discussion *supra* Part II(B).

discussions and deliberations, produced a number of findings illuminative of how this procedure operates.¹¹⁸

• “[F]ears that trial time will be extended substantially by permitting juror questions appear unwarranted, at least when the courts and attorneys manage the process efficiently.”¹¹⁹

• Judges permitted witnesses to answer 76% of jurors’ questions overall.¹²⁰

• The largest category of questions, at 42%, was “Cross-Checking,” which “jurors use[d] . . . to assist them in evaluating witness credibility and judging the plausibility of witness accounts, particularly those of interested witnesses whose credibility is in doubt. Jurors look for evidence from disinterested witnesses or non-witness sources of probative information to compare that information with claims from other sources.”¹²¹

• Of the 829 questions that jurors submitted, only 8.3% appeared argumentative.¹²² In 30 of the 50 cases, no such questions were submitted.¹²³ In ten of them, one was.¹²⁴ And, one case was responsible for ten of these questions—with the same juror probably responsible for eight of those.¹²⁵ “This pattern, while based on a small sample, suggests that concerns that jurors permitted to submit questions during trial will generally become adversarial and argumentative in their questioning are unfounded.”¹²⁶

A 2003-2004 New Jersey survey of civil presiding judges answered the interesting question of, where a witness testifies by videotape or deposition, whether juror questions should be permitted of the other

¹¹⁸ Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1941-42 (2006).

¹¹⁹ *Id.* at 1942.

¹²⁰ *Id.* at 1938.

¹²¹ *Id.* at 1956.

¹²² *Id.* at 1965.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

party's corresponding witness(es).¹²⁷ Fifty-six percent of the 232 judges surveyed said "no," with the primary reason being "to ensure a level playing field."¹²⁸ That 44% said "yes" indicates that either there was doubt that allowing juror questions would tilt the field to begin with, or that the importance of allowing them to ask outweighed any unfairness.¹²⁹

The Seventh Circuit Project, conducted from 2005 to 2008, tested juror questions in 50 trials and analyzed responses from 434 jurors, 22 federal trial judges, and 86 attorneys.¹³⁰ The results were both consistent with those discussed above¹³¹ and encouraging:

[T]he vast majority of jurors, 83[%], reported that the ability to submit written questions helped their understanding of the facts. Judges and attorneys who participated in trials in which juror questions were permitted also responded very favorably to the procedure, with 77[%] of judges and 65[%] of attorneys reporting increases in juror understanding. Moreover, 75[%] of judges and 66[%] of attorneys saw no reduction in efficiency associated with permitting juror questions. The Seventh Circuit Jury Project Commission therefore strongly recommends use of this procedure in future state and federal jury trials.¹³²

In a pilot project conducted by the Michigan Supreme Court from 2008 to 2010, with 54 attorneys from 30 trials responding, only "approximately 35[%] thought juror questions increased the fairness of the trial, while fewer than . . . 49[%] thought the questions increased jurors' understanding."¹³³ These percentages stand in contrast to the jurors' feedback, in that 98% "thought questions should be allowed;"¹³⁴ 64%

¹²⁷ *Report of the Conference of Civil Presiding Judges on Its Evaluation of Juror Question-Asking Procedures*, 3-4 (2006), available at <http://www.judiciary.state.nj.us/jurypilot/jurquest2.pdf>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Am. Jury Project Comm'n, Seventh Circuit Bar Ass'n, *Seventh Circuit American Jury Project: Final Report* 13, 22 (2008), available at <http://c.ymcdn.com/sites/www.7thcircuitbar.org/resource/resmgr/imported/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf> [hereinafter *Seventh Circuit American Jury Project*].

¹³¹ See findings and discussion *supra* Parts III(A) & (B).

¹³² *Seventh Circuit American Jury Project*, *supra* note 130, at 13.

¹³³ Hicks, *supra* note 1, at 40.

¹³⁴ *Id.*

“thought allowing questions increased the fairness of the trial;”¹³⁵ and 72% “said it increased their understanding of the case.”¹³⁶

D. Summary

Statistically, juror questioning has proven its merit. Purported advantages have been supported and purported concerns or disadvantages disproven. For jurors themselves, there is great enthusiasm for the right to ask questions of witnesses and to be a true participant in their trials—and also, in their view, bringing significant benefits from the use of this procedure. As for judges or attorneys, there more recently is great support for juror questioning, albeit less than by jurors. The extent that judges and attorneys have been reluctant may be explained, at least in part, by (1) their having expressed this opinion prior to the near-present, when juror questioning has become almost universally permitted¹³⁷ and (2) their not having been involved in juror questioning, as the research shows that experience with this procedure results in greater enthusiasm. There can be little doubt at this time, with all three trial participant groups having spoken, repeatedly, that juror questioning is an innovation whose time has fully arrived.

III. The 2013 Ninth Judicial Circuit Survey on Juror Questioning

In 2013, the author conducted a survey of judges (on both the criminal and civil benches), prosecutors, and public defenders in the Ninth Judicial Circuit (in and for Orange and Osceola Counties, Florida) on the subject of juror questioning.¹³⁸ Responses were received from fifty-two judges, forty-one prosecutors, and eleven public defenders.¹³⁹ The results showed, particularly in criminal cases, (1) a distinct lack of use of this

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See discussion *supra* Part I; *infra* Appendix I.

¹³⁸ See *infra* Appendices II, III & IV.

¹³⁹ See *id.*

procedure, as well as (2) asserted reasons for this lack of use that, for the most part, are statistically unsupported, have been disproven, or, are based more on feeling than logic.¹⁴⁰ In civil cases, the results were far more favorable for juror questioning.¹⁴¹

This lack of use may initially be explained by the fact that this procedure is only discretionary in criminal cases but mandatory in civil cases.¹⁴² However, a closer analysis of these results shows that, separate and apart from this difference in juror question authority, it is mainly the attitudes of counsel that drive these results.

In assessing the following findings of note,¹⁴³ it may be of benefit to the reader to generally consider them *in pari materia*, where applicable, with the statistical research findings cited in Part II of this Article. This research is particularly beneficial in regard to the findings below as to why juror questioning was not used.

A. The Judges

1. In Criminal Cases

Only 6 of 28 criminal judges (or 21%), who have presided since Rule 3.371¹⁴⁴ came into effect and permitted juror questions, have allowed them.¹⁴⁵ Eleven (39%) have not allowed them, and 11 did not respond.¹⁴⁶

Eighty-two percent of the judges responding on this issue stated that the prosecution has never asked to allow juror questioning, and 76% said the same was true of defense attorneys.¹⁴⁷

Reasons given by judges for allowing jurors to question witnesses include: "In my opinion, jurors are more invested in the process if

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See FLA. R. CRIM. P. 3.371, effective Jan. 1, 2008; see also FLA. R. CIV. P. 1.452, effective Jan. 1, 2008.

¹⁴³ See *infra* Appendices II, III & IV.

¹⁴⁴ FLA. R. CRIM. P. 3.371, effective Jan. 1, 2008.

¹⁴⁵ See *infra* Appendix II.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

allowed to ask questions.”; “Rule permits it.”; “I think it makes them better listeners and does away with any areas that they are worried about.”; “To assist them in making a decision.”; “They asked me if they could.”; and “Parties had no objection.”

Only in the first, third and fourth responses did the judges give any reasons consistent with either the expected or proven benefits of juror questioning discussed in Part II. Although this sample is small, one would have hoped for a higher percentage of objectively positive reasons as the bases for their decision to use this procedure.

Of particular importance, since this procedure was discretionary, was why these judges would *not* allow it? The following in toto are the responses to Question 2(d):

Q2d	When you have not, why not?
1	Too many issues arise. More trouble than it's worth.
2	My concern was that the trial would be taken over by an over-active juror and lead us into irrelevant areas of inquiry.
3	The attorneys do not favor it. Additionally, if the questions are submitted and then not asked, there was concern that the jurors would unduly focus on the questions not asked (whys and why-nots) instead of the evidence presented.
4	Disruptive to the process
5	When involved in trials as an attorney where the procedure was allowed, the questions were generally objectionable, outside the scope of permissible evidence, or too confusing.
6	Too great a chance to cause a mistrial
7	Too fraught with potential error
8	The burden is on the state to present relevant facts.
9	Potential negative impact on the defendants' rights not worth the risk.
10	Have not found it beneficial, slows proceedings, too many questions posed by jurors cannot be answered, some jurors seem to focus more on what questions they will be asking than the testimony given by the witnesses
11	I always have.
12	I have never turned down a request from the jurors, but they rarely ask.
13	Parties have objected.

It must be remembered that these judges' civil brethren have been using the same process for six years. These objections are either not borne out

or even mentioned as a concern in the extensive body of (highly positive) research findings discussed in Part II; or are specifically contrary to some of these findings.¹⁴⁸

Fourteen of seventeen judges responding said that prosecutors never asked to allow juror questioning.¹⁴⁹ Thirteen of sixteen said the same about defense counsel.¹⁵⁰

Among the reasons given in response to the question of why judges thought defense attorneys objected to juror questioning, were that “[t]hey do not want jurors filling gaps in the evidence that the state left unfilled” and “[t]hey believe that it might assist the State in establishing their burden of proof.” These responses are consistent with the reasons suggested in Part II(C) that explain why defense attorneys would object. And, these reasons, from their standpoint, are understandable. On the other hand, questions from jurors could seek or elicit evidence that would support the defense. In at least one judge’s opinion here, they liked neither the risk nor the odds.

2. In Civil Cases

Of the six judges responding who have presided since Rule 1.452¹⁵¹ became effective, requiring that juror questions be allowed, not surprisingly 100% did so.¹⁵²

Otherwise, the findings for civil judges are noteworthy mainly for their *not* reflecting anything materially controversial or oppositional in how juror questioning is working in their courtrooms.¹⁵³ This is consistent with this procedure working well.

¹⁴⁸ *Cf.*, e.g., Response (3) with the disadvantage discussed at Part II(A); Response (4) with Part II(B); Responses (5) and (10) with the perceived disadvantage discussed at Part II(A) as well as III(B); and Response (9) with III(B).

In regard to Response (12), given that jurors likely would not know they had the right to at least ask to be able to question witnesses, a preferred method would be to advise them of the possibility. And, evidence shows that they likely would want the ability to do so. See findings *supra* Part II(C).

¹⁴⁹ See *infra* Appendix II.

¹⁵⁰ *Id.*

¹⁵¹ FLA. R. CIV. P. 1.452, effective Jan. 1, 2008.

¹⁵² See *infra* Appendix II.

¹⁵³ *Id.*

3. In Criminal and Civil Cases Combined

Only 6 out of 52 judges found (1) that jurors' questions focused on material issues not sufficiently covered by the attorneys' questions (thereby indicating that attorneys are doing an excellent job in this respect) and (2) that attorneys discernibly altered their tactics or arguments based on juror questions.¹⁵⁴

B. The Prosecutors

Thirty-nine of 41 prosecutors said they have *never* asked the court to allow jurors to ask questions.¹⁵⁵ Two said the percentage of cases in which they had done so was very small or approximately five percent of the time.¹⁵⁶ Twenty-seven of the 30, who actually responded, said the defense never did.¹⁵⁷ Fourteen out of the 14, who actually responded, said they had not discerned witnesses being either more truthful or testifying with greater candor in response to jurors' questions.¹⁵⁸

Their comments show that they empathize with why defense attorneys say they do not like juror questions:¹⁵⁹ "It is the state's burden of proof, how many prosecutors do you want in the courtroom? 1, or 7, or 13?"; "The jury was telling the state what additional witnesses to call. It relieves the state of its burden to prove the case and allows the jurors to prove the case."; "Almost universally when the court wants to do it the defense opposes. It's the state's burden; if we miss something, the last thing a defendant would want is the juror to do our job."

Although prosecutors rarely asked the court to allow juror questions, when they did ask it was because "the jury instructions [were] particularly complex" or they wanted to get an "idea of where their minds are at."

On the question so important to the use (or non-use) of the juror questioning procedure—why they did *not* ask—they gave the following responses.

¹⁵⁴ *Id.*

¹⁵⁵ *See infra* Appendix III.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See supra* Part III(A)(1).

Q2	When you have not (asked the Court to allow jurors to questions of witnesses as part of the trial process), why not?
1	It generally creates more problems than it solves, because most of the questions can't be answered.
2	Never thought to; Did not think of it; Did not think to do so
3	Never thought about it before and now for past year or so the judges automatically read an instruction to them allowing them to ask questions.
4	Never needed to; Not necessary; Wasn't necessary; Not necessary
5	Was unaware that was allowed; Did not think the parties to the case could request it.
6	Judge does not ask.
7	Most judges do not favor this practice; My judge did not allow it; Courts generally don't go for it; Most judges are not open to the idea.
8	Belief that jurors' questions are not likely to be helpful
9	I believe the judges should decide how to run their courtroom.
10	Have not needed too, Judge already allowed
11	Want to stay on track to relevant issues not curiosity
12	It's my case and the defendant's to present, not theirs.
13	It slows down the trial, and they seem to want to know objectionable things.
14	Most judges do not inform the jurors about the ability to ask questions. When they have the jurors have not asked questions.
15	I want to control the presentation of evidence, and would not ask a question for a reason.
16	I don't know, as the State we probably should do it so that a jury doesn't come back not guilty because of a silly question they could have asked during trial.
17	I usually wait to see if they have any questions.
18	I've had major problems with this.
19	Court usually instructs them on that.
20	Because I don't want jurors asking questions
21	No point
22	Jurors often ask common sense questions that call for inadmissible evidence. This introduces the possibility that the judge may error and allow something into (or keep something out of) evidence that will overturn the case on appeal.
23	It is not common practice in criminal

24	Some judges do it already.
25	Was never instructed by the office to do so
26	Court controls
27	The questions are usually inappropriate or inadmissible.
28	I would never ask the Court to invite jurors to ask questions because I imagine the questions the jurors will ask will attempt to ascertain answers that likely are not admissible evidence, and it would make my case presentation less smooth. I have also never seen a prosecutor, or a defense attorney for that matter, ask the court to allow jurors to ask questions. I know that a judge may allow jurors to ask questions of witnesses.
29	It would interrupt the flow of the trial.
30	Complicates the trial

Some of these reasons are consistent with the reasons given by judges as to why they do not allow this procedure.¹⁶⁰ However, a number of them reflect concerns without, in the absence of the respondent stating any such experience, any discernible objective basis—such as (8), (11), (28—“I imagine . . .”) and (29) (“It would . . .”). Some seem emotional—such as (12) or (20). Some are based merely on habit, or on judges’ practices, when the question is why these attorneys did not even *ask* to allow this procedure—such as (4), (6), (7), (9), (23), (24), and (26). And, others are contrary to research findings, such as (13),¹⁶¹ (22),¹⁶² (29) and (30).¹⁶³ Of these thirty reasons, one could argue that none fail to suffer from any of these infirmities, or that any may reasonably be considered to be objectively supportable. Yet, it is these reasons, given by these prosecutors, which are currently playing a role in explaining why juror questioning is not used more often.

C. The Public Defenders

All eleven public defenders responding said they have *never* asked the court to allow juror questioning.¹⁶⁴ Ten of them state their reasons below.

¹⁶⁰ See *supra* Part III(A)(1).

¹⁶¹ Cf. *supra* Part II(B).

¹⁶² Cf. *supra* Part II(B).

¹⁶³ Cf. *supra* Part II(B).

¹⁶⁴ See *infra* Appendix IV.

Q2	When you have not (asked the Court to allow jurors to questions of witnesses as part of the trial process), why not?
1	Rather not have jurors ask questions that might have intentionally not been asked to possibly add evidence to the State's case.
2	I believe it is harmful to the defense to do so.
3	It is ultimately the responsibility of the state to answer the jurors' questions. If the jurors have questions, that creates room for reasonable doubt. If the jury is permitted to ask questions, they are essentially taking on the role of the prosecutor, which effectively destroys the ability of the defendant in a criminal case to pick apart a prosecutor's theory of the case and the evidence they present. If jurors have remaining questions, they have reasonable doubt. If all their questions get answered, not only has the state failed to do its job properly, but the jury has filled in the gaps left by the state's failure. I would never want a jury interrogating my client or other witnesses in a criminal case.
4	Juries sometimes focus on non-issues and I do not want to distract from my theory.
5	Concerned about what they would ask
6	Unpredictability of it
7	I want to control all aspects of questioning that I can control.
8	Not sure of the benefit. Many times unanswered questions help reasonable doubt.
9	I want to control the evidence as much as possible.
10	Usually the Judge is the one who takes the initiative. I am ambivalent about allowing jurors to ask questions. When they ask questions that are not admissible I get the feeling they think we are hiding something from them.

Defense objections to juror questioning are based mainly on two reasons. First, as in (1), (2, probably) and (3), they ascribe to the belief that jurors' questions will help prosecutors prove their cases against these attorneys' clients. However, this appears to be an anxiety not based on fact or experience. No respondents state here that they have *seen* this happen, as opposed to their anxiety that it may or will happen. No research was discovered that tested what can only be called, in the absence of evidence here, a hypothesis. There is no logical basis to believe juror questions would help the prosecution more than the defense. Assuming jury selection resulted in a panel of mostly reasonable-minded, middle-of-the-road jurors, it would seem more likely that their questions would favor both sides. And, not all public defenders automatically believe that

jurors' questions will help prosecutors prove their cases, as even some prosecutors do.¹⁶⁵ One public defender reported that "[the jurors] started to ask some very pointed questions of the state's alleged victims and it became obvious they were having a hard time believing these witnesses." However, this instance seems not to have made a difference with this attorney, as all eleven public defenders said they never asked the court to allow juror questioning.

The second reason for not asking, as seen in (7), (9) and, arguably, (6) as well, is the fear of losing control. This fear is consistent with the finding discussed previously that people want to keep control.¹⁶⁶ One would hope, however, that important decisions, such as whether to ask for juror questioning or whether to object when juror questioning is requested, would be made on a more objective basis.

D. Summary

This survey produced some clear, even striking, results regarding juror questioning in criminal cases. Even though permitted, juror questioning was almost nonexistent.¹⁶⁷ No groundswell was found among judges for the practice, and the opposition from prosecutors and public defenders was nearly total.

There was little evidence that any of the participants were aware of, much less considered or relied upon in forming their opinions, any of the statistically-validated benefits that juror questioning brings to the trial process. Unless they receive an education on these benefits, there is no substantial reason to believe that this situation will change. However, as research reveals,¹⁶⁸ if these participants would give juror questioning the proverbial "fair shake," there is reason to believe that they will either substantially increase their use of, or possibly even embrace, this most worthwhile of trial innovations.¹⁶⁹

¹⁶⁵ See *supra* Part III(B).

¹⁶⁶ See *supra* notes 32-36 and accompanying text.

¹⁶⁷ Even Chief Judge Belvin Perry, Jr. said he had "never" even been asked to allow juror questioning. See *supra* note 30 and accompanying text.

¹⁶⁸ See discussion *supra* Part II(B).

¹⁶⁹ This is the overwhelming conclusion of the substantial statistical evidence discussed in Part II.

IV. Juror Questioning in the Case Law: How Far Can Jurors—and Judges—Go?

Separate and apart from cases where juror questions resulted in issues of admissibility in no different a fashion than if the questions had been asked by attorneys,¹⁷⁰ other decisions have marked the limits of juror questioning for both jurors and judges.

A. Rulings on the Scope of the Questions

In *United States v. Stierwalt*,¹⁷¹ the defendant argued on appeal that jurors should not have been permitted to ask “nonclarifying” questions of the witnesses. The court rejected this argument:

These questions did not elicit new evidence, but filled in innocuous details of testimony already before the court. Stierwalt’s attempts to construe them as something else are imaginative but unavailing. Moreover, Stierwalt has not directed our attention to any case in this Circuit or elsewhere where “nonclarifying” juror questions have been held to violate a defendant’s right to a fair trial. As far as we know, there is no requirement that juror questions be merely “clarifying,” and we decline Stierwalt’s invitation to impose such a requirement.¹⁷²

There are limits, however. In *People v. McAlister*,¹⁷³ a juror asked what the defendant said on the way to the hospital, would have forced the defendant to object in front of the jury because the procedure at trial allowed the juror to directly question the witness.¹⁷⁴ The court held that this evidence was inadmissible but not prejudicial to the defendant, and

¹⁷⁰ See, e.g., *Cranmer v. Commonwealth*, No. 2000-SC-0778-MR, 2003 WL 21990216 (Ky. Aug 21, 2003) (reversible error to overrule juror’s question seeking inadmissible habit evidence).

¹⁷¹ 16 F.3d 282 (8th Cir. 1993).

¹⁷² *Stierwalt*, 16 F.3d at 286.

¹⁷³ 167 Cal. App. 3d 633 (Ct. App. 1985).

¹⁷⁴ *McAlister*, 167 Cal. App. 3d at 645. This issue is no longer a problem, as no jurisdictions are currently known to allow direct, verbal questioning by jurors. Questions are to be written, with objections raised and ruled on outside the presence of the jury. See *supra* Part I, notes 17-18.

therefore affirmed the conviction.¹⁷⁵ However, it did include as one of the reasons why counsel should have had the opportunity to object outside the presence of the juror, the fact that “neither counsel had previously opened up (the area of what the defendant had said).”¹⁷⁶

B. Have the Jurors Crossed the Line and Become Advocates?

Jurors almost certainly “advocate” at trial but only in the sanctity of the jury room where they may urge their views on other jurors. For them to advocate during the presentation of evidence is an entirely different and, as the following decisions show, serious matter. In *Day v. Kilgore*,¹⁷⁷ the trial court allowed the jury to ask plaintiff, while he was on the stand, for a photograph of the front of his automobile.¹⁷⁸ At the time, he was under re-cross examination by the defense, and the photograph was not in evidence.¹⁷⁹ Moreover, the court, over defense objections, allowed plaintiff’s counsel to interrupt the re-cross examination of his client to lay a foundation for the photograph, and then enter it into evidence.¹⁸⁰

The South Carolina Supreme Court affirmed the court below by holding the trial court abused its discretion, which warranted a new trial.¹⁸¹ The court reasoned:

“The adversary theory as it has prevailed for the past 200 years maintains that the devotion of the participants, judge, juror and advocate, each to a single function, leads to the fairest and most efficient resolution of the dispute.” The production of evidence is a function of the advocate and not the judge or jury. Where, as here, the roles of advocate, judge or jury become intermingled, the fundamental basis of our adversarial system is undermined.¹⁸²

¹⁷⁵ *McAlister*, 167 Cal. App. 3d at 645.

¹⁷⁶ *See id.*

¹⁷⁷ 444 S.E.2d 515 (S.C. 2005).

¹⁷⁸ *Day*, 444 S.E.2d at 517.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 519.

¹⁸² *Id.* at 517 (quoting *Morrison v. State*, 845 S.W. 2d 882, 885 (Tex. 1992)).

The fact that jurors ask or actually have answered an extensive number of questions is not automatically determinative of whether they will be deemed to have crossed the line from juror to advocate. In *People v. Garrison*,¹⁸³ jurors at trial submitted and possibly had answered over 450 written questions.¹⁸⁴ The defendant appealed arguing in part that the jurors had “become investigators and advocates over the course of the trial.”¹⁸⁵ The court noted, however, that this case involved a ten-day murder trial with six different charges, over thirty witnesses, and 170 exhibits.¹⁸⁶ Accordingly, the court concluded that it was within the discretion of the trial court whether to prohibit or limit the number of juror questions.¹⁸⁷

It is more laborious to require juror questions to be in writing than allowing them to question witnesses orally and directly, but the benefits—requiring jurors to take the additional time to phrase the question as they wish; knowing precisely what the question is as opposed to hearing it orally and possibly for the first time; and giving counsel the opportunity to object outside the presence of the jury—are obvious. These benefits are almost assuredly a large part of why oral questioning is no longer permitted.¹⁸⁸ Two cases, however, show how this procedure played a role in jurors impermissibly becoming advocates.

In *State v. Jeffries*,¹⁸⁹ jurors directly examined an important witness with about fifty questions that resulted in approximately fourteen transcript pages.¹⁹⁰ The court additionally allowed them to question other witnesses, reflected in another twenty pages of transcript.¹⁹¹ On appeal, the court noted that “[m]any of the jurors’ questions were prejudicial; they were argumentative; some of them were outside of the issues and showed that the jurors had become prejudiced against the appellant.”¹⁹²

¹⁸³ 303 P.3d 117 (Colo. App. 2012).

¹⁸⁴ *Garrison*, 303 P.3d at 120 n.1.

¹⁸⁵ *Id.* at 121.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., FLA. R. CIV. P. 1.452, at Part I.

¹⁸⁹ 644 S.W.2d 432, 434 (Tenn. Crim. App. 1982).

¹⁹⁰ *Jeffries*, 644 S.W.2d at 434.

¹⁹¹ *Id.*

¹⁹² *Id.*

Based thereon, the court reversed the defendant's conviction and found that the trial court abused its discretion in allowing this extensive juror examination and that the "[j]urors appeared to [have] take[n] the role of advocates for the state in their examination of witnesses."¹⁹³ If written questions had been required, it is doubtful from a mechanical standpoint, that page after page of transcript of juror examination ever could have been generated.

Similarly, in *Krause v. State*,¹⁹⁴ the defendant's conviction was reversed where a juror interrogated him at length while he was on the witness stand, and "the record disclose[d] that [the juror] apparently thought he was the county attorney and assumed the role of prosecutor."¹⁹⁵

Finally, one jury went far beyond advocacy, and was able to do something that most trial attorneys would neither think of trying nor achieve if they did, in *Miller v. Commonwealth*.¹⁹⁶ In this case from 1920, the jurors returned to the courtroom, after retiring to the jury room to consider their verdict, and asked the court to recall a witness who testified for the accused.¹⁹⁷ It is not noted whether either attorney objected to this, although defense counsel certainly objected to two juror questions asking whether counsel had sought to coerce the witness's favorable testimony by saying that if she did not provide it her son would be sent to the penitentiary.¹⁹⁸ The objections were overruled.¹⁹⁹ In a holding that has likely never been repeated on even remotely similar facts in the ninety-four years since, the court said:

We do not find any objection to the course pursued by the trial judge in permitting Sallie Ann Miller to be recalled and examined Any member of the jury has the right, during the examination of a witness, to ask any competent, pertinent question, and, after the jury has retired to consider their verdict, they have the right to return to the courtroom and ask that a witness, who has testified, be recalled if he is present or so convenient as to be

¹⁹³ *Id.* at 435.

¹⁹⁴ 132 P.2d 179, 180 (Crim. Ct. App. Okla. 1942).

¹⁹⁵ *Krause*, 132 P.2d at 182.

¹⁹⁶ 222 S.W. 96, 98-99 (Ct. App. Ky. 1920).

¹⁹⁷ *Miller*, 222 S.W. at 98-99.

¹⁹⁸ *Id.* at 99.

¹⁹⁹ *Id.*

quickly secured, and in the presence of the court, the parties to the case and their attorneys ask the witness any pertinent, competent questions relating to matter brought out on the examination of the witness.²⁰⁰

C. As Indicated by Their Questions, Have Jurors Jumped the Gun and Prejudged the Case?

It is axiomatic that jurors are told that they should wait until their deliberations, after all the evidence has been presented and they have heard closing argument and received their instructions, before discussing the case among themselves, much less begin judging the case. Juror questions, however, and even a single question, have raised issues on whether this stricture has been violated. One such question was asked by a juror in *Biela v. State*.²⁰¹ There, the defendant was charged with murder, sexual assault and kidnapping.²⁰² After the jury saw a video where the defendant mentioned that he attempted to purchase a gun the week before the attack, a juror submitted a question, to which no objection was made by either party, to be put to a detective.²⁰³ The question was: "Do you have any thoughts on why [the defendant] would try to buy a gun, if he already had one (as used with one of the victims)?"²⁰⁴ The opinion does not reveal whether the detective ever answered the question, or, if so, what he said.

The following day, the defendant moved for a mistrial "stating that upon further reflection, we are concerned the question presupposes guilt as to the sexual assault [charge]."²⁰⁵ The court held a hearing, where it asked the juror who presented this question whether it indicated that she prematurely decided defendant's guilt on this charge.²⁰⁶ She said no, and the parties asked no follow-up questions.²⁰⁷

²⁰⁰ *Id.*

²⁰¹ No. 56720, 2012 WL 3139876 (Nev. Aug. 1, 2012).

²⁰² *Biela*, 2012 WL 3139876, at *1.

²⁰³ *Id.* at *4.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

The Nevada Supreme Court held that “the juror was simply requesting factual information and not revealing a premature opinion”²⁰⁸ and that “a proper question does not imply that a juror formed any opinion any more than it does when a judge asks a question.”²⁰⁹

D. What Have Juror Questions Prompted, and to What Effect?

Juror questions are supposed to seek to elicit admissible evidence. Otherwise, they should not be asked. Even when such is their purpose, at least apparently, it is not always the case that the results end there. And when they do not, not just issues but reversals may result. In *State v. Banko*, the defendant was convicted of second-degree possession of a weapon for an unlawful purpose.²¹⁰ During trial, jurors presented written questions that asked whether a pellet gun could kill someone and for statistical information on the gun, such as velocity of the projectiles.²¹¹ The court told counsel that the jury would be provided “sufficient information” to respond to these evidentiary concerns.²¹² Without objection, the court then instructed the jury that “some of these questions may be answered during the course of the trial, or during my instructions; so we will hold these in abeyance. If they still need to be answered, you will let us know.”²¹³ The next day, the prosecutor questioned the defendant about these very matters.²¹⁴ In doing so, as the court noted, the prosecutor “succeeded in responding to the two main substantive areas raised in the queries from the jury: (1) the lethal potential of the BB

²⁰⁸ *Id.* at *5.

²⁰⁹ *Id.* (citing *Flores v. State*, 965 P.2d 901, 903 (Nev. 1998)); *People v. Garrison*, No. 08CA2637, 2012 WL 3517377, at *4 (Ct. App. Colo. Sept. 27, 2012) (“A juror may form a bias about a piece of evidence or make a determination about the credibility of a witness over the course of a trial without necessarily violating a defendant’s rights.”).

²¹⁰ No. 99-12-2233, 2006 WL 3313634, at *1 (N.J. Super. Ct. App. Div. Nov. 16, 2006).

²¹¹ *Banko*, 2006 WL 3313634, at *3.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

gun, and (2) the gun's muzzle velocity."²¹⁵ The prosecutor's questions apparently bothered the court: "[W]e consider the substantive questions posed by the jury, and the insights gleaned by the prosecutor from those questions, highly problematic."²¹⁶ The court went on to state:

[T]he juror questions regarding the BB gun here undoubtedly induced the prosecutor to elicit new and very specific proof concerning the gun's ballistic characteristics through her ensuing cross-examination of the defendant.

We have serious concerns about whether the jury questions in this case unduly influenced the conduct of the trial. [The questions came] from the jury, rather than from an individual juror, which indicates that the jurors had improperly discussed the questions among themselves prior to their deliberations. That is flatly contrary to [the instruction that they not discuss the case among themselves] until the entire case has been concluded.

....
... We also recognize the absence of any timely objection from trial counsel. Nevertheless, the apparent inquisitorial activism of the jury in the conduct of this trial raises considerable doubts in our minds about the fairness of the proceedings. . . .²¹⁷

Based on the above, as well as other prejudicial events at trial, the defendant's conviction was reversed.²¹⁸

This case creates a proverbial "Catch-22" for trial counsel. On the one hand, they cannot realistically ignore juror questions and what they may indicate about how their case is proceeding. And, neither should they, for if jurors are saying through their questions that they need more information, this is of benefit both to counsel and the judicial system's interest in obtaining the most informed verdicts. On the other hand, however, if trial counsel reacts to the jurors' cues contained in their questions by giving them (here, without dispute) admissible and highly material evidence, they may face disapproval such as is found in this opinion. With its holding, this court materially narrowed the path upon which trial counsel must walk in terms of reacting—or not reacting—to cues provided by jurors.

²¹⁵ *Id.* at *4.

²¹⁶ *Id.*

²¹⁷ *Id.* at *5.

²¹⁸ *Id.* at *17.

In a scenario similar to the one in *Banko*, a juror's single question about blood led to a reversal in *Morrison v. State*.²¹⁹ The defendant was convicted of murder after claiming at trial that he acted in self-defense, with the struggle having taken place at least partially in the hallway of the victim's home.²²⁰ Following testimony of the investigating detective, a juror presented this question: "Was any of the blood in the hall [the defendant's]?"²²¹ However, the defendant's hearsay objection was sustained, and the question was never asked.²²²

The prosecutor claimed that he intended to ask the detective about the defendant's physical well being on the night of the murder but "forgot," so he asked to recall him.²²³ The defendant objected and argued in part that the juror's question stimulated this tactic and that the detective already finished his testimony.²²⁴ The objection was overruled, and the detective testified that he had not observed any wounds, scratches, or injuries on the defendant on the night of the murder.²²⁵

The issue framed on appeal was "should jurors be allowed to alert counsel?"²²⁶ The court first noted the statement in *United States v. Callahan*²²⁷ that said, "If nothing else, *the question should alert trial counsel that a particular factual issue may need more extensive development.*"²²⁸ What was expected and desirable in *Callahan*, however, received a very different reception by the *Morrison* court:

What is bothersome . . . is the explicit acknowledgement [in *Callahan*] that jurors should be allowed to *alert* counsel that additional evidence should be introduced on a material fact.

The first admonition the court gives a jury after its selection is "Do not talk to the lawyers." . . . What could be more helpful to counsel—particularly

²¹⁹ 815 S.W.2d 766 (Ct. App. Tex. 1991).

²²⁰ *Morrison*, 815 S.W.2d at 766-67.

²²¹ *Id.* at 767.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ 588 F.2d 1078 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979).

²²⁸ *Callahan*, 588 F.2d at 1086 (emphasis added).

to a prosecutor—than to hear firsthand from jurors during the trial the things which concern them about the evidence? . . . Essentially, the *Callahan* court is encouraging communication between the jury and counsel during the trial, a practice which undermines the court's admonition: "Do not talk to the lawyers." Sanctioning this practice in a criminal case is particularly troubling.

. . . .

A procedure which would encourage jurors to communicate directly with the prosecutor . . . would be so patently and fundamentally unfair to the defendant that even the most state's-oriented advocate could scarcely condone it.²²⁹

This decision does not seem to be well-reasoned. First, the juror's question in this case was not only reasonable but *highly* material. Second, his obvious purpose was to gather factual information to help him decide whether defendant's self-defense claim had merit; if his blood was in fact found in the hallway, this would have been *strong* evidence in support of his claim. There is no reason for juror questioning at all if this purpose is not permitted. Third, the juror was not "allowed" to alert counsel—the alert was *inherent* in the question (which was a perfectly good question to begin with). Taking the "alert" out of this question would nullify the question *ab initio*. And, finally, the opinion makes no mention of there being any impropriety where a juror's question "tipped off" the *defense* and spurred it to take steps that might ultimately lead to acquittal. Under this holding, trial counsel's path in response to juror questions asking for factual information is almost unusable.

Finally, a single juror's question caused yet another conviction to be reversed in an almost Perry Mason-like fashion, in *Branch v. State*.²³⁰ The defendant claimed self-defense in his trial for murder and alleged the deceased was chasing him brandishing a knife when the defendant shot him.²³¹ There was testimony, however, that the deceased did not have a knife.²³² A juror orally asked the defendant what happened to the deceased's knife and whether it was ever found.²³³ The defendant tried to explain that a woman "sent the knife 'up there'" but was stopped

²²⁹ *Morrison*, 815 S.W.2d at 768.

²³⁰ 469 S.W.2d 533 (Tenn. Crim. App. 1969).

²³¹ *Branch*, 469 S.W.2d at 533.

²³² *Id.* at 533-34.

²³³ *Id.* at 534.

because of the hearsay nature of his statement.²³⁴ It is not clear from the opinion that “up there” was identified at trial, but it certainly was in a hearing upon defendant’s motion for a new trial.²³⁵ The Assistant District Attorney General stated that his case file “disclosed that an unidentified colored man turned a knife into the police department . . . that they said was found.”²³⁶ As a result of this favorable evidence being withheld from the defense, the conviction was reversed.²³⁷ If the juror had never asked the question, there is no reason to believe that this would have occurred.

E. Trial Judges: How “Active” May They Be in Response to Juror Questions?

Jurors’ questions either require or may cause action, in some form, from their trial judges. The following decisions provide guidelines for how “active” a judge may be. The issue of whether the court could “lay a foundation” arose in *Trotter v. State*.²³⁸ Preliminarily, because jurors typically are not knowledgeable about evidentiary requirements, the questions they present will rarely be accompanied by any necessary predicate or foundational questions. If only admissible questions may be approved by the court for presentation to the witness, this poses a problem—who is to lay the foundation? One would think it would be counsel, albeit with “prove-up” evidence after the juror’s questions are asked and answered. However, here it was the trial judge—and the defendant, convicted of theft, appealed on this issue.

A juror submitted a written question “asking if the time of day indications on the voided sales receipt and the videotape were consistent.”²³⁹ This question was a logical follow-up to the already admitted evidence that the time stamp on the former was different from the time appearing on the latter.²⁴⁰ This evidence was material because it directly

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 536-37.

²³⁸ 733 N.E.2d 527 (Ind. Ct. App. 2000).

²³⁹ *Trotter*, 733 N.E.2d at 530.

²⁴⁰ *Id.*

related to the defendant's alleged use of a stolen credit card to purchase merchandise.²⁴¹ Defense counsel objected on several grounds including the foundational basis that the security guard on the stand was not a proper witness to answer the question.²⁴² The court overruled the objection and, in the presence of the jury, questioned the guard on whether he was "familiar with the time stamping on the receipts . . . and the videotape," among other foundational matters.²⁴³ Trial counsel also questioned him.²⁴⁴ Ultimately, the difference in times was explained by an electrical storm that required the videotape system to be rebooted, which caused a delay consistent with the difference.²⁴⁵

The court held that such questioning by the trial court "is permitted if the court needs the requested information to rule intelligently on a matter, as long as the questioning is done in an impartial manner and does not influence the jury improperly with the judge's own contention," and that "a trial court does not abuse its discretion by asking questions which ultimately aid a party in laying a foundation for an exhibit."²⁴⁶

May the trial court alter a juror's question and then have it asked? This issue arose in *Sommers v. Friedman*,²⁴⁷ with the answer, limited to the facts, being "yes."²⁴⁸ In this medical malpractice case, a juror presented a question for a defense expert—"When a patient comes in with *potential* aortic dissection, is it common to do more than one x-ray?"²⁴⁹ The trial court thought the word "potential" was vague, and in order to give the question "more significance or greater probative value," the trial court altered the question and asked the witness: "When a patient comes in with *suspected* aortic dissection . . . ?"²⁵⁰ The plaintiff objected:

[B]ecause the question came from a juror, the jury would be aware of the word change and would consider the change to indicate that the trial court

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 530.

²⁴⁶ *Id.* at 532-33.

²⁴⁷ 493 N.W.2d 393, 394 (Wis. Ct. App. 1992).

²⁴⁸ *Sommers*, 493 N.W.2d at 400-01.

²⁴⁹ *Id.* at 399.

²⁵⁰ *Id.*

itself personally “believed that no additional x-rays were required unless [the defendant] ‘suspected’ aortic dissection.” Thus, says [the plaintiff], the test of negligence was shifted from an objective standard to a subjective one—“if [the defendant] did not suspect aortic dissection, no further x-rays were necessary”—and that the error is all the more serious because “the trial court itself obscured the standard.”²⁵¹

The court disagreed stating that “it appears to us that, considered in the context of the testimony leading up to the question, the trial court did not err in making the alteration.”²⁵² Admittedly limited to these narrow facts, this opinion does stand as authority for a trial court to alter a juror’s proffered question prior to it being asked of the witness.

Perhaps the most activist of judges, where juror questioning has been involved on appeal, is found in *Hinton v. United States*.²⁵³ The defendant was charged with possession of PCP, which officers said they found in the sleeve area of a black jacket he was wearing.²⁵⁴ Both defendant and other witnesses denied that he was wearing a jacket—rather, stating he was wearing a sweatshirt.²⁵⁵ Thus, the issue of what he was wearing was quite material.²⁵⁶

After empanelment of the twelve-member jury, “Juror 8” submitted nine questions to be put to the witnesses.²⁵⁷ Although not extremely clear or precise, the questions were discernable.²⁵⁸ Most of them were asked with no objection, and witnesses usually understood them without trouble.²⁵⁹ Six of these questions focused on the primary issue of whether defendant was in fact wearing a black jacket—and targeted the police version.²⁶⁰

On the fourth day of trial, the prosecutor told the court that he had “‘increasing concerns’ about Juror 8’s ability ‘to communicate and

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ 979 A.2d 663 (D.C. 2009) (en banc).

²⁵⁴ *Hinton*, 979 A.2d at 668.

²⁵⁵ *Id.*

²⁵⁶ *See id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

effectively deliberate with other jurors.”²⁶¹ The court commented that Juror 8 “had been asking ‘really off the wall questions that would indicate that person has difficulty following the evidence in this case,’” and noted “‘pained’ looks on other jurors’ faces when [he] submitted a question.”²⁶² The court also “expressed doubt about his ‘level of intelligence.’”²⁶³ Defense counsel disagreed and stated, “Juror 8’s questions were relevant and ‘insightful,’ and objected to his removal from the jury.”²⁶⁴

The next day, the trial court reopened the discussion about Juror 8, indicating that it “did not ‘read [his questions] as favoring the defense,’ but rather as being ‘strange and bizarre’ and difficult to comprehend or answer.”²⁶⁵ Defense counsel (properly) pointed out that “‘because he doesn’t write well or he doesn’t seem to express his opinion on the paper doesn’t mean that he cannot express it verbally.’”²⁶⁶ The trial court concluded that Juror 8’s questions revealed “the extent to which he would have difficulty serving in deliberation” and “demonstrated that this is a hung jury waiting to happen because . . . he doesn’t think along the wavelength of normal functioning people in my view.”²⁶⁷ Accordingly, over objection, and *without* further²⁶⁸ inquiry of Juror 8, the trial court removed him and replaced him with one of the alternate jurors.²⁶⁹ The defendant appealed his conviction arguing “the trial court abused its discretion and violated his rights under [Federal Rule of] Criminal Procedure 24(c), because the juror was neither shown nor found to be ‘unable or disqualified to perform juror duties.’”²⁷⁰

The reader at this point has likely concluded some or all of the following: (1) Juror 8 may have been one of the most focused jurors on

²⁶¹ *Id.* at 669.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* The trial court at this point had not raised the issue of his removal, but defense counsel certainly knew “which way the wind was blowing.” *Id.*

²⁶⁵ *Hinton*, 979 A.2d at 669.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 668.

²⁶⁸ “Further” is likely not the correct word, as the opinion does not reflect that there was *any* inquiry of Juror 8 (or any other juror) regarding his questions. *See Hinton*, 979 A.2d at 668-70.

²⁶⁹ *Hinton*, 979 A.2d at 670.

²⁷⁰ *Id.*; *see* SUPER. CT. CRIM. R. 24(c)(1) (2009).

the panel; (2) the trial court was not correct in finding that his questions did not favor the defense—although, even if true, this should not be a reason to remove him; (3) there was no factual basis of any kind that supported the trial court’s action, merely its perceptions—and these appear to be objectively incorrect; and (4) the real reason for his removal, although never stated, was that he *was* at that point leaning toward the defense.²⁷¹

The court, en banc, reversed the defendant’s conviction, recognizing what the trial court should have:

The judge expressly based her decision on the juror’s written questions to the witnesses. . . . [However, Juror 8’s] questions had a reasonable basis in the evidence, and they were not objectionable. Indeed, they focused intelligently on the central issue in dispute, the alleged connection between [the defendant] and the jacket in which the arresting officers claimed to have found PCP. The questions simply do not support a finding that Juror 8 was unable to perform his duties as a juror.

Although we do not doubt that the judge acted in good faith, the removal of a juror on account of his questions to witnesses comes perilously close to removing a juror because of his views of the evidence—one of the principal evils against which Rule 24(c)’s restrictions are directed. Indeed, that was the essence of defense counsel’s objection to the removal of Juror 8 [whom counsel perceived as receptive to his defense]. This is therefore an area where a trial judge must proceed with great caution. Unless a juror’s questions *unmistakably* reveal his incapacity, bias or other basis for disqualification—for instance, because their total irrelevance to the trial or incoherence indicate that the juror is delusional or otherwise unable to follow the proceedings—it is difficult to imagine that they could justify his removal.

We conclude that the trial court exercised its discretion erroneously in this case by removing Juror 8 in violation of Criminal Rule 24(c).²⁷²

Conclusion

The apparent extent to which juror questioning is used is markedly inconsistent with the extent to which it is authorized. This inconsistency is unfortunate because, as this Article demonstrates, empirical studies have verified the benefits of juror questioning. As much of the authoriza-

²⁷¹ See *Hinton*, 979 A.2d at 670, 690-92.

²⁷² *Id.* at 684-85.

tion nationwide allows juror questioning on a discretionary and not mandatory basis, the perceptions and feelings of judges and trial attorneys can, and in the case of the Ninth Circuit survey discussed herein²⁷³ do, stand in the way of implementing this most worthwhile of trial innovations. Strong statistical evidence exists showing that when judges and attorneys use juror questioning their perceptions of this procedure change for the better. However, it is doubtful that the benefits of this procedure or the fact that experience with it changes perceptions for the better have been adequately communicated to the bench and trial bar.

It appears that two efforts would materially help in overcoming this reluctance. The first, likely more difficult to implement than the second, would require states and circuits to move from being "discretionary" to "mandatory" in regard to juror questioning. The second would consist of a significant effort to educate both the bench and the trial bar with the hope and expectation of turning those that are currently reluctant into enthusiastic collaborators with a more active and participatory body of American jurors. The result, already known through empirical testing, would be well worth the effort.

²⁷³ See *supra* discussion at Part III.

Appendix I

Federal and State Compendium Report: Permissibility of Juror Questioning of Witnesses

Jurisdiction	Civil (Mandatory/ Discretionary/ Not Allowed)	Authority	Criminal (Mandatory/ Discretionary/ Not Allowed)	Authority
Federal Summary	6 circuits discretionary 5 circuits have not ruled Supreme Court has not ruled	2 circuits base permissibility on case law only 4 circuits base permissibility on jury instructions and case law	10 circuits discretionary 1 circuit has not ruled Supreme Court has not ruled	9 circuits base permissibility on case law only 1 circuit bases permissibility on jury instructions and case law
State Summary	36 states discretionary 7 states mandatory 5 states do not allow	11 states base permissibility/prohibition on case law only 39 states base permissibility on a statute or other source	37 states discretionary 3 states mandatory 9 states do not allow 1 state unknown	17 states permissibility/prohibition based on case law only 33 states base permissibility on a statute or other source
Supreme Court	Has Not Ruled	<i>See Shackleford v. Champion</i> , 156 F.3d 1244 (10th Cir. 1998), <i>cert. denied</i> , 525 U.S. 1150 (1999).	Has Not Ruled	<i>See United States v. Witt</i> , 215 F.2d 580 (2d Cir.), <i>cert. denied</i> , 348 U.S. 887 (1954); <i>United States v. Callahan</i> , 588 F.2d 1078 (5th Cir.), <i>cert. denied</i> , 444 U.S. 826 (1979); <i>United States v. Land</i> , 877 F.2d 17 (8th Cir.), <i>cert. denied</i> , 493 U.S. 894 (1989).
First Circuit	Has Not Directly Ruled	<i>See United States v. Sutton</i> , 970 F.2d 1001, 1005 (1st Cir. 1992); <i>United States v. Nivica</i> , 887 F.2d 1110, 1123 (1st Cir. 1989) (holding juror questioning of witnesses in a criminal context is permissible within the discretion of the judge). Although not specifically limited to criminal trials, no direct authority could be found that the practice is permissible in civil trials in this circuit.	Discretionary	<i>United States v. Nivica</i> , 887 F.2d 1110, 1123 (1st Cir. 1989).

Second Circuit	Has Not Directly Ruled	<i>See United States v. Witt</i> , 215 F.2d 580, 584 (2d Cir. 1954) (holding juror questioning of witnesses in a criminal context is permissible within the discretion of the judge). Although not specifically limited to criminal trials, no direct authority could be found that the practice is permissible in civil trials in this circuit.	Discretionary	<i>Witt</i> , 215 F.2d at 584.
Third Circuit	Discretionary	Model Civil Jury Instructions for the District Courts of the Third Circuit, Instruction No. 1.8 (2011).	Discretionary	<i>United States v. Hernandez</i> , 176 F.3d 719 (3d Cir. 1999).
Fourth Circuit	Discretionary	<i>DeBenedetto v. Goodyear Tire & Rubber Co.</i> , 754 F.2d 512, 514 (4th Cir. 1985).	Discretionary	<i>United States v. Polowichak</i> , 783 F.2d 410, 413 (4th Cir. 1986).
Fifth Circuit	Has Not Directly Ruled	<i>See United States v. Callahan</i> , 588 F.2d 1078, 1086 (5th Cir. 1979) (holding juror questioning of witnesses in a criminal context is permissible within the discretion of the judge). As with other circuits, the Fifth Circuit did not specifically limit its holding to criminal trials, but no direct support could be found that the practice is permissible in civil trials in this circuit.	Discretionary	<i>Callahan</i> , 588 F.2d at 1086.
Sixth Circuit	Has Not Directly Ruled	<i>See United States v. Collins</i> , 226 F.3d 457, 464 (6th Cir. 2000) (holding juror questioning of witnesses in a criminal context is permissible within the discretion of the judge). As with other circuits, the Sixth Circuit did not specifically limit its holding to criminal trials, but no direct support could be found that the practice is permissible in civil trials in this circuit.	Discretionary	<i>Collins</i> , 226 F.3d at 464.
Seventh Circuit	Discretionary	<i>S.E.C. v. Koenig</i> , 557 F.3d 736, 743 (7th Cir. 2009); Federal Civil Jury Instructions of the Seventh Circuit, Instruction Appendix: Sample Preliminary Instructions (2010).	Discretionary	<i>United States v. Feinberg</i> , 89 F.3d 333, 337 (7th Cir. 1996).
Eighth Circuit	Discretionary	8th Cir. Civil Jury Instr. § 1.07 (2013).	Discretionary	<i>United States v. Land</i> , 877 F.2d 17 (8th Cir. 1989); FED. CRIM-JI8C 1.06B, Model Crim. Jury Instr. 8th Cir. 1.06B (2011).

Ninth Circuit	Discretionary	Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit, Instruction 1.15 (2007).	Discretionary	United States v. Huebner, 48 F.3d 376 (9th Cir. 1994).
Tenth Circuit	Discretionary	Willner v. Soares, 57 F. App'x 848, 851 (10th Cir. 2003).	Has Not Directly Ruled	See Willner, 57 F. App'x at 851 (noting the practice of juror questioning witnesses has never been prohibited in federal courts and thus found no error in allowing the practice in the case directly at hand). Although the court did not specifically limit its holding to civil trials, no direct authority could be found that the practice is permissible in criminal trials in the Tenth Circuit.
Eleventh Circuit	Has Not Directly Ruled	See United States v. Richardson, 233 F.3d 1285, 1290-91 (11th Cir. 2000) (holding juror questioning of witnesses in a criminal context is permissible within the discretion of the judge). As with other circuits, the Eleventh Circuit did not specifically limit its holding to criminal trials, but no direct authority could be found that the practice is permissible in civil trials in this circuit.	Discretionary	Richardson, 233 F.3d at 1290-91.
Alabama	Discretionary	Prather v. Nashville Bridge Co., 236 So. 2d 322, 324 (Ala. 1970).	Discretionary	Ex parte Malone, 12 So. 3d 60, 65 (Ala. 2008).
Alaska	Discretionary	Alaska Pattern Jury Instr. Civ. 1.12.	Discretionary	Landt v. State, 87 P.3d 73, 80 (Alaska Ct. App. 2004).
Arizona	Mandatory	ARIZ. R. CIV. P. 39(b)(10) (1995).	Mandatory	ARIZ. R. CRIM. P. 18.6(e) (2009).
Arkansas	Discretionary	Ratton v. Busby, 326 S.W.2d 889, 894 (Ark. 1959).	Not Allowed	ARK. R. CRIM. P. 33.8 (2007).
California	Discretionary	Cal. R. of Ct. 2.1033.	Discretionary	Cal. R. of Ct. 2.1033.
Colorado	Mandatory	COLO. R. CIV. P. 47(u).	Mandatory	COLO. R. CRIM. P. 24(g).
Connecticut	Discretionary	Conn. R. Super. Ct. Civ. § 16-7.	Discretionary	Conn. R. Super. Ct. Crim. § 42-9.
Delaware	Not Allowed	GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 85 (2007). According to the survey, zero percent of the Delaware respondents stated juror questioning of	Not Allowed	MIZE ET AL., <i>supra</i> .

		witnesses was allowed, with no specific reference to either the civil or criminal setting. <i>Id.</i> However, no case law, rules of procedure, statutory or other direct authority was offered or found to support this proposition.		
Florida	Mandatory	FLA. R. CIV. P. 1.452.	Discretionary	FLA. R. CRIM. P. 3.371.
Georgia	Discretionary	Steele v. Atlanta Maternal-Fetal Medicine, P.C., 610 S.E.2d 546 (Ga. Ct. App. 2005) (overruled on other grounds).	Discretionary	Story v. State, 278 S.E.2d 97 (Ga. Ct. App. 1981); Ga. Practice Handbook § 18:75; Ga. R. Unified Appeal Part II.
Hawaii	Discretionary	HAW. R. CIV. P. 47(c).	Discretionary	HAW. R. PENAL. P. 26(b).
Idaho	Discretionary	IDAHO R. CIV. P. 47(q).	Discretionary	IDAHO CRIM. R. 30.1.
Illinois	Discretionary	Ill. S. Ct. R. Civ. P. 243.	Discretionary	In <i>Chicago Hansom Cab Co. v. Havelick</i> , 131 Ill. 179 (1889), juror questioning of witnesses did not constitute reversible error. Although decided in the civil context, the court did not explicitly limit its holding to civil trials. <i>Id.</i> Based on <i>Havelick</i> , it is likely the state would allow jurors to submit questions to witnesses in the criminal context. However, unlike Illinois Rule of Civil Procedure 243, no Rule of Criminal Procedure was found. See also MIZE ET AL., <i>supra</i> . Zero percent of Illinois respondents stated juror questioning of witnesses was allowed, referencing criminal settings. <i>Id.</i> ; see Judge & Attorney Survey: Illinois, available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx . Again, no case law, rules of procedure, statutory or other direct authority was offered or found to support this.
Indiana	Discretionary	IND. R. EVID. 614(d) (1994); IND. JURY R. 20(a)(7) 22A; Ind. Prac., Civ. Trial Prac. § 30.24; 30 Ind. Law. Encyc. § 72.	Discretionary	IND. R. EVID. 614(d) (1994).
Iowa	Discretionary	Rudolph v. Iowa Methodist Center, 293 N.W.2d 550, 553 (Iowa 1980).	Discretionary	State v. Buchanan, 800 N.W.2d 743, 748 (Iowa Ct. App. 2011).

Kansas	Discretionary	Rood v. Kansas City Power & Light Co., 755 P.2d 502, 505 (Kan. 1988).	Discretionary	State v. Hays, 883 P.2d 1093, 1097 (Kan. 1994).
Kentucky	Discretionary	KY. R. EVID. 614(c).	Discretionary	KY. R. EVID. 614(c).
Louisiana	Not Allowed	MIZE ET AL., <i>supra</i> . Zero percent of Louisiana respondents stated juror questioning of witnesses was allowed, referencing both the civil and criminal settings, however no direct authority was found or offered. <i>Id.</i> ; see Judge & Attorney Survey: Louisiana, available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx . See State v. Johnson, 458 So. 2d 539, 544 (La. Ct. App. 1984) (the court in a criminal case specifically chose not to rule on the issue as objection to the procedure had not been properly preserved at trial).	Not Allowed	MIZE ET AL., <i>supra</i> .
Maine	Not Allowed	Traverse Juror Handbook, State of Maine Superior Court (2009).	Not Allowed	Traverse Juror Handbook, State of Maine Superior Court (2009).
Maryland	Discretionary	See Handy v. State, 30 A.3d 197, 218 (Md. Ct. Spec. App. 2011) (permitting juror questioning of witnesses at the discretion of the court in criminal trial and allowing the presumption that the holding is applicable to civil trials). Additionally, as the court based its decision in part on Maryland Rule of Procedure 4-326, it is likely that the practice would be allowed on a discretionary basis in civil trials, although no authority has been found to directly support this proposition. See <i>id.</i> ; see also MIZE ET AL., <i>supra</i> . Just over nine percent of Maryland respondents stated juror questioning of witnesses was allowed, referencing civil and criminal settings. <i>Id.</i> ; see Judge and Attorney Survey: Maryland, available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx .	Discretionary	<i>Handy</i> , 30 A.3d at 218.
Massachusetts	Discretionary	MASS. R. EVID. 614(d).	Discretionary	MASS. R. EVID. 614(d).

Michigan	Discretionary	MICH. R. CIV. P. 2.513(I).	Discretionary	<i>People v. Heard</i> , 200 N.W.2d 73, 75 (Mich. 1972).
Minnesota	Discretionary	<i>See State v. Costello</i> , 646 N.W.2d 204, 214 (Minn. 2002) (holding juror questioning of witnesses was not allowed in criminal trials and implying the practice remains discretionary in a civil setting); <i>see also</i> MIZE ET AL., <i>supra</i> . Almost three percent of Minnesota respondents stated juror questioning of witnesses was allowed in civil trials, although not allowed in criminal trials. <i>Id.</i> ; <i>see Judge & Attorney Survey: Minnesota</i> , available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx .	Not Allowed	MINN. R. CRIM. P. 26.03 (Subd. 16. Evidence); MINN. R. EVID. 614(d).
Mississippi	Not Allowed	<i>See Wharton v. State</i> , 734 So. 2d 985, 990 (Miss. 1998) (holding juror questioning of witnesses is impermissible in a criminal trial and allowing the presumption that the holding is applicable to civil trials); <i>see also</i> MIZE ET AL., <i>supra</i> . Zero percent of Mississippi respondents state juror questioning of witnesses was allowed, referencing both civil and criminal trials. <i>Id.</i> ; <i>see Judge & Attorney Survey: Mississippi</i> , available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx .	Not Allowed	<i>Wharton</i> , 734 So. 2d at 990 ("Today we hold that juror interrogation is no longer left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden by this Court.").
Missouri	Discretionary	MO. SUP. CT. R. CIV. P. 69.04.	Discretionary	<i>State v. Sickles</i> , 286 S.W. 432, 433 (Mo. Ct. App. 1926).
Montana	Discretionary	<i>See State v. Graves</i> , 907 P.2d 963, 966-67 (Mont. 1995) (permitting juror questioning of witnesses at the discretion of the court in a criminal trial and allowing the presumption that the holding is applicable to civil trials). Further, the court based its decision in part of Montana Rule of Evidence 611(a)(1), thus supporting the inference that the practice would be discretionary in a civil setting. <i>See also</i> MIZE ET	Discretionary	<i>Graves</i> , 907 P.2d at 965-67.

		AL., <i>supra</i> . Six percent of Montana respondents stated juror questioning of witnesses was allowed in both civil and criminal trials. <i>Id.</i> ; see Judge & Attorney Survey: Montana, available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx .		
Nebraska	Not Allowed	1 Neb. Prac., NJI2d Civ. 1.00 (2012-2013 ed.).	Not Allowed	State v. Zima, 468 N.W.2d 377, 380 (Neb. 1991).
Nevada	Mandatory	Nev. Short Trial R. 24.	Mandatory	Flores v. State, 965 P.2d 910, 913 (Nev. 1998); Nev. Short Trial R. 24.
New Hampshire	Discretionary	N.H. R. of Super. Ct. 64-B.	Discretionary	N.H. R. of Super. Ct. 64-B.
New Jersey	Discretionary	N.J. R. of Ct. 1:8-8.	Not Allowed	State v. Jumpp, 619 A.2d 602, 613 (N.J. App. 1993).
New Mexico	Discretionary	NMRA, Civ. UJI 13-112.	Discretionary	NMRA, Crim. UJI 14-101.
New York	Discretionary	Sitrin Bros., Inc. v. Deluxe Lines, Inc., 231 N.Y.S.2d 943, 946 (N.Y. Cty. Ct. 1962).	Discretionary	People v. Knapper, 230 A.D. 487, 492 (N.Y. App. Div. 1930).
North Carolina	Discretionary	See State v. Kendall, 57 S.E. 340, 341 (N.C. 1907) (permitting juror questioning of witnesses at the discretion of the court in a criminal trial and allowing the presumption that the holding is applicable to civil trials).	Discretionary	<i>Kendall</i> , 57 S.E. at 341.
North Dakota	Discretionary	N.D. R. Ct. 6.8.	Unknown	MIZE ET AL., <i>supra</i> . Three percent of North Dakota respondents stated juror questioning of witnesses was allowed, referencing only civil trials. <i>Id.</i> ; see Judge & Attorney Survey: North Dakota, available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx . No case law, rules of procedure, statutory or other direct authority was offered or found as to the permissibility of juror questioning in criminal trials in the state.
Ohio	Discretionary	OHIO CIV. R. 47(F).	Discretionary	OHIO CRIM. R. 24(J).

Oklahoma	Discretionary	White v. Little, 268 P. 221, 222 (Okla. 1928).	Discretionary	Krause v. State, 132 P.2d 179, 182 (Okla. Crim. App. 1942).
Oregon	Discretionary	OR. R. CIV. P. 58.	Discretionary	OR. REV. STAT. § 136.330 (2007).
Pennsylvania	Discretionary	Boggs v. Jewell Tea Co., 109 A. 666, 668 (Penn. 1920).	Discretionary	<i>See Boggs</i> , 109 A. at 668 (allowing juror questioning of witnesses in civil trials and leaving open the inference that the practice is additionally discretionary in criminal trials); <i>see also MIZE ET AL., supra</i> . Less than one percent of Pennsylvania respondents stated juror questioning of witnesses was allowed in both civil and criminal trials. <i>Id.</i> ; <i>see Judge & Attorney Survey: Pennsylvania, available at</i> http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx . No authority was offered or found to support the proposition in regard to criminal trials.
Rhode Island	Discretionary	According to a phone conversation with a librarian from the Rhode Island State Law Library, the practice of juror questioning of witnesses would be allowed in both civil and criminal trials under Rhode Island Rule of Evidence 611, which grants the court control over the mode and order of interrogating witnesses. However, this rule does not explicitly state that juror questioning of witnesses is allowed in either civil or criminal trials, and no additional direct authority was found to support this proposition. <i>See also MIZE ET AL., supra</i> . Nearly five percent of Rhode Island respondents stated juror questioning of witnesses was allowed in both civil and criminal trials. <i>Id.</i> ; <i>see Judge & Attorney Survey: Rhode Island, available at</i> http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx .	Discretionary	MIZE ET AL., <i>supra</i> .

South Carolina	Discretionary	Day v. Kilgore, 444 S.E.2d 515, 518 (S.C. 1994).	Discretionary	State v. Barrett, 297 S.E.2d 794, 796 (S.C. 1982).
South Dakota	Discretionary	MIZE ET AL., <i>supra</i> . Twelve percent of South Dakota respondents stated juror questioning of witnesses was allowed in both civil and criminal trials. <i>Id.</i> ; see Judge & Attorney Survey: South Dakota, available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx . However, no case law, rules of procedure, statutory or other direct authority was offered or found to support this proposition.	Discretionary	MIZE ET AL., <i>supra</i> .
Tennessee	Discretionary	TENN. R. CIV. P. 43A.03.	Discretionary	TENN. R. CRIM. P. 24.1(c).
Texas	Mandatory	S.B. 297, 2011 82d Leg. (Tex. 2011); TEX. PRACTICE GUIDE: CIV. TRIAL § 7:263.	Not Allowed	Morrison v. State, 845 S.W.2d 882,889 (Tex. Crim. App. 1992).
Utah	Discretionary	UTAH R. CIV. P. 47.	Discretionary	UTAH R. CRIM. P. 17(i).
Vermont	Discretionary	Buker v. King, No.523-11-05, 2009 WL 5454432 (Super. Ct. Vt. Aug. 5, 2009).	Discretionary	State v. Doleszny, 844 A.2d 773, 786-87 (Vt. 2004).
Virginia	Discretionary	See Williams v. Commonwealth, 484 S.E.2d 153, 155 (Va. App. 1997) (permitting juror questioning of witnesses at the discretion of the court in a criminal trial and allowing the presumption that the holding is applicable to civil trials); Snead v. Va. Elec. & Power Co., 17 Va. Cir. 534 (Va. Cir. Ct. 1978) (noting "unrestricted questioning by the jury was unwise" but not specifying whether the practice was allowed or prohibited). Based on <i>Snead</i> , it is likely the practice would be found discretionary in civil trials.	Discretionary	<i>Williams</i> , 484 S.E.2d at 155; Va. Practice Series § 2:20.
Washington	Mandatory	WPI 1.01; Wash. Super. Ct. Civ. R. 43(k); Wash. R. Civ. Ltd Juris. 43.	Discretionary	<i>State v. Munoz</i> , 837 P.2d 636, 639 (Wash. App. 1992); WPIC 4.166 5A Wash. Prac., Evid. L. & Prac. § 611.20.
West Virginia	Discretionary	According to a phone conversation with a librarian from the West Virginia State Law Library, the practice of juror questioning of witnesses	Discretionary	MIZE ET AL., <i>supra</i> .

		would likely be allowed in both civil and criminal trials under West Virginia Rule of Evidence 611, which grants the court control over the mode and order of interrogating witnesses. However, this rule does not explicitly state juror questioning of witnesses is allowed in either civil or criminal trials, and no authority was found to support this proposition. <i>See also</i> MIZE ET AL., <i>supra</i> . Two percent of West Virginia respondents stated juror questioning of witnesses was allowed in only civil settings. <i>Id.</i> ; <i>see</i> Judge & Attorney Survey: West Virginia, available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx .		
Wisconsin	Discretionary	<i>Sommers v. Friedman</i> , 493 N.W.2d 393, 400 (Wis. Ct. App. 2008).	Discretionary	<i>Toliver v. McCaughtry</i> , 910 F.Supp. 1366, 1372 (E.D. Wis. 1995).
Wyoming	Mandatory	WYO. R. CIV. P. 39.4.	Discretionary	<i>Cathcart v. State Farm Mutual Auto Ins. Co.</i> , 123 P.3d 579, 594-95 (Wyo. 2005) ("Wyoming is among the majority of states that allow juror questioning" without specific limitation to civil setting.); <i>see also</i> MIZE ET AL., <i>supra</i> . Thirty-four percent of Wyoming respondents stated that juror questioning of witnesses was allowed, referencing both civil and criminal settings. <i>Id.</i> ; <i>see</i> Judge & Attorney Survey: Wyoming, available at http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx . No case law, rules of procedure, statutory or other direct authority was offered or found, aside from <i>Cathcart</i> , to support this proposition in criminal trials.

Appendix II

Florida Ninth Judicial Circuit Judges Survey (52 Total Responses Received)

Overview

Of the 52 judges who responded to the survey, 28 (54%) have presided over criminal jury trials since the Rules of Criminal Procedure were changed to allow juror questioning of witnesses [Question 1].

Of those 28 judges who have presided over criminal jury trials since the Rules of Criminal Procedure were changed, only 6 (21%) have allowed jurors to ask questions, 11 (39%) have not allowed juror questioning of witnesses, and 11 did not respond [Question 2a].

Fourteen of the 17 judges (82%) stated that the prosecution has never asked to allow juror questioning of witnesses; the remaining 3 (18%) said that prosecutors asked to allow the process anywhere from 1% to 60% of the time [Question 2e]. Thirteen of 17 (76%) stated that the defense attorneys never asked to allow juror questioning of witnesses, with the remaining 4 (24%) stating that defense asked to allow the process from 1 to 50% of the time [Question 2f].

Of the 52 judges who responded to the survey, only 7 (13.5%) have presided over civil jury trials since jurors have been allowed to question witnesses; 33 (63.5%) have not; 12 (23%) did not respond [Question 3].

Of those 7 who have presided over civil jury trials since juror questioning of witnesses has been allowed, only 6 responded to the follow up questions 4a-k. Of those 6, 100% have allowed jurors to ask questions in trial [Question 4a]. Those 6 allowed questioning in 75 to 100% of their trials [Question 4b].

According to the judges who responded, both plaintiffs and defendants have asked to allow juror questioning of witnesses, but the frequency of such requests has ranged from 20 to 100% of the time. Only 1 judge stated that neither plaintiffs nor defendants have asked to allow juror questioning of witnesses [Questions 4e & 4f].

Of the 52 judges who responded, 6 said that jurors' questions focused on material issues not sufficiently covered by attorneys' questions. Those questions focused on these issues anywhere from 10 to 80% of the time [Question 5a].

Of the 52 judges who responded, 6 additionally said that attorneys discernibly altered their tactics or arguments based on jurors' questions, ranging anywhere from asking follow up questions or asking subsequent witnesses questions seemingly in response to jurors' questions or referencing the answer to jurors' question in closing statements [Questions 5c & 5d].

Appendix III
Florida Ninth Judicial Circuit
State Attorneys Survey
(41 Total Responses Received)

Overview

Of the 41 state attorneys who responded to the survey, 39 (95%) said that they have never asked the court to allow jurors to ask questions of witnesses as part of the trial process; only 2 (5%) asked the court to allow them, and only in a very small percentage or approximately 5% of cases [Question 1].

Of the 41 state attorneys who responded to the survey, 27 (66%) said that the defense has never asked the court to allow jurors to ask questions of witnesses as part of the trial process; only 1 (2%) of the state attorneys had had the defense request that questions be allowed, and then only 5% of the time; 2 (5%) of the state attorneys have had the defense request that questions be allowed more often in recent years, up to 50% of the time [Question 8].

An equal number of state attorneys, 19 out of the 41 (46.5%), participated in trials that allowed jurors to question witnesses, as those that had not (19 out 41-46.5%) [Question 12].

In those trials where jurors were allowed to question witnesses, anywhere from 1 to every witness was questioned [Question 13]; and included eye witnesses, experts, defendant, victim, and even the victim's family [Question 14].

Six out of 41 state attorneys saw attorneys alter their tactics or arguments in response to juror questions [Question 16]. Of those who had altered their tactics, the success of altering those tactics was mixed from "hard to say" to "very successful" [Question 18].

Fourteen out of 41 (34%) state attorneys said that they had not discerned witnesses being either more truthful or testifying with greater candor, in responding to jurors' questions; with the remaining 27 not answering the question [Question 23].

Appendix IV
Florida Ninth Judicial Circuit
Public Defenders Survey
(11 Total Responses Received)

Overview

Of the 11 public defenders who responded to the survey, all 11 (100%) said that they have never asked the court to allow jurors to ask questions of witnesses as part of the trial process [Question 1].

Of the 11 public defenders who responded to the survey, 6 (55%) said that the prosecution has never asked the court to allow jurors to ask questions of witnesses as part of the trial process; only 1 (9%) of the public defenders had had the prosecution request that questions be allowed, and then only 1% of the time; 4 did not respond to this question [Question 8].

Six out of the 11 (55%) of the public defenders who responded had participated in trials that allowed jurors to question witnesses, as compared to 5 of 11 (45%) who had not [Question 12].

In those trials where jurors were allowed to question witnesses, anywhere from 0 to 80% of witnesses were questioned [Question 13]; and included eye witnesses, crime scene investigators, detectives, victims, victim's family [Question 14].

Only 2 out of 11 public defenders had seen attorneys alter their tactics or arguments in response to juror questions [Question 16]. Of those who had altered their tactics, the success of altering those tactics was mixed from "not particularly" to "extremely" [Question 18].

Only 3 out of 11 (27%) public defenders said that they had not discerned witnesses being either more truthful or testifying with greater candor, in responding to jurors' questions; with the remaining 8 not answering the question [Question 23].

