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Keeping Your Case Above Water

Juror Questions in the Age of the Activist Juror

At the dawn of the jury system, jurors not only decided questions of fact, but personally investigated the facts and then decided what the law should be. As time went by, juries were stripped of their right and power to investigate the facts, and eventually were told that they had to apply the law as given to them by the court. They became passive observers of the courtroom drama, instead of active participants in the process.

As an outgrowth of the challenge to the authority of institutions that began in the 1960's, jurors have again been given broad powers in many jurisdictions to question witnesses during trial. While this transition has been uncomfortable to some lawyers and judges, jurors appear to be happy to have this power and it appears to be here to stay.

I recently tried a case in a small local county where the population has a reputation for independent thinking. The judge told the panel about their right to submit written questions after direct and cross. Once the ice was broken, nearly every witness was faced with a barrage of questions. I had plenty of opportunity to worry about what that meant, and to understand its importance.

What does the right of jurors to ask questions mean to you, as trial counsel, and how do you best deal with it?

1. Embrace their right to ask questions. The jurors are going to be allowed to ask questions. They like that. It makes them feel important (they are!). Their participation in the trial by asking questions keeps their interest level high. Therefore, be the champion of that right. Tell them in voir dire that they will be able to ask questions. Tell them you think that is a great thing. Encourage them to do it, both with your witnesses and with your opponent's witnesses. Be on their side about this.
2. Make sure the jury understands your role in this process. Here's what the jury sees and hears about their right to ask questions: The judge tells them they can ask questions. You tell them they can ask questions. When the time comes, they write down their question and hand it to the bailiff. The bailiff takes the question to the judge. The judge calls the lawyers to the bench, and they have a side-bar conference off the record and out of the hearing of the jury. Good so far, but what about those times when the judge looks at the jury and tells them that she or he can't or won't ask that question, and doesn't explain why?



Jeffrey D. Boyd, Esq.

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How do you think that makes the jury feel? NOT happy. We know the purpose of those side-bar meetings is for the judge to ask the lawyers if they have any objection to the questions, not to find out if the lawyers want the question to be asked. Jurors may see this as a rejection of their right, or as an insult to the questioner. As a proponent of the jury's right to ask questions, you have to be sure that the jury understands that it is the judge's call about whether to ask the question or not. You have to be sure that they understand that it is NOT your call, that you do NOT have the right to disallow the question. You have to do that in voir dire, when you are explaining and embracing their right to ask questions.

Nevertheless, you do NOT want to throw the judge under the bus in that process. You have to explain in voir dire that just as the judge makes rulings on the lawyer's objections for sound legal reasons, she or he will be making the same kind of rulings on the juror's questions. You can explain that the judge will talk about such rulings in the preliminary jury instructions and in the instructions they will hear at the end of the case. And when the judge in those side-bars asks you whether you have any objections, it can't hurt to say "no objections, your honor" in a voice that's a little louder than you might otherwise use in a side-bar conference. You want to be seen as the one supporting the right to ask.

3. Learn from the questions. The question is being asked for one of two reasons: you didn't ask it and you should have, or, the jury didn't hear/understand the question when you asked it. There is no better way to determine what jurors want to know or need to know or what they think is important than by paying close attention to these questions. Further, don't forget that you have the right to ask follow-up questions! If you have missed an area, or if the jury missed that you addressed an area, be sure to go over it again in follow-up questions.

Don't, however, read too much into the questions. Just as with questions asked after the jury retires to deliberate, a question may be just that, the question of one juror. While we all live for a great question (in my trial, one question asked of the defendant's risk manager was "didn't you think it was your job to take care of this problem BEFORE someone got hurt"!!!), no single question means you are going to win or lose the case.

4. Understand that questions shape the jury's thinking. In theory, if not in practice, jurors don't talk to one another about the trial until deliberations begin. In theory, that means that one juror does not know what the others are thinking about the case or which way they are leaning until the end. Juror questions, however, can be a window into the thinking of the questioner.

If there is only one question asked, and if you can see who wrote it out and handed it to the bailiff, you know which juror asked that question. Sometimes, if there is more than one question asked, you can tell by body language who probably asked the question.

This is important for at least two reasons. First, it may help you to identify leaders, who are more likely to ask questions and more likely to ask aggressive questions. Second, to the extent that questions show which way the questioner is leaning, it will give other jurors a frame of reference and may influence their thinking.

Remember, many jurors don't have strong feelings about how a case should turn out, and their vote is shaped by the leadership of other jurors. Knowing how another juror thinks during the trial may shape their feelings about the

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Contact Jeff Boyd:

Tel. (206) 971-7601
boyd@nelsonboyd.com
<http://www.boydtrialconsulting.com>

411 University Street
Suite 1200
Seattle, WA 98101

case, for better or for worse, as the trial moves along.

Juror questions during trial are here to stay. Their use is growing. You can fear this "loss of control" or you can make it work to your advantage.

Jeffrey D. Boyd, Esq.



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Boyd Trial Consulting, PLLC
411 University Street
Suite 1200
Seattle, WA 98101
US

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