

# Should Jurors Ask Questions?

By Michael D. Wade and Sarah L. Walburn

This article will address the tactical considerations for the litigator when confronted with the option of permitting jurors to ask questions during the course of a trial. It is clear that the majority of state jurisdictions grant discretion to the trial court on the issue of whether or not jurors can ask questions of witnesses at trial. The cases are gathered at *Propriety of Jurors Asking Questions During Open Court During Course of Trial*.<sup>1</sup> Some states, such as Michigan, have court rules or standard instructions for dealing with the issue, and some judges are more eager to permit jurors to ask questions than others. In jurisdiction for Michigan, the criminal court rule MCR 6.414(E) grants discretion to the trial court as follows:

The Court may, in its discretion, permit the jurors to ask questions of witnesses. If the Court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.

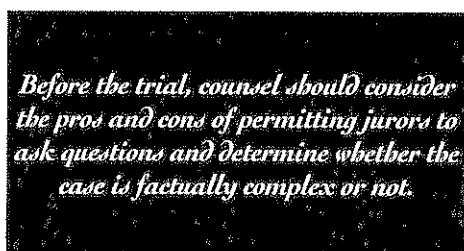
The Michigan Standard Civil Jury Instructions provide a more detailed procedure for permitting jurors to ask questions, as follows:

During the testimony of a witness, you might think of an important question that you believe will help you better understand the facts in this case. Please wait to ask the question until after the witness has finished testifying. If, after the witness has completed testimony, and only then, your question is still unanswered, you may write the question down, raise your hand, and pass the question to the bailiff. The bailiff will give it to me. Do not under any circumstances ask the witness the question yourself. There are rules that a

trial must follow. If your question is allowed under those rules, I will ask the witness your question (Mich. Civ. JI2.11).

It is clear that the civil instruction regarding questioning by jurors is to be given as a preliminary instruction after the jury is sworn but before any testimony is taken.

Customarily, the process is as follows: Once a jury is seated and sworn, the preliminary jury instructions are given, including one on whether or not the jury may ask questions. If the jury may ask questions, then notepads and pens are



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provided by the Court. The jurors must write out their questions, and after the witnesses are questioned by the Court and counsel, the Court will customarily ask the jurors if they have any questions. The juror would then raise his or her hand and provide the written question to the bailiff, who gives the written question to the Court. At a sidebar, the Court and counsel confer regarding the propriety of the question. The Court may then exercise its discretion, and the Court itself will address the question to the witness who then answers. At that point, all counsel may ask follow-up questions.<sup>2</sup>

Cases from various jurisdictions provide the parameters for this process. The process should never involve direct questioning by the juror.<sup>3</sup> Permitting jurors to question witnesses should never be routine but should depend on the complexity of the case.<sup>4</sup> The questions should relate to admissible facts of the case.<sup>5</sup> The court should instruct

the jury not to draw adverse inferences from the Court's refusal to allow certain questions.<sup>6</sup>

In some courts, this process is virtually automatic, as some judges assume that the jurors should be permitted to ask questions. Other judges are disinclined to permit the process. Both types of judges can be persuaded otherwise.

The trial attorney often merely goes along with the Court's decision regarding questioning by jurors, but the process is not without danger and prejudice may occur to one side or the other. Thus, before the trial, counsel should consider the pros and cons of permitting the jurors to ask questions. Counsel should determine and consider whether the case is factually complex. If counsel sees that a case is not factually complex, then he or she may safely permit or positively encourage juror questioning. On the other hand, if the case is complex, factually subtle, and requiring many inferences, then counsel may want to encourage the Court to decline to permit jury questioning.

One should also consider whether the witnesses are articulate and under counsel's control and, therefore, well prepared. It appears that one can safely permit juror questioning under the latter set of circumstances. But if a witness is not articulate or not under control and, therefore, not personally prepared prior to trial, the litigator might be well advised to discourage questions by the jury.

Part of the pretrial consideration is the impact on the juror whose question is not answered. That juror, and the friends that juror has made on the panel, may blame the Court, but the witness could also be blamed, or perhaps counsel whose witness it is could be blamed.

Counsel should also consider whether the panel is generally sophisticated or well educated. Well-educated jurors may be more likely to ask serious and pertinent questions.

The sole object at trial is to win the case, and anything that occurs during the trial that could potentially lose the case should be avoided by trial counsel. Thus, these considerations, as well as knowledge concerning the tendencies of the trial court, should be considered well before trial and become part of the trial plan.

Conducting the sidebar conference is important in the process, as the jurors are attentive to the huddle at sidebar. While voices are kept soft, body language may betray counsel's objections. It is recommended that body language appear neutral, whether counsel is objecting or advocating the question asked by the juror.

One additional issue remains and that is when to object to the question asked by jurors. Most jurisdictions require an immediate objection, though some jurisdictions would permit objections at the first opportunity outside the hearing of the jury. The objection usually must be made at the time and counsel would courteously state to the Court prior to the Court, stating "Your Honor, I respectfully object to the question asked." In that way, the appellate record is preserved. ■

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### Endnotes

1. 31 ALR 3rd 872.
2. See U.S. v. Collins, 226 F.3d 457 (6th Cir. 2000).
3. Pacific Improvement Co. v. Weidenfeld, 227 F.2d 224 (2nd Cir. 1921).
4. U.S. v. Collins, 226 F.3d 457 (6th Cir. 2000) (providing an excellent discussion of the pros and cons).
5. State v. Dolezyny, 176 VT 203, 844 A.2d 773 (2004) (providing an excellent discussion and background on juror questioning of witnesses).
6. State v. Fisher, 99 Ohio St. 3d 127, 789 NE2d 222 (2003).

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## A Practical Guide to the Successful Defense of a 30(b)(6) Deposition

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even if no employee in the corporation with personal knowledge is available to testify. This can pose significant challenges when the 30(b)(6) deposition notice includes topics related to the distant past; when key employees have retired, been terminated, or now work for a competitor; when relevant business lines have been sold or abandoned; or if an employee with personal knowledge invokes the Fifth Amendment privilege against self-incrimination at the deposition. Under these circumstances, the case law is clear that the corporation is obligated to prepare someone on the noticed topics using available information, including documents and interviews, even if this requires the corporation to hire someone to testify on its behalf with respect to the noticed topics.<sup>3</sup>

How should the corporation select one or more witnesses to testify on its behalf? Counsel should interview individuals within the corporation with knowledge about the issues in the

deposition notice and/or management within the corporation with responsibility for the litigation. While doing so, counsel should bear in mind the following strategic considerations.

### *Designate Only One 30(b)(6) Witness*

The first thing to consider is whether to designate one or more witnesses for the 30(b)(6) deposition. Some noticing parties will strategically set out a great number of topics to force counsel to designate more than one 30(b)(6) witness. Counsel should be wary of this strategy because the noticing party's goal is to get more than one seven-hour day for the 30(b)(6) deposition. For each witness you designate, the noticing party will have one seven-hour day for questioning. Selecting only one witness, such as a mid- to senior-level official who, with preparation, can testify about all of the noticed topics, will more likely minimize the extent of off-topic questioning and make the preparation process easier for counsel and the corporation. Of course, if the corporation designates only one witness, counsel must ensure that the witness has plenty of time for an intense period of preparation.

### *Look for an Experienced Witness*

Counsel should also consider whether a potential deponent will make a good witness. For purposes of a 30(b)(6) deposition, titles and résumés do not matter. However, it is important to select a witness with experience testifying in depositions or at trial because a witness who is easily intimidated or flustered by questioning is likely to veer off course. An easily shaken 30(b)(6) witness is dangerous because the witness' statements are attributed to the corporation. A witness who is comfortable with aggressive questioning is more likely to be able to represent the corporation well.

### *Use a Current or Former Employee or an Outsider*

Counsel will have to determine whether to select a current employee, a former employee, or a stranger to the corporation as the 30(b)(6) witness. Counsel must be aware of certain issues that arise depending on what kind of witness is chosen. For example, the deposing party may argue that by designating former employees or outsiders, the corporation waives the attorney-client privilege and loses the protection of