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COMMENT

JUROR QUESTIONS A SURVEY OF THEORY AND USE

Judging from current literature one might think that juror questions are a recent phenomenon.¹ In fact, juror interrogation was known in the English common law courts since at least the eighteenth century.² Records of juror interrogation in American courts extend to the nineteenth century. The earliest form of juror question was the juror outburst, that is, a juror asking a question without invitation during

1. See, e.g., Beyler, *Improving the Jury Selection Process*, 73 ILL. B.J. 150, 155 (1984); Frankel, *Judge Frankel on Jurors Questioning Witnesses*, 60 WIS. B. BULL., Dec., 1987, at 23; Heuer & Penrod, *Trial Lawyers in the Box?*, 13 DOCKET 4 (1989) [hereinafter Heuer & Penrod, *Trial Lawyers*]; Heuer & Penrod, *Increasing Jurors' Participations in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231 (1988) [hereinafter Heuer & Penrod, *Jurors' Participations*]; Sand & Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985); Urbom, *Toward Better Treatment of Jurors by Judges*, 61 NEB. L. REV. 409 (1982); Comment, *The Questioning of Witnesses by Jurors*, 27 AM. U.L. REV. 127 (1977); Note, *Questions to Witnesses and Notetaking by the Jury as Aids in Understanding Complex Litigation*, 18 NEW ENG. L. REV. 687 (1983); Sherman, *Wider Role for Jurors is Studied*, Nat'l L.J., July 10, 1989, at 3, col. 1; *Sixty Minutes: Trial By Jury* (CBS television broadcast, April 23, 1989) (transcript available: 21 *Sixty Minutes Transcript* no. 31) [hereinafter *Sixty Minutes Transcript*].

This Comment refers to "juror questions" as the questions jurors ask witnesses or counsel during a trial. "Juror interrogation" refers to the juror's asking of the question. These terms are used instead of "jury questions" (used by some courts) to distinguish from references to questions of fact for the jury's decision, as that term is most often used.

2. See 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1978) (reprint of 1783 ed.) ("the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth"); M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 164 (C. Gray ed. 1971) (1st ed. 1713) ("That by this Course of personal and open Examination, there is Opportunity for all Persons concerned, viz. The Judge, or any of the Jury . . . to propound occasional questions, which beats and bolts out the Truth . . .").

This Comment does not develop a detailed history of jury trials to prove this point but notes the matter-of-fact statements of these commentators. One brief historical survey may be found in Comment, *supra* note 1, at 134-39.

examination of a witness. The first recorded incident of a juror outburst found by this author was in an 1862 New York case.³ The North Carolina Supreme Court in 1907 indicated that allowing juror questions at the discretion of the trial court "has always been followed without objection . . . in the conduct of trials in our superior courts."⁴ The earliest record of juror outbursts in federal court is a 1921 Second Circuit case.⁵ Juror questions were approved explicitly in 1895 in a Missouri case⁶ and in 1917 jurors were invited to ask questions in an Arizona case.⁷

The controversy over juror interrogation today likely stems from the fact that juror questions are now becoming a standard part of trial procedure. The first formal system for jurors to ask questions found by this author was a 1961 Missouri case in which a juror raised his hand, was recognized by the court, and asked a question, whereupon the court conferred with counsel for objections and then instructed the witness to answer.⁸ In 1976, the Arizona appellate court recommended an instruction to the jury on the procedure for asking questions.⁹ In 1979, a court in the Fifth Circuit delivered the first pre-trial instruction informing the jury of its right to ask questions and the procedure to be followed.¹⁰

To date, juror questions have been allowed in some form in five United States Circuits¹¹ and twenty-five states and the District of

3. *Kelley v. Commonwealth Ins. Co.*, 23 N.Y. Super. Ct. 82, 99 (1862) (court only addressed issue of improper juror question). An 1887 case, *Chicago, Milwaukee & St. Paul R.R. v. Krueger*, 23 Ill. App. 639 (1887), considered a juror question from the perspective of whether the juror was biased.

4. *State v. Kendall*, 143 N.C. 659, 662, 57 S.E. 340, 341 (1907).

5. *Pacific Improvement Co. v. Weidenfeld*, 277 F. 224 (2d Cir. 1921).

6. *Schaeffer v. St. Louis & S. Ry.*, 129 Mo. 64, 30 S.W. 331 (1895).

7. *Superior & Pittsburg Copper Co. v. Tomich*, 19 Ariz. 182, 188-89, 165 P. 1101, 1104 (1917), *aff'd*, 250 U.S. 400 (1919), *rev'd on other grounds*, 22 Ariz. 543, 199 P. 132 (1921) (at counsel's invitation). The trial court had invited jury questions in a California case in 1922. *Maris v. H. Crummey, Inc.*, 55 Cal. App. 573, 204 P. 259 (1922).

8. *Sparks v. Daniels*, 343 S.W.2d 661 (Mo. Ct. App. 1961).

9. *State v. Taylor*, 25 Ariz. App. 497, 499, 544 P.2d 714, 716 (1976).

10. *United States v. Callahan*, 588 F.2d 1078 (5th Cir.), *reh'g denied*, 591 F.2d 1343 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979). This case also is the earliest record of formal juror interrogation in the federal courts. See also Annotation, *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 A.L.R.3d 872, 880-89 (1970).

11. *Second Circuit*: *United States v. Witt*, 215 F.2d 580 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954). *Fourth Circuit*: *United States v. Polowichak*, 783 F.2d 410 (4th Cir. 1986); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512 (4th Cir. 1985). *Fifth Circuit*: *United States v. Callahan*, 588 F.2d 1078

Columbia.¹² No court has ruled juror interrogation unconstitutional¹³

(5th Cir.), *reh'g denied*, 591 F.2d 1343 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979). *Eighth Circuit*: United States v. Gray, No. 89-2053 (8th Cir. Mar. 5, 1990) (1990 WL 19093); United States v. Johnson, 892 F.2d 707 (8th Cir. 1989); United States v. Land, 877 F.2d 17 (8th Cir.), *cert. denied*, 110 S. Ct. 243 (1989). *Ninth Circuit*: United States v. Gonzales, 424 F.2d 1055 (9th Cir. 1970).

The First Circuit has not yet ruled directly on the issue but appears to follow the decisions of the other circuits. In United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989) (opinion by Seyla, J.), appellant challenged the trial court's refusal to allow the jury to interrogate him. The appellate court upheld the trial court, noting the pitfalls of juror interrogation and that "[a]t most, use of such a mechanism rests in the trial court's discretion." *Id.* at 1123 (citing *DeBenedetto*, 754 F.2d at 515-17).

12. *Alabama*: Prather v. Nashville Bridge Co., 286 Ala. 3, 236 So. 2d 322 (1970). *Arizona*: Superior & Pittsburgh Copper Co. v. Tomich, 19 Ariz. 182, 165 P. 1101 (1917), *aff'd*, 250 U.S. 400 (1919), *rev'd on other grounds*, 22 Ariz. 543, 199 P. 132 (1921); State v. LeMaster, 137 Ariz. 159, 669 P.2d 592 (Ct. App. 1983); State v. Taylor, 25 Ariz. App. 497, 544 P.2d 714 (1976). *Arkansas*: Nelson v. State, 257 Ark. 1, 513 S.W.2d 496 (1974); Ratton v. Busby, 230 Ark. 667, 326 S.W.2d 889 (1959). *California*: People v. McAlister, 167 Cal. App. 3d 633, 213 Cal. Rptr. 271 (1985); O'Nellion v. Haynes, 122 Cal. App. 329, 9 P.2d 853 (1932); Maggart v. Bell, 116 Cal. App. 306, 2 P.2d 516 (1931); Maris v. H. Crummeys, Inc., 55 Cal. App. 573, 204 P. 259 (1922). *Florida*: Strawn v. State *ex rel.* Anderberg, 332 So. 2d 601 (Fla. 1976); Scheel v. State, 350 So. 2d 1120 (Fla. Dist. Ct. App. 1977). *Georgia*: Matchett v. State, 257 Ga. 785, 364 S.E.2d 565 (1988); State v. Williamson, 247 Ga. 685, 279 S.E.2d 203 (1981), *rev'g* 156 Ga. App. 856, 276 S.E.2d 260 (1980); Pierce v. State, 158 Ga. App. 343, 280 S.E.2d 381 (1981); Story v. State, 157 Ga. App. 490, 278 S.E.2d 97 (1981). *Illinois*: Chicago Hansom Cab Co. v. Havelick, 131 Ill. 179, 22 N.E. 797 (1889); Chicago, Milwaukee & St. Paul Ry. v. Harper, 128 Ill. 384, 21 N.E. 561 (1889); Coffey v. Sutton, 175 Ill. App. 331 (1912); North Chicago St. R.R. v. Burgess, 94 Ill. App. 337 (1901); Chicago, Milwaukee & St. Paul R.R. v. Krueger, 23 Ill. App. 639 (1887). *Indiana*: Cheeks v. State, 266 Ind. 190, 361 N.E.2d 906 (1977); Cherry v. State, 258 Ind. 298, 280 N.E.2d 818 (1972); Carter v. State, 250 Ind. 13, 234 N.E.2d 650 (1968); Dolezal v. Goode, 433 N.E.2d 828 (Ind. Ct. App. 1982). *Iowa*: Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550 (Iowa 1980). *Kentucky*: Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987), *cert. denied*, 109 S. Ct. 3174, *reh'g denied*, 110 S. Ct. 11 (1989); Big Sandy & Cumberland Ry. v. Thacker, 270 Ky. 404, 109 S.W.2d 820 (1937); Louisville Bridge & Terminal Co. v. Brown, 211 Ky. 176, 277 S.W. 320 (1925); Stamp v. Commonwealth, 200 Ky. 133, 253 S.W. 242 (1923); Miller v. Commonwealth, 188 Ky. 435, 222 S.W. 96 (1920). *Maryland*: although no cases were found discussing jury question in Maryland, Maryland's handbook for judges contains a recommended procedure for jury questions. See Yeager v. Greene, 502 A.2d 980, 1001 n.27 (D.C. 1985). *Michigan*: People v. Heard, 388 Mich. 182, 200 N.W.2d 73 (1972); People v. Wesley, 148 Mich. App. 758, 384 N.W.2d 783 (1985), *aff'd*, 428 Mich. 708, 411 N.W.2d 159, *cert. denied*, 484 U.S. 967 (1987); People

and the United States Supreme Court consistently has denied certiorari to juror question cases.¹⁴

v. Stout, 116 Mich. App. 726, 323 N.W.2d 532 (1982); People v. Charles, 58 Mich. App. 371, 227 N.W.2d 348 (1975); People v. Justice, 50 Mich. App. 55, 212 N.W.2d 762 (1973). *Minnesota*: State v. Crawford, 96 Minn. 95, 104 N.W. 822 (1905). *Mississippi*: Myers v. State, 522 So. 2d 760 (Miss. 1988); Lucas v. State, 381 So. 2d 140 (Miss. 1980). *Missouri*: Schaeffer v. St. Louis & S. Ry., 128 Mo. 64, 30 S.W. 331 (1895); Sparks v. Daniels, 343 S.W.2d 661 (Mo. Ct. App. 1961); State v. Sickles, 220 Mo. App. 290, 286 S.W. 432 (1926); Ray v. Collins, 274 S.W. 1098 (Mo. Ct. App. 1925). *Nebraska*: See United States v. Land, 877 F.2d 17 (8th Cir.), *cert. denied*, 110 S. Ct. 243 (1989). *New Mexico*: State v. Rodriguez, 107 N.M. 611, 762 P.2d 898 (Ct. App.), *cert. denied*, 107 N.M. 546, 761 P.2d 424 (1988). *New York*: People v. Wilds, 141 A.D.2d 395, 529 N.Y.S.2d 325 (1988); People v. Knapper, 230 A.D. 487, 245 N.Y.S. 245 (1930); Sitrin Bros., Inc. v. Deluxe Lines, Inc., 35 Misc. 2d 1041, 231 N.Y.S.2d 943, (Cty. Ct. 1962); Kelley v. Commonwealth Ins. Co., 23 N.Y. Super. Ct. 82 (1862). *North Carolina*: State v. Howard, 320 N.C. 718, 360 S.E.2d 790 (1987); State v. Kendall, 143 N.C. 659, 57 S.E. 340 (1907). *Ohio*: State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (1955), *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910, *reh'g denied*, 352 U.S. 955 (1956). *Oklahoma*: White v. Little, 131 Okla. 132, 268 P. 221 (1928); Smith v. State, 81 Okla. Crim. 412, 165 P.2d 381 (1946); Krause v. State, 75 Okla. Crim. 381, 132 P.2d 179 (1942); Singleton v. State, 48 Okla. Crim. 276, 291 P. 145 (1930). *Pennsylvania*: Wallace v. Keystone Auto. Co., 239 Pa. 110, 86 A. 699 (1913). *South Carolina*: State v. Barrett, 278 S.C. 414, 297 S.E.2d 794 (1982), *cert. denied*, 460 U.S. 1045 (1988); State v. Bradford, 87 S.C. 546, 70 S.E. 308 (1911). *Tennessee*: State v. Jeffries, 644 S.W.2d 432 (Tenn. Crim. App. 1982); Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978); Branch v. State, 4 Tenn. Crim. App. 164, 469 S.W.2d 533 (1969). *Texas*: Rojas v. Vuocolo, 142 Tex. 152, 177 S.W.2d 962 (1944); Espinoza v. State, 73 Tex. Crim. 237, 165 S.W. 208 (1914). *Utah*: State v. Martinez, 7 Utah 2d 387, 326 P.2d 102 (1958); State v. Anderson, 108 Utah 130, 158 P.2d 127 (1945). *Virginia*: although no cases were found discussing the use of jury question in Virginia, a handbook for jurors published by the Judicial Council of Virginia in 1975 recognizes the right of jurors to ask questions. See Yeager v. Greene, 502 A.2d 980, 1002 n.36 (D.C. 1985). *District of Columbia*: Yeager v. Greene, 502 A.2d 980 (D.C. 1985). There are A.L.R. articles keeping track of the status of juror questions in both the state and federal courts which can, through the pocket supplements, apprise the interested reader of the (fairly) latest tallies. For state courts, see Annotation, *supra* note 10. For federal courts, see Annotation, *Jurors Questioning Witnesses in Federal Court*, 80 A.L.R. FED. 892 (1986).

13. Yeager, 502 A.2d at 981-82. Indeed, one scholar asserts that "the discretion of the court to allow such questioning is undoubted." 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 784a (Supp. 1989).

14. See United States v. Land, 877 F.2d 17 (8th Cir.), *cert. denied*, 110 S. Ct. 243 (1989); United States v. Callahan, 588 F.2d 1078 (5th Cir.), *reh'g denied*, 591 F.2d 1343 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); United States v. Witt,

This Comment will survey the contemporary use of juror questions. The first section presents arguments in favor of and against allowing juror interrogation. The second section compiles commentary from judges who have allowed juror questions and includes two studies of courts which have experimented with the procedure. The third section surveys the various procedures used in implementing juror interrogation, as they have been recorded in court cases. The fourth section offers a comprehensive model juror interrogation procedure.

I. THE JUROR QUESTION CONTROVERSY

Since the inception of the juror questioning, many judges and scholars have argued in favor of or against allowing jurors to interrogate witnesses. What follows is a summary of these arguments. For now this controversy remains unresolved with each side emphasizing the benefits or detriments of juror interrogation. At the least, these arguments denote the goals sought and the failures to be avoided for any court considering instituting juror interrogation.

A. *The Arguments for Juror Interrogation*

Those in favor of juror interrogation focus on the jury's role as the finder of fact and discernor of truth; these advocates view juror questions as a means of improving the jury's information and understanding of the issues it must decide. The benefit of juror interrogation can be summarized in the words of one advocate: "the better informed the jury, the more likely it is to render a just verdict."¹⁵ For juror question advocates, the pragmatic benefits of better-informed juries, and thus of better-considered verdicts, exceed the theoretical risks of altering a settled and static system of trial procedure.¹⁶

215 F.2d 580 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954); *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987), *cert. denied*, 109 S. Ct. 3174, *reh'g denied*, 110 S. Ct. 11 (1989); *People v. Wesley*, 148 Mich. App. 758, 384 N.W.2d 783 (1985), *aff'd*, 148 Mich. App. 758, 411 N.W.2d 159, *cert. denied*, 484 U.S. 967 (1987); *State v. Sheppard*, 100 Ohio App. 345, 128 N.E.2d 471 (1955), *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910, *reh'g denied*, 352 U.S. 955 (1956); *State v. Barrett*, 278 S.C. 414, 297 S.E.2d 794 (1982), *cert. denied*, 460 U.S. 1045 (1983).

15. Interview with Hon. Scott O. Wright, United States District Court, Western District of Missouri, in Kansas City, Missouri (May 2, 1989) [hereinafter Wright Interview].

16. For one case in which this kind of balancing test was undertaken, see *LeMaster*, 137 Ariz. at ___, 669 P.2d at 597-98. See also Urbom, *supra* note 1, at 422 ("The advantages are real, and the shortcomings are either imaginary or

Allowing jurors to ask questions allows jurors to clarify issues about which they are confused.¹⁷ As expressed by one court, juror interrogation provides "reasonable help in resolving legitimate questions which trouble [the jury] but have not been answered through the interrogation of witnesses by counsel."¹⁸ In the medical malpractice case before that court plaintiff had sued for injuries to his spine as a result of being dropped while in a hospital. A juror asked the doctor in charge of the plaintiff-patient the following questions: "Would the previously described incident involving the alleged dropping of [plaintiff's] head necessarily result in visible disruption or damage to the dura or other parts of the spine? . . . How is the depth of the drilling of the intervertebral disc determined insofar as the depth varies from person to person?"¹⁹ Questions such as these aid a juror's understanding of medical terminology and its relation to a plaintiff's injury.

Another case, *Byrge v. State*,²⁰ involved a criminal trial for forgery in which the identification of the defendant was based on an F.B.I. fingerprint analysis. A juror asked the F.B.I. officer how many points of comparison were required before two sets of fingerprints were deemed alike. The witness responded that there was no set number but that seven was the fewest used.²¹ In *State v. Anderson*,²² defendant was accused of stealing money under the guise of a chiropractor. The jury asked the defendant-witness how he had examined the victim and whether the victim was wearing a coat and had anything in his pockets.²³ The state supreme court ruled that these were questions that could have been asked in direct examination and they clarified material points in the defendant's testimony.²⁴

easily avoidable.").

17. See *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), *reh'g denied*, 591 F.2d 1343 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); *Yeager v. Greene*, 502 A.2d 980, 982 n.7, 998 (D.C. 1985); *Stamp v. Commonwealth*, 200 Ky. 133, 143, 253 S.W. 242, 246 (1923) ("it is often necessary to a fair understanding of the issues that jurors ask[] questions of the witnesses").

18. *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 556 (Iowa 1980).

19. *Id.*

20. 575 S.W.2d 292 (Tenn. Crim. App. 1978).

21. *Id.* at 294.

22. 108 Utah 130, 158 P.2d 127 (1945).

23. *Id.* at 134, 158 P.2d at 128.

24. *Id.*; see also *Smith v. State*, 81 Okla. Crim. 412, 419, 165 P.2d 381, 384 (1946), a criminal action for assault in which a juror asked what type of Army discharge defendant had received; defendant responded it was for inaptitude. Although the question might seem prejudicial, the court ruled it was not.

Juror interrogation also allows the juror to seek out evidence it feels is necessary for its decision but which counsel have failed to adduce. One judge has observed that "a juror may, and often does, ask a very pertinent and helpful question in furtherance of the investigation."²⁵ In *Sitrin Bros., Inc. v. Deluxe Lines, Inc.*,²⁶ jurors asked technical questions concerning a matter "in which apparently counsel was not too interested or too well advised."²⁷ As a result of its inquiry the jury was able to throw out a damage claim.²⁸ Another example is found in *People v. Stout*,²⁹ a trial for drug possession. In that trial a police officer had testified about the test used to identify the nature of the substance seized from the defendant. A juror asked whether there could have been extraneous matter in the item seized that could have clouded the test results.³⁰ A good example of a jury's extensive examination is found in *People v. McAlister*³¹ where four jurors asked twelve questions of a witness concerning the scene of an accident.³² And in the trial in *State v. Howard*,³³ a prosecution for rape, a nurse had testified about the examination of the victim and the alcohol level in her blood at the time she entered the hospital. A juror inquired about the procedure used to test the blood.³⁴

The benefit of these types of questions seems apparent: resolving ambiguities in the jurors' minds helps them come to a more competent decision. As the Honorable Scott O. Wright, Chief Judge of the United States District Court for the Western District of Missouri, has put it, it is better for jurors to ask their questions immediately, even if improper, than to leave them unresolved and open for speculation in deliberations.³⁵

Questions from jurors also generally improve communication between counsel and jury. This occurs in two ways. In one respect,

25. *State v. Kendall*, 143 N.C. 487, 489, 57 S.E. 340, 341 (1907); *see also* Urbom, *supra* note 1, at 422 ("jurors do not ask many questions but they usually ask good ones").

26. 35 Misc. 2d 1041, 231 N.Y.S.2d 943 (Civ. Ct. 1962).

27. *Id.* at 1043, 231 N.Y.S.2d at 946.

28. *Id.*

29. 116 Mich. App. 726, 323 N.W.2d 532 (1982).

30. *Id.* at 732, 323 N.W.2d at 535.

31. 167 Cal. App. 3d 633, 213 Cal. Rptr. 271 (1985) (vehicular manslaughter).

32. *Id.* at 638-42, 213 Cal. Rptr. at 273-75.

33. 320 N.C. 718, 360 S.E.2d 790 (1987).

34. *Id.* at 727-28, 360 S.E.2d at 795.

35. Wright Interview, *supra* note 15.

juror questions alert counsel to matters that need further development.³⁶ This would be especially important in complex litigation where counsel might not fully develop its evidence by virtue of mistake or familiarity with the case. In another respect, juror questions improve the quality of communication between counsel, witnesses, and the jury. As Judge Wright has observed, the interplay between counsel and the jury helps counsel to present the evidence at the jury's level of understanding.³⁷

This latter point deserves special consideration because the disparity in understanding between the jury and counsel is often disregarded. Counsel or witness and juror often have different social, cultural, and educational backgrounds which cause subtle differences of semantics in language between speaker and hearer. Because of this semantic gap a juror is likely not to understand fully what the speaker, that is, counsel or witness, intended to communicate. In the traditional trial format, jurors have no direct way of indicating their understanding of what was communicated to them and thus court and counsel have no means of detecting any disparities of understanding. Yet with such imperfect understanding the jury must decide the facts of the case. With such a system, erroneous or improper verdicts are highly probable.

The juror question bridges this semantic gap to a degree because the questions asked by a juror indicates his understanding of the evidence presented. From this, counsel can more readily detect juror misunderstanding and restructure the presentation of evidence to improve the jurors' understanding.³⁸

Another benefit from allowing juror interrogation is that it increases the jurors' attention and keeps them more interested in the case. Allowing jurors to ask questions "results in their putting forth more effort to listen and to understand because they *know* they may ask questions."³⁹ The Honorable Warren D. Wolfson, Circuit Judge for

36. See, e.g., *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), *reh'g denied*, 591 F.2d 1343 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); *Yeager v. Greene*, 502 A.2d 980, 982 n.7, 998 (D.C. 1985); see also Frankel, *supra* note 1, at 23, 24 ("Lawyers . . . stand to benefit by learning what the jury's concerns are and where the evidence may be unclear."); Urbom, *supra* note 1, at 419 (remarks of Judge Urbom of the United States District Court in Nebraska) (the questions "may well be a clue to counsel of a line of inquiry that needs to be made"); *Sixty Minutes Transcript*, *supra* note 1, at 5, 6 (remarks of Judge Robert Landry) (questions "direct the attorneys to the concerns of the jury"). Judge Wright of the United States District Court, Western District of Missouri, has found that lawyers who at first disliked the system have come to appreciate it for this aspect. Wright Interview, *supra* note 15.

37. Wright Interview, *supra* note 15.

38. See *Yeager*, 502 A.2d at 998-99; Comment, *supra* note 1, at 130-31.

39. *Yeager*, 502 A.2d at 1000; see also Frankel, *supra* note 1, at 23-24.

Cook County, Illinois, has found that jurors "listen better [because] they feel like they are a part of the process and not just some distant audience."⁴⁰ Because juror interrogation involves jurors as active participants in the trial, they will become more interested in the trial and pay more attention.

One criticism of juror interrogation is that it increases the chances of a juror making improper or prejudicial statements or inquiries. To this proponents respond that airing such prejudices in open court is in fact beneficial. According to Judge Wright, it is better for jurors to ask prejudicial questions in court because then the judge may warn the jury of their error and even explain why the testimony sought is improper. Even if the effectiveness of the remedy is questionable, it certainly is more effective than just leaving the jury to ask the same questions in deliberations, to be answered only by the jurors' speculation.⁴¹ It is better that a juror indicate bias to the court and counsel than for such bias to remain hidden until it affects deliberations. It is easier to recognize and remedy a biased juror from statements in court than from verdicts or judgments that may or may not be supported by the facts.⁴²

This argument applies equally to juror questions which are not biased but only improper. For example, in some cases jurors have improperly inquired of a defendant's insurance.⁴³ It is certainly better for court and counsel to know definitely that a juror is considering improper matters than to presume such occurrences *post facto* from the jury's verdict. When jurors ask questions which evince their concern for a party's insurance, the court may make an effort to inform the jury of its error and set it aright. The recorded juror question about insurance also could present a stronger case on appeal that a seemingly excessive verdict was prompted by the jury's consideration of insurance. If a juror is unable to indicate in court her improper consideration, then it is left

40. Sherman, *supra* note 1, at 9, col. 1. For an empirical substantiation of this belief, see the discussion of the court surveys *infra* notes 101-18 and accompanying text.

41. Wright Interview, *supra* note 15. Judge Urbom agrees with this assessment, having stated, "A question about an inappropriate subject affords the judge an opportunity to deal squarely with the fact of the inappropriateness. . . . [A]llowing questions by jurors tends to open the trial, whereby forbidden subjects can be declared forbidden and can be treated, rather than left to fester in the jury room." Urbom, *supra* note 1, at 419.

42. This rationale was also mentioned by the Hon. Henry F. Greene of the District of Columbia Superior Court in his memorandum and order reprinted in *Yeager v. Greene*, 502 A.2d 980, 998 (D.C. 1985).

43. See, e.g., *O'Neill v. Haynes*, 122 Cal. App. 329, 9 P.2d 853 (1932); *Maggart v. Bell*, 116 Cal. App. 306, 2 P.2d 516 (1931); *Kelly v. Commonwealth Ins. Co.*, 23 N.Y. Super. Ct. 82, 99 (1862); *Rojas v. Vuocolo*, 142 Tex. 152, 156-57, 177 S.W.2d 962, 963-64 (1944).

to speculation whether the jury did in fact consider insurance in its verdict.⁴⁴

Even when the juror's inquiry is not prejudicial or improper but merely unnecessary, responding to the inquiry in court may be helpful. For example, in one trial a juror had asked whether it was legally impermissible for a deponent to see others' depositions before giving his own.⁴⁵ The court responded that this was permissible.⁴⁶ Such an inquiry had little to do with the trial and the question certainly was not prejudicial. But the effect of such a doubt in a juror's mind is indeterminable; answering the question at least resolves the doubt.

B. *The Arguments Against Juror Interrogation*

Opponents of juror interrogation note the threat juror questions pose to a traditional trial procedure which has been developed over centuries to ensure a fair trial. The opponents' paramount concern is trial fairness. The principal evil juror interrogation poses is that it undermines a structure designed to ensure that a jury considers only what it fairly should, when it should.

One aspect of this unfairness is that the juror question places counsel in an untoward dilemma. As the court in *State v. Sickles*⁴⁷ put it, counsel is "put to the choice of offending a juror by an objection or letting incompetent testimony go in without objection. . . . If [counsel] objects to the question and by doing so offends the juror and he loses his case he has no remedy."⁴⁸ Similarly, if counsel successfully objects or

44. This reasoning applies, of course, to any improper considerations of the jury, e.g., defendant's attempts to settle out of court, *Big Sandy & Cumberland Ry. v. Thacker*, 270 Ky. 404, 407, 109 S.W.2d 820, 821 (1937), and defendant's refusal to testify, *Espinoza v. State*, 73 Tex. Crim. 237, 165 S.W. 208 (1914).

45. Transcript at 243, *Darnell v. Ford*, No. 88-4468-CV-C-S (W.D. Mo. Feb. 13, 1989) [hereinafter Transcript].

46. *Id.* at 243-44.

47. 220 Mo. App. 290, 286 S.W. 432 (1926).

48. *Id.* at 433, 286 S.W. at 293; see also *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 (4th Cir. 1985) (argument of counsel). Although the *DeBenedetto* court recognized the merits of this argument, it asserted that under the procedure used by the trial court counsel could have objected to the jury question procedure outside the presence of the jury. *Id.* at 515; see also *State v. Martinez*, 7 Utah 2d 387, 389, 326 P.2d 102, 103 (1958) ("counsel dare not object lest they invoke the displeasure of the inquisitorial jurors"); *People v. McAlister*, 167 Cal. App. 3d 633, 643, 645, 213 Cal. Rptr. 271, 277 (1985); *Strawn v. State ex rel. Anderberg*, 332 So. 2d 601, 602 (Fla. 1976); *Stinson v. State*, 151 Ga. App. 533, 536, 260 S.E.2d 407, 410 (1979); *Stamp v. Commonwealth*, 200 Ky. 133, 143, 253 S.W. 242, 246 (1923); *White v. Little*, 131 Okla. 132, 133-34, 268 P. 221, 222-23 (1928). See generally Annotation, *supra* note 10,

counsel's witness refuses to answer a juror's question, the jury is likely to believe that the witness is concealing something; at least the jury could place less value in such witness's testimony.⁴⁹

The acuteness of this problem will vary with the context. For example, in *Story v. State*,⁵⁰ a trial for child molestation, the jury was allowed to question directly the seven year-old victim.⁵¹ The prejudicial problems of such testimony are severe enough when counsel examines such witnesses. For counsel to attempt to thwart a juror's examination of such a witness would seem quite a threat to counsel's standing with the jury.

As a result of this dilemma a greater variety of evidence can be allowed into trials. Because counsel would be hesitant to object to juror questions, much otherwise inadmissible testimony could be admitted. This can only be prevented to the extent that the judge is vigilant in preventing such testimony. But even the best judge cannot immediately determine the admissibility of all borderline questions as they are asked and thus some questionable testimony necessarily will get through.⁵²

Juror interrogation opponents advocate traditional trial procedure as a necessary, if cumbersome, device to ensure that the jury properly serves its discreet function in the trial process: the impartial body which declares the facts on the basis of the evidence presented to it. Opponents emphasize the principles of fairness underlying this structure over possible practical gains from enhancing the information presented to the jury. As one court has said,

I think the question is really whether or not we want an inquisitorial system or we want a system of jury trials which are conducted by a Judge with the assistance of trained advocates, in accordance with well-developed and historically sound rules of law; particularly, those rules of law that deal with procedure, rights of defendant, and questions of what may or may not be introduced.⁵³

at 881-82.

For an empirical refutation of this argument, see discussion of court surveys *infra* note 114 and accompanying text.

49. *Krause v. State*, 75 Okla. Crim. 381, 386-87, 132 P.2d 179, 182 (1942); *Strawn*, 332 So. 2d at 605; *see also* *United States v. Johnson*, 892 F.2d 707, 712, 713 (8th Cir. 1989) (Lay & McMillian, JJ., concurring).

50. 157 Ga. App. 490, 278 S.E.2d 97 (1981).

51. *Id.* at 491, 278 S.E.2d at 98.

52. An example of this can be found in *Johnson*, where, in a trial for drug possession, a juror asked defendant how long he had been on drugs. *Johnson*, 892 F.2d at 711. Counsel did not object nor did the court intervene. *Id.* at 710, 711-12.

53. *Strawn v. State ex rel. Anderberg*, 332 So. 2d 601, 605 (Fla. 1976) (remarks of trial judge).

One essential aspect of traditional trial procedure is the manner in which it ensures that the finder of fact bases its decision solely on proper evidence. As stated by one judge:

Our judicial system is founded upon the presence of a body constituted as a neutral factfinder to discern the truth from the positions presented by the adverse parties. The law of evidence has as its purpose the provision of a set of rules by which only relevant and admissible evidence is put before that neutral factfinder. Individuals not trained in the law cannot be expected to know and understand what is legally relevant, and perhaps more importantly, what is legally admissible.⁵⁴

As stated by the trial judge in *Strawn v. State ex rel. Anderberg*, "Our system depends on utter impartiality [of the jury] and upon having two trained counsel to ask questions, to object to each other's questions at times, and to ask those questions for the purpose of eliciting admissible evidence."⁵⁵ Because jurors are not trained lawyers they necessarily are more likely to seek improper testimony from witnesses.⁵⁶ As noted *supra* at least some of this inadmissible testimony will enter the jury's decision of facts. Consequently, the jury will be deciding facts to a degree on information which the legal community long has determined should not be considered.

An example of this problem is found in *State v. Sickles*.⁵⁷ In a trial for criminal possession of alcohol, the defendant testified on his own behalf. A juror asked defendant whether he was a naturalized citizen, how long he had been in the United States, and what was his nationality. Defendant declared he was a Russian Jew. This juror asked a number of similar questions, all of which the appellate court declared clearly prejudicial and irrelevant.⁵⁸ The jury ultimately convicted the defendant. What information formed the basis of this

54. *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1986) (opinion written by the Hon. James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation).

55. *Strawn*, 332 So. 2d at 602 (remarks to jury in declaring mistrial).

56. *See* *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), *reh'g denied*, 591 F.2d 1343 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979) (argument of counsel); *Strawn*, 332 So. 2d at 602; *State v. Stinson*, 151 Ga. App. 533, 536, 260 S.E.2d 407, 410 (1979); *State v. Howard*, 320 N.C. 718, 725, 360 S.E.2d 790, 794-95 (1987); *Krause v. State*, 75 Okla. Crim. 381, 386-87, 132 P.2d 179, 182 (1942).

57. 220 Mo. App. 290, 286 S.W. 432 (1926).

58. *Id.* at 433-34.

verdict is unknown; the state court of appeals found enough of a possibility of improper consideration to reverse the conviction.⁵⁹

Opponents of juror interrogation also argue that juror questions will too often seek unnecessary evidence and thus waste trial time on irrelevant issues.⁶⁰ With dockets as crowded as they are, courts do not need another impediment to speedy trials.

The other aspect of traditional trial procedure which juror interrogation affects is the jury's position as the "fair and impartial arbiter of evidence brought before it."⁶¹ Impartiality is essential to a fair trial because only the impartial jury gives full consideration to all and only the evidence presented to it.

One way in which juror interrogation undermines the jury's impartiality is by inducing the jury to decide the facts before all of the evidence has been presented. Once the juror is allowed to become interrogator he "will develop a line [of] questioning which predisposes that juror towards a particular finding of guilt or innocence and once committed to that role as an 'advocate' could well find it impossible to retreat once again to the position of a neutral arbiter."⁶²

[The] jurors will become advocates. They will lose their ability to remain neutral. If they don't like an answer or given the way its given or if objections by Counsel to a question asked by a juror, and they take an adverse position established by that objection . . . instead of fair and impartial jurors who are not going to form or express any opinions until the entire case has been heard, we would . . . have some advocates on the jury.⁶³

One judge has noted how

the questioning juror has begun the deliberative process with his fellow jurors. . . . [S]tating the question and receiving the answer in the hearing of the remaining jurors begins the reasoning process in the minds of the jurors, stimulates further

59. *Id.*; see also *United States v. Johnson*, 892 F.2d 707, 710 (8th Cir. 1989) (juror asking criminal defendant about past drug use).

60. See, e.g., *Pacific Improvement Co. v. Weidenfeld*, 277 F. 224, 227 (2d Cir. 1921) (jury interrupted examination with "unnecessary questions" about 35 times); *State v. Jeffries*, 644 S.W.2d 432, 434-35 (Tenn. Crim. App. 1982) (juror questions cover 42 transcript pages).

61. *State v. LeMaster*, 137 Ariz. 159, ___, 669 P.2d 592, 596-97 (Ct. App. 1983) (counsel's arguments).

62. *Id.*

63. *Strawn v. State ex rel. Anderberg*, 332 So. 2d 601, 605-06 (Fla. 1976).

questions among jurors, whether asked or not, and generally affects the deliberative process.⁶⁴

The Honorable Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit, emphasizes the importance in the adversarial system of preserving the jury's neutrality until deliberations.⁶⁵ Judge Lay asserts that

juror questions [disrupt] neutrality, because even a seemingly innocuous response to a seemingly innocuous juror question can sway the jury's appraisal of the credibility of the witness, the party, and the case. The factfinder who openly engages in rebuttal or cross-examination, even by means of a neutral question, joins sides prematurely and potentially closes off its receptiveness to further suggestions of a different outcome for the case. While nothing can assure the jury will remain open-minded to the end, keeping the jury out of the advocacy process increases the probability.⁶⁶

For a party to get a fair trial, the jury must remain neutral so that it is predisposed toward giving each party's presentation of the facts equal consideration. Juror interrogation, especially during presentation of evidence, undermines this predisposition toward neutrality by allowing the jury to begin judging the evidence immediately in considering questions to ask.

Examples of the effects on juror neutrality are found in counsel's observations in *People v. McAlister*.⁶⁷ Counsel noted the danger that jurors "might get a little bit more concerned with thinking of questions to ask, and that distracts them from actually listening to the evidence."⁶⁸ In the trial, during the jury's extensive examination of certain witnesses, the jury "got all excited, and all of a sudden, some of them were writing down questions." Because of this there "no longer . . . [was] a neutral party ruling with the questions coming from the counsel and the witnesses answering."⁶⁹ This problem also arose in *People v. Wilds*,⁷⁰ a criminal trial, where a juror asked the victim why

64. *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985) (opinion written by the Hon. James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation).

65. *See United States v. Johnson*, 892 F.2d 707, 711 (8th Cir. 1989) (opinion of Lay, J., concurring) ("as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct").

66. *Id.*

67. 167 Cal. App. 3d 633, 642, 213 Cal. Rptr. 271, 275 (1985).

68. *Id.*

69. *Id.* at 643, 213 Cal. Rptr. at 275-76.

70. 141 A.D.2d 395, 529 N.Y.S.2d 325 (1988).

it took so long to identify the defendant in court and whether the State had established a particular fact.⁷¹ The appeals court ruled that these questions were improper and demonstrated the jury's premature deliberations.⁷²

Indeed, juror interrogation may even render jurors adversarial against one party or another.⁷³ Examples of this phenomenon can be found in a number of cases. In *Chicago, Milwaukee, & St. Paul Railroad v. Harper*,⁷⁴ an action for negligence, a juror interrogated defendant's witness in the following manner:

Question: Is your memory good?

Answer: Yes, sir.

Q: Do you remember anything that transpired yesterday, about a week from now; do you remember what you had seen?

A: Sometimes I may, and sometimes I don't pay no attention; but such things as that, of course I would.

Q: Don't you remember of saying previous to this the cars were all moved from one side of the street to be fixed . . .

A: I don't remember.

Q: Your memory is so bad you cannot remember from this forenoon to the afternoon?⁷⁵

In *State v. Jeffries*,⁷⁶ defendant was accused of selling heroin. In defense, defendant had produced an employer as an alibi-witness. As part of many prejudicial, argumentative, and irrelevant questions to the employer extending over forty-two pages of transcript a juror made the following statement:

My question, the reason for my line of questioning is that if the gentleman was working for you in February, then shortly thereafter he was, whatever took place, whether he was taken in custody or whatever did take place, if that man was an employee of yours and he was in such a position to be manager, why wouldn't you have known or why wouldn't you have said something back at that time if he were such an important employee of yours and so forth and it wasn't until September of '78 that all this took place?

....

71. *Id.* at 397, 529 N.Y.S.2d at 326-27.

72. *Id.* at 398, 529 N.Y.S.2d at 327.

73. *See, e.g., Krause v. State*, 75 Okla. Crim. 381, 386, 132 P.2d 179, 182 (1942) (juror had "assumed the role of prosecutor," asking prejudicial and argumentative questions).

74. 128 Ill. 384, 21 N.E. 561 (1889).

75. *Id.* at ___, 21 N.E. at 561.

76. 644 S.W.2d 432 (Tenn. Crim. App. 1982).

I was just wondering, I'm sorry, but if I had somebody working for me and they had some offense committed⁷⁷

The court found this and similar questions to be sufficiently prejudicial to merit a reversal.⁷⁸

A stronger example is given in *Slaughter v. Commonwealth*.⁷⁹ In a murder trial defendant had testified that a friend named "Red" had committed the *actus reus*. A juror engaged in the following interrogation:

He stated that he knew, he and this Red had been friends for sometime. Where did this Red live[?] . . . Where did he hang out at? Why didn't any of your friends know about you and Red . . . [Defendant responded that Red lived on Hill Street] You are asking for your life and nobody can find Red and you refuse. Why do you refuse to tell his address so he can be found to save you probably?⁸⁰

What makes this incident particularly egregious is that the state supreme court ruled that this questioning was a legitimate inquiry of Red's existence.⁸¹ The court noted that this question would have been asked in deliberations anyway and thus the fact that it was stated in court in the presence of the other jurors did not necessarily prejudice defendant's case.⁸² But the question is whether the fact that the juror made his statement at that time, right after defendant had offered his alibi testimony, prejudiced the other jurors. It is also questionable whether this juror had already convicted the defendant before the completion of the trial.

The fact that this court found no problem with this questioning undermines the argument that prejudicial juror statements made in court are helpful in revealing juror bias. It is of no help to reveal juror bias and then do nothing about it. In this instance it may have been better to take the chance that this juror would not have influenced the jury in deliberations rather than virtually ensure such influence by the juror's statements in court.

Both problems of improper evidence and biased juries are exacerbated by the fact that jurors are more likely to put greater weight in

77. *Id.* at 434.

78. *Id.* at 435.

79. 744 S.W.2d 407 (Ky. 1987), *cert. denied*, 109 S. Ct. 3174, *reh'g denied*, 110 S. Ct. 11 (1984).

80. *Id.* at 413.

81. *Id.*

82. *Id.*

testimony elicited from their own questions.⁸³ The jurors' faith in their own abilities to find the truth may be so strong as to withstand any admonition from the court.

The arguments for and against juror interrogation have no apparent resolution, nor are they wholly substantiated or refuted by empirical studies.⁸⁴ One's opinion of juror interrogation likely will be shaped by one's opinion of juries generally: the more faith one has in jury decision-making, the more prone one may be to enhancing the jury's role in trial. Much of the debate today is driven by prejudices about juries and trials. Only the experience of judges at the trial level can fairly evaluate the procedure. Aware of the goals to be sought and the harms to be avoided, each judge must decide for her or his own court whether and how to implement juror questions.

II. JUROR QUESTIONS IN PRACTICE

Many judges who have allowed juror questions have reported in the media that they like the procedure. They employ a variety of methods which are described below. The Honorable Warren K. Urbom, Chief Judge of the United States District Court in Lincoln, Nebraska, allows written juror questions and recommends the procedure "without reservations."⁸⁵ The Honorable Mark Frankel, of the Dane County Circuit Court in Wisconsin, allows juror questions in about 90% of trials before him.⁸⁶ He has been allowing the procedure since 1982.⁸⁷ He usually does not allow questions when significant evidence will be suppressed or the evidence will mostly be videotaped depositions.⁸⁸ In

83. See *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516-17 (4th Cir. 1985).

84. Court studies are discussed *infra* notes 101-18 and accompanying text.

85. Ranii, *Judges Push Increased Jury Role*, Nat'l L.J., Aug. 16, 1982, at 1, col. 4. Judge Urbom also uses this oral question procedure:

[J]urors . . . direct the questions to the judge. In turn, the judge decides whether the question meets the legal rules and, if so, the judge puts the question to the witness. If the question is not to be put to the witness, the judge gives the jury a brief explanation of why the judge has ruled it out. If there is any doubt as to the propriety of the question, the judge calls counsel to the bench for a conference or hears from counsel outside the presence of the jury. If questions by jurors are relayed to and answered by a witness, counsel are then afforded opportunity to examine and cross-examine the witness on the subject of those questions.

Urbom, *supra* note 1, at 418.

86. Frankel, *supra* note 1, at 23.

87. *Id.*

88. *Id.*

pre-trial instructions, Judge Frankel instructs the jury on their right to ask questions and the procedure to use. The jurors are told to raise their hand if they have questions after counsel's examinations of a witness. The bailiff gives the juror pencil and paper to write the question and delivers the question to the judge who conducts a side bar conference with counsel. Upon approval, the judge asks the witness the question. The judge explains to the jury why a question is rejected.⁸⁹ Counsel then are allowed to re-examine the witness. If such re-examination is extensive, the jurors are given another opportunity to ask questions. Among questions that have been rejected are those asking for opinion testimony for which a witness is not competent, hearsay testimony, and questions for which an improper or inadequate foundation has been laid.⁹⁰

The Honorable Robert Landry, presiding judge in the Milwaukee Criminal Court, follows a similar written question procedure, except that he discusses juror's questions with counsel in chambers.⁹¹

The Honorable Scott O. Wright, Chief Judge of the United States District Court for the Western District of Missouri, has allowed juror interrogation as standard procedure since 1988.⁹² In his pre-trial instruction, Judge Wright instructs the jury on how it may ask questions.⁹³ The judge warns counsel before trial that he will allow juror interrogation. Judge Wright allows jurors to ask their questions orally, directing them to himself.⁹⁴ He determines admissibility and then either instructs the witness to answer or explains to the jury why the question may not be answered. On difficult questions he calls counsel to the bench for discussion. The judge watches the lawyers as the question is being asked; when he sees that counsel is about to object he calls a bench conference for discussion. By this method he attempts to alleviate the objection dilemma faced by counsel.⁹⁵

An example of Judge Wright's bench conference procedure was demonstrated during a trial for wrongful termination of employment as

89. *Id.*

90. *Id.* at 24.

91. *Sixty Minutes Transcript, supra* note 1, at 5.

92. Wright Interview, *supra* note 15. For some courts which question the effectiveness of curative measures, see Annotation, *supra* note 10, at 887-88.

93. See *infra* text accompanying note 144 for the text of the instruction.

94. The judge believes that a written-question procedure consumes too much time. The secrecy benefit of the written-question procedure is undermined by the fact that jurors likely will just ask each other what the written questions were anyway. Also, the jurors would not express themselves well in writing; asking orally, the jurors are better able to clarify their questions immediately. Wright Interview, *supra* note 15.

95. *Id.*

a police officer. A juror had inquired of the plaintiff's right to a hearing; in that case the police department had been given inaccurate advice on the matter so the court ruled the issue was precluded by good faith immunity. Once the question was asked the judge called counsel to the bench where counsel and judge discussed how to handle the matter. The judge refused to allow the questions asserting that it was an issue of law.⁹⁶

When jurors, by their questions, appear to be deviating from relevant issues Judge Wright instructs the jury about the proper scope of their examination. For example, in a wrongful death trial, when jurors' questions indicated they were thinking about the plaintiff's inheritance and tax liabilities, the judge instructed the jury they could not consider these issues in their decision. The judge also may instruct the jury to wait for counsel to develop some issues later in the trial.⁹⁷

Judge Wright finds that the procedure is especially helpful in complex trials where issues and facts become more confused under a traditional procedure of presentation. He has found that trials are not necessarily prolonged by the questions and that there has been no noticeable bias in awards or convictions. One significant change he has found is that jurors ask fewer questions of him during their deliberations.⁹⁸

Overall, these judges have found that the juror questions asked have been fair and relevant.⁹⁹ Allowing juror interrogation is also popular with jurors.¹⁰⁰

96. Transcript, *supra* note 45, at 311-13.

97. Wright Interview, *supra* note 15.

98. *Id.*

99. Ranii, *supra* note 85, at 19, col 2. (Judge Urbom: Questions "pretty much run the gamut, but they usually deal with substantive issues. The jurors have a good sense of what the issues are. They almost never ask foolish questions.") This assessment was shared by the Hon. J. Rosalyn Bell, Circuit Court Judge in Montgomery County, Maryland: "We get some very astute questions. Some questions have indicated there were points that the lawyers had not brought out but should have." *Id.* Judge Frankel has found juror questions in his court to be generally "thoughtful, pertinent, respectful, and to the point. . . . Most frequently the jury is concerned about nuances of time, places, and distances that have not been adequately covered by counsel." Frankel, *supra* note 1, at 24.

100. *Sixty Minutes Transcript*, *supra* note 1, at 5, 7. From his polls of juries Judge Wright of the United States District Court, Western District of Missouri, has found that jurors uniformly like the procedure. Wright Interview, *supra* note 15.

To date there have been two field studies conducted to examine the effects of juror interrogations.¹⁰¹ One study was conducted in the United States District Courts of the Second Circuit by the Second Circuit Committee on Juries.¹⁰² It examined twenty-six trials, evenly split between civil and criminal, before six judges.¹⁰³ In these trials after counsel had made their opening remarks, each judge instructed the jury on the procedure to use for asking questions in writing. As part of their instructions the judges discouraged jurors from asking questions.¹⁰⁴

The study found that four of the six judges found the procedure useful, especially in complex cases. The judges found the procedure useful in twelve of eighteen reported cases and unhelpful only in six of the cases.¹⁰⁵ Prosecutors and plaintiff's lawyers all favored the procedure while defense counsel found the procedure more often unhelpful.¹⁰⁶

In eight of the twenty-six reported cases the jury asked no questions. The jury asked one question in one case, two questions in two cases, several in eleven cases, forty in one case, and fifty-six questions in another case.¹⁰⁷ The study found no correlation between the number of questions asked and counsels' and judges' opinions of the procedure. Indeed, in the case with fifty-six questions, the judge found the questions irrelevant, whereas both counsel found the questions helpful "in focusing their attention on the juror's concerns."¹⁰⁸

The second field study was conducted among the Wisconsin circuit courts under the auspices of the Judicial Council of Wisconsin.¹⁰⁹ The courts used the same procedure as in the Second Circuit study. The study examined thirty-three trials before twenty-nine judges.¹¹⁰ The study found that judges and counsel had no strong objections to the

101. Heuer & Penrod, *Jurors' Participation*, *supra* note 1; Sand & Reiss, *supra* note 1. Heuer and Penrod via the American Judicature Society and the State Justice Institute are now engaged in a more extensive national survey of juror questions, the results of which are soon to be published. They briefly reviewed both surveys (primarily the Wisconsin survey) in Heuer & Penrod, *Trial Lawyers*, *supra* note 1.

102. Sand & Reiss, *supra* note 1, at 423.

103. *Id.* at 443.

104. *Id.*

105. *Id.* at 444.

106. *Id.*

107. *Id.* at 445.

108. *Id.* at 446.

109. Heuer & Penrod, *Jurors' Participation*, *supra* note 1, at 231.

110. *Id.* at 240, 251

procedure, but counsel found no great benefit in it either.¹¹¹ A total of eighty-eight questions were asked, averaging about 2.7 per trial. Sixty-seven percent were asked of plaintiff's or prosecution witnesses, thirty-three percent of defendant's witnesses.¹¹² The prosecution or plaintiff's counsel objected eleven times, defendant's counsel twelve times. All objections were sustained. Both counsel agreed on objections "considerably."¹¹³

Perhaps the most notable finding of this survey concerned the jurors' responses to these objections. Counsel objected to seventeen percent of all questions asked, yet the jury did not feel embarrassed or angered by the objections and generally understood the bases for the objections.¹¹⁴ This finding undercuts juror question opponents' arguments that counsel risk alienating the jury by their objections. Of course, one limited survey cannot wholly refute this argument.

Jurors felt that questioning produced more thorough evidence and they were more satisfied with their knowledge going into deliberations. But this did not make deliberations any easier. Jurors found the questions "moderately helpful" in clarifying the evidence and the law and in finding the truth, but not as helpful as some jurors had expected.¹¹⁵

Counsel did not find juror questions helpful in uncovering important evidence, but they found them somewhat helpful in indicating areas that needed further development. They found the feedback from the jury useful, but not for indicating jurors' confusion over evidence or the law.¹¹⁶ For them, juror questions did not unnecessarily slow the trial process or hinder their trial performance or strategy.¹¹⁷

Judges found that the procedure did not take up too much trial time. The study found no correlation between judges' satisfaction and the number of questions asked.¹¹⁸

Two field surveys alone are certainly an inadequate basis on which to judge the value of juror questions; for that, further experience and similar surveys will be necessary. Nor are the results of these surveys dispositive of the issue; the results are mixed and, if anything, show

111. *Id.* at 256.

112. *Id.* at 252.

113. *Id.*

114. *Id.* at 255-56

115. *Id.* at 252-53. Jurors in "question-asking trials" found the questions generally less helpful than jurors in "non-question-asking trials" had expected they might be. *Id.* at 253.

116. *Id.* at 253-54.

117. *Id.* at 254-55

118. *Id.* at 255.

that the value of juror interrogation will vary with each case. Still, some general conclusions may be drawn.

Juror interrogation does not necessarily hamper trial procedure and is not necessarily cumbersome. Only one judge in the Second Circuit survey believed the procedure was detrimental to the jury's function. Allowing juror interrogations also did not result in excessive questions. Most Second Circuit trials experienced 11 questions and the Wisconsin trials averaged 2.7 questions per trial. The jury also appeared to appreciate the procedure. The Wisconsin juries found the procedure somewhat helpful, albeit not as helpful as anticipated. Most Second Circuit juries were more attentive under the procedure. In neither survey was there general disapproval of the procedure, although the Second Circuit participants found the procedure less helpful than did the Wisconsin participants.

In sum, there is yet no conclusive determination of the value of juror questions. Whether to implement the procedure, on a trial or permanent basis, will have to be up to each judge and depend on each judge's proclivities. More time and experience is needed before an ultimate judgment on juror interrogation can be made.

III. A SURVEY OF JUROR INTERROGATION PROCEDURE

This section will survey current use of juror questions in United States courts, as recorded in case reporters. It will first describe the breadth of use of juror interrogation procedure and then will describe different procedures for implementing juror interrogation in chronological order from the beginning to the review of trial.

No court has yet ruled that juror interrogation is unconstitutional¹¹⁹ and the United States Supreme Court has consistently denied certiorari to juror question cases.¹²⁰ While some courts have found authority for the procedure by analogy to a trial judge's right to

119. *Yeager v. Greene*, 502 A.2d 980, 981-82 (D.C. 1985). Indeed, one scholar asserts that "the discretion of the court to allow such questioning is undoubted." 3 J. WIGMORE, *supra* note 13, § 784a.

120. See *United States v. Land*, 877 F.2d 17 (8th Cir.), *cert. denied*, 110 S. Ct. 243 (1989); *United States v. Callahan*, 588 F.2d 1078 (5th Cir.), *reh'g denied*, 591 F.2d 1343, *cert. denied*, 444 U.S. 826 (1979); *United States v. Witt*, 215 F.2d 580 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954); *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987), *cert. denied*, 109 S. Ct. 3174, *reh'g denied*, 110 S. Ct. 11 (1989); *People v. Cheeks*, 148 Mich. App. 758, 384 N.W.2d 783 (1985), *aff'd*, 428 Mich. 708, 411 N.W.2d 159, *cert. denied*, 484 U.S. 967 (1987); *State v. Sheppard*, 100 Ohio App. 345, 128 N.E.2d 471 (1955), *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910, *reh'g denied*, 352 U.S. 955 (1956); *State v. Barrett*, 278 S.C. 414, 297 S.E.2d 794 (1982), *cert. denied*, 460 U.S. 1045 (1983).

interrogate witnesses,¹²¹ the more common and logical basis of authority is found in the trial judge's power to administer justice in the trial.¹²² No court has made an analytical distinction concerning juror interrogation between civil and criminal trials.¹²³

A. *Allowing Juror Questions*

No state or federal court today absolutely forbids a judge from allowing juror interrogation.¹²⁴ At one point Georgia was the only

121. See, e.g., *Sparks v. Daniels*, 343 S.W.2d 661, 667 (Mo. Ct. App. 1961).

122. See, e.g., *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1986) (noting that jury is not trained in law and thus cannot exercise functions similar to judge).

123. Cf. *United States v. Johnson*, 892 F.2d 707, 711 (8th Cir. 1989) (Lay, McMillian, JJ., concurring) ("In a criminal case the practice could reach constitutional dimensions, requiring reversal of a conviction under the due process clause.").

Judge Lay finds the constitutional dimension to this problem in language of the United States Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968). There the Court had stated that the Framers of the Constitution had provided for the right to trial by jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156. Judge Lay noted that "[w]hen the jury becomes an advocate or inquisitor in the process, it foresakes its role of arbiter between the government and its citizens." *Johnson*, 892 F.2d at 715. Judge Lay does not cite any more specific provision or interpretation of the United States Constitution.

Judge Lay's opinion is subject to a number of criticisms. The language of the sixth amendment alone does not clearly prohibit juror questions in criminal trials. Rather it states: "In all criminal prosecutions, the accused shall enjoy the right of speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI. To the extent that the Framers' intent is relevant to constitutional interpretation, Judge Lay produces no definite sign of intent against juror questions, even though juror interrogation in English common law courts apparently was known in colonial times. See W. BLACKSTONE, *supra* note 2; M. HALE, *supra* note 2. Even if Judge Lay's understanding of the Framers' intent is correct and relevant, he produces no evidence that juror interrogation necessarily undermines such role of the jury. Indeed, the empirical evidence to date does not support this contention. See *supra* notes 101-18 and accompanying text. Abuse of juror interrogation in specific trials could undermine the fairness of a trial, as many cases show, and to this extent a party's right to due process may be affected. This may be remedied at the appellate level for each case. But unless the abuse is sufficiently widespread, Judge Lay's argument for prohibiting juror interrogation seems overbroad.

124. Cf. *State v. Anderson*, 108 Utah 130, 138, 158 P.2d 127, 130 (1945) (Larson, J., concurring).

state expressly prohibiting juror questions of any kind.¹²⁵ In 1981, however, the Georgia Supreme Court reconsidered and it now allows juror questions at the trial court's discretion.¹²⁶ All courts which have considered the issue have ruled that the trial court either has discretion to allow juror interrogation or must allow some form of juror interrogation.¹²⁷

Some courts which place the allowance of juror interrogation in the discretion of the trial court, have included within that discretion the trial court's absolute prohibition of all juror questions.¹²⁸ Some have ruled that a trial judge may not absolutely prohibit questions from jurors.¹²⁹ Most courts have ruled that it is solely within the trial court's discretion whether to allow juror questions.¹³⁰

The best rule would be to allow the trial court absolute discretion over whether it will allow or prohibit juror questions. The juror interrogation procedure requires a diligent and conscientious judge to carefully instruct the jury and monitor the process; restraining the jury from excessive or prejudicial questioning requires a judge's constant supervision and care. To force such a system upon a reluctant or unwilling judge is to deny the process of what perhaps is its most important element—the alert eye of the conscientious judge. To deny

125. *Hall v. State*, 241 Ga. 252, 256, 244 S.E.2d 833, 837 (1978) ("jurors are not permitted during the trial to interrogate witnesses"); *Williamson v. State*, 156 Ga. App. 856, 276 S.E.2d 60 (1980), *rev'd*, 247 Ga. 685, 279 S.E.2d 203, *on remand*, 159 Ga. App. 508, 285 S.E.2d 271 (1981); *Stinson v. State*, 161 Ga. App. 533, 536, 260 S.E.2d 407, 410 (1979) (citing *Hall*, 241 Ga. 252, 244 S.E.2d 833(1978)).

126. *State v. Williamson*, 247 Ga. 685, 279 S.E.2d 203 (1981), *rev'g* 156 Ga. App. 856, 276 S.E.2d 260 (1980); *Pierce v. State*, 158 Ga. App. 343, 343-44, 280 S.E.2d 381, 382 (1981).

127. *See generally* Annotation, *supra* note 10, at 878-80.

128. *E.g.*, *United States v. Nivica*, 887 F.2d 1110, 1123 (1st Cir. 1989); *State v. Taylor*, 25 Ariz. App. 497, 500, 544 P.2d 714, 717 (1976); *State v. Sickles*, 220 Mo. App. 290, 293, 286 S.W. 432, 433 (1926) (dictum); *State v. Sheppard*, 100 Ohio App. 345, 390, 128 N.E.2d 471, 499 (1955), *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910, *reh'g denied*, 352 U.S. 955 (1956).

129. *E.g.*, *Carter v. State*, 250 Ind. 13, 16, 234 N.E.2d 650, 652 (1968) (error for court to give preliminary instruction that jury may not question witnesses); *Dolezal v. Goode*, 433 N.E.2d 828, 833 (Ind. Ct. App. 1982) (error for court to instruct jury that it may not question witnesses); *People v. Heard*, 388 Mich. 182, 187-88, 200 N.W.2d 73, 76 (1972) (error for judge, in response to counsel's invitation of jury-question, to rule jury have no right to ask questions); *People v. Charles*, 58 Mich. App. 371, 376-77, 227 N.W.2d 348, 352 (1975) (error for judge, upon juror's request to ask question, to instruct jury that questions are prohibited).

130. *See generally* Annotation, *supra* note 10, at 878-80.

a willing judge the discretion to allow juror questions is to deny the parties and the judicial system a device that may significantly improve the litigation process and the administration of justice. At the least, it denies modern American jurisprudence another laboratory in which to conduct this experiment.

B. Warning Counsel

Some judges warn counsel before trial that they will allow jurors to interrogate witnesses.¹³¹ One example of this is found in the trial court's memorandum appended to the opinion in *Yeager v. Greene*.¹³² When the trial court instituted its juror question procedure it sent a memorandum to all counsel with matters on its docket informing them of the use and specifics of the procedure.¹³³ The court then heard challenges to the procedure outside of the jury's presence via pre-trial motion and hearing.¹³⁴

Warning counsel before trial of the use of juror interrogation, especially when a court first implements the procedure, provides a number of benefits. Most importantly, it adequately forewarns counsel so that they may structure their trial strategy to accommodate the innovation. This makes the procedure more fair for all counsel and, thus, to the parties to the action. Such forewarning gives counsel time to prepare sufficiently researched and developed objections to the procedure for presentation to the court at a convenient time before trial. A pre-trial hearing of objections allows counsels' positions to be recorded for future reference. The judge is allowed to consider the objections well before juror interrogation or the rush of trial begins. The judge is then given greater time to rule on the objections and to structure, with counsel, a mutually agreeable procedure for juror interrogation.

C. Objecting to the Procedure

As the use of juror interrogation becomes more prevalent and the court's discretion over the procedure established, fewer objections to a court's implementation of the procedure will be made. Today, however,

131. *E.g.*, *Yeager v. Green*, 502 A.2d 980 (D.C. 1985). Judge Wright also warns counsel. Wright Interview, *supra* note 15; *see supra* text accompanying note 94.

132. 502 A.2d 980 (D.C. 1980).

133. *Id.* at 981. The text of this memorandum is reproduced *id.* at 981 n.4.

134. *Id.* at 980-81 (the motion was denied and counsel brought a writ of mandamus to the appellate court to prevent the jury questions).

counsel continue to object to the procedure generally¹³⁵ and express alarm at having to object before the jury, thereby risking the jury's displeasure. One way to address this alarm is to allow counsel some time outside the presence of the jury to object to the procedure—for example, before trial. This opportunity is given when the court forewarns counsel of juror interrogation and holds a pre-trial hearing on the matter. Some courts merely require the trial court to provide some procedure for counsel to object to juror interrogation out of the presence of the jury.¹³⁶ Courts generally have been unsympathetic to counsel's argued dilemma, asserting that counsel can find some time during the trial to make its objections away from the jury.¹³⁷

D. Initiation of Juror Interrogation

Courts vary on how they initiate juror interrogations. Most courts, in their pre-trial instructions inform the jury of its right to ask questions and the procedure to follow.¹³⁸ These courts are split on whether they discourage or encourage juror questions in their jury instructions.¹³⁹

135. Indeed, some courts require objection to preserve the issue for appeal. *See generally* Annotation, *supra* note 10, at 888-89.

136. *E.g.*, *State v. LeMaster*, 137 Ariz. 159, ___, 669 P.2d 592, 597 (Ct. App. 1983).

137. *E.g.*, *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 (4th Cir. 1985); *State v. Williamson*, 247 Ga. 685, ___, 279 S.E.2d 203, 204 (1981) (20 minute period after court instructs jury when jury is in recess); *State v. Rodriguez*, 107 N.M. 611, 615, 762 P.2d 898, 902 (Ct. App. 1988).

138. *E.g.*, *DeBenedetto*, 754 F.2d at 515 n.1; *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), *reh'g denied*, 591 F.2d 1343 (5th Cir.), *cert denied*, 444 U.S. 826 (1979); *LeMaster*, 137 Ariz. at ___, 669 P.2d at 596; *State v. Taylor*, 25 Ariz. App. 497, 500, 544 P.2d 714, 717 (1976); *State v. McAlister*, 167 Cal. App. 3d 633, 637, 213 Cal. Rptr. 271, 273 (1985); *Maris v. H. Crummey, Inc.*, 55 Cal. App. 573, 578-79, 204 P.2d 259, 261 (1921); *State v. Williamson*, 247 Ga. 685, ___, 279 S.E.2d 203, 204 (1981); *People v. Wilds*, 141 A.D.2d 395, 397, 529 N.Y.S.2d 325, 326 (1988) (recommending such procedure).

139. *See, e.g.*, *Callahan*, 588 F.2d at 1086 and *Yeager v. Green*, 502 A.2d 980, 981 n.4 (D.C. 1985) as examples of cases which advocate discouragement. The trial courts in *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986) and *State v. Martinez*, 7 Utah 2d 387, 389-90, 326 P.2d 102, 103 (1958) advocate encouragement. The appellate court in *Polowichak* advocated discouragement. *Polowichak*, 783 F.2d at 413; *see also* Annotation, *supra* note 10, at 880-82.

An example of a discouraging instruction is found in *Yeager*.¹⁴⁰ There the trial court delivered this instruction:

Generally only the lawyers and I ask witnesses questions. If you are concerned about whether a witness will testify about a matter that seems important to you, usually, if you are patient, the matter will be covered by further questions asked by me of the lawyers.

Occasionally, however, a juror feels that an important question has not been asked. Now I am not encouraging any of you to pose questions to the witnesses in this case. However, if it happens during trial that you feel an important question has not been asked¹⁴¹

Other courts do not expressly discourage juror questions in their instructions. The trial court in *State v. LeMaster*¹⁴² delivered this as part of its instruction:

Something I'll let you do is this: Ask questions of the witness. Now, it doesn't happen very often; but it is permissible under our rules and I like it. . . . I think it is really a very useful tool. Usually the lawyers are very careful and they'll ask the questions that really get out the essential information that you need to have; but sometimes there will be some lingering doubt in your mind or maybe you won't quite have heard something, you want it explained a little and we'll give you the chance to do that.¹⁴³

A more neutral and succinct instruction is that given by Judge Wright:

[A]fter each witness has been examined and cross examined, if you have any questions of the witness, I'll ask you to direct the question to me and if it's a proper question, I'll have the witness answer it. If it's not a proper question or if it's not admissible for some reason, I'll explain to you why it is not.¹⁴⁴

The instruction discouraging juror questions has the virtue of controlling its vice. A jury admonished to seek facts first from evidence adduced by counsel and then to ask questions only to clarify or elicit information would seem less likely to abuse the practice by interrupting testimony or asking excessive questions. To encourage questions may be asking too much. In the same manner, the neutral instruction

140. 502 A.2d at 1005 (from appended Order, *United States v. Mitchell*, No. F-1003-84 (D.C. Super. Ct. March 12, 1985)).

141. *Id.*

142. 137 Ariz. 159, 669 P.2d 592 (Ct. App. 1983).

143. *Id.* at ___, 669 P.2d at 596.

144. Transcript, *supra* note 45, at 4.

informs the jury of its right without inviting excessive questioning. Yet it lacks the admonition and thus the greater protection against the jury's abuse of its right.

Some courts do not inform the jury via pre-trial instruction of its right to interrogate witnesses. In a number of older cases, the court at some point during the trial invited the jury to ask questions.¹⁴⁵ This procedure poses a number of problems. If counsel are not notified of the procedure before trial, then the court's offering in the middle of trial is certain to catch counsel off guard and raise all of the problems concerning objections before the jury. Such a procedure may invite chaos if the court does not also instruct the jurors how to ask their questions. In addition, the procedure may catch the jury off guard; once alerted to the opportunity to ask questions in the middle of the trial, it is likely the jury thereafter could become more concerned with thinking up questions than listening to testimony.

An advantage to this procedure is that it does not invite the jury to think up questions from the beginning of trial. But this advantage will last only until the judge first invites questions.

One court has ruled that it is not required to instruct on juror question procedure, but counsel must request such instructions from the court.¹⁴⁶ An advantage of this rule is that it gives counsel more control over the procedure. If the rule is framed properly—namely, that counsel must request the juror question procedure before trial and the judge considers objections at that time—then counsel will be informed of the use of juror questions and will be able to make objections at a convenient time. The court could also discuss with counsel the procedure all parties would prefer. This option is unusable, of course, for the judge who wishes to use the procedure regularly despite counsel's objections.

In a number of cases, counsel had invited the jury to ask questions of their witnesses.¹⁴⁷ In *People v. Heard*¹⁴⁸ counsel had invited juror

145. *E.g.*, *Maggart v. Bell*, 116 Cal. App. 306, 308-09, 2 P.2d 516, 517 (1931); *Maris v. H. Crummey, Inc.*, 55 Cal. App. 573, 578-79, 204 P. 259, 261 (1922); *State v. Anderson*, 108 Utah 130, 133-34, 158 P.2d 127, 128 (1945).

146. *See People v. Justice*, 50 Mich. App. 55, 57-58, 212 N.W.2d 762, 763-64 (1973); *cf. Cherry v. State*, 258 Ind. 298, 300-01, 280 N.E.2d 818, 820 (1972) (counsel had requested trial court to instruct jury of right to question, providing instruction and procedure to use; trial court refused, upheld by state supreme court which held that although court may not prohibit juror question, it is not obligated to instruct jury on right).

147. *See Superior & Pittsburgh Copper Co. v. Tomich*, 19 Ariz. 182, 188, 165 P. 1101, 1104 (1917), *aff'd*, 250 U.S. 400 (1919), *rev'd on other grounds*, 22 Ariz. 543, 199 P. 132 (1921); *Strawn v. State ex rel. Anderberg*, 332 So. 2d 601, 601 (Fla. 1976); *People v. Heard*, 388 Mich. 182, 183, 200 N.W.2d 73, 74 (1972); *Lucas v. State*, 381 So. 2d 140, 144 (Miss. 1980).

questions in its opening statement.¹⁴⁹ Opposing counsel immediately objected and the trial court refused to allow juror questions.¹⁵⁰ In *Lucas v. State*¹⁵¹ and *Strawn v. State ex rel. Anderberg*,¹⁵² after its examination of the criminal defendant, counsel asked the court if it could invite questions from the jury.¹⁵³ The prosecutor in *Lucas* objected and the trial court prohibited juror questions.¹⁵⁴ In *Strawn*, the trial court determined that counsel's action was so prejudicial that it declared a mistrial.¹⁵⁵ In *Superior & Pittsburgh Copper Co. v. Tomich*,¹⁵⁶ counsel had invited juror questions after its presentation of evidence.¹⁵⁷ On appeal, counsel attempted to get a new trial on the basis of one of the questions asked; this was denied.¹⁵⁸

For either counsel to invite questions from the jury or request such from the court in the presence of the jury seems very problematic. If there is no forewarning, both opposing counsel and the court are taken by surprise. Moreover, such a thinly-veiled attempt to curry favor with the jury requires opposing counsel to object to preserve its client's rights, which alienates the jury. There seems no good reason to allow this practice. To prevent prejudice to either party, if counsel wishes to have juror questions in a trial, he should make such a request of the court outside the presence of the jury.

Many courts that do not require or that discourage juror interrogation hold that a trial court may not invite juror questions and may allow interrogation only at a juror's request.¹⁵⁹ The benefit of this procedure

148. 388 Mich. 182, 200 N.W.2d 73 (1972).

149. *Id.* at 183, 200 N.W.2d at 74.

150. *Id.* at 184-85, 187-88, 200 N.W.2d at 74, 76.

151. 381 So. 2d 140 (Miss. 1980).

152. 332 So. 2d 601 (Fla. 1976).

153. *Lucas*, 381 So. 2d at 144; *Strawn*, 332 So. 2d at 601.

154. *Lucas*, 381 So. 2d at 144 (affirmed on appeal).

155. *Strawn*, 332 So. 2d at 602 (mistrial affirmed on writ of prohibition).

156. 19 Ariz. 182, 165 P. 1101 (1917), *aff'd*, 250 U.S. 400 (1919), *rev'd on other grounds*, 22 Ariz. 543, 199 P. 132 (1921).

157. *Id.* at 188, 165 P. at 1104.

158. *Id.* Some courts also assert counsel's invitation of juror interrogation precludes objection to the procedure generally. See Annotation, *supra* note 10, at 882-83.

159. See, e.g., *Ratton v. Busby*, 230 Ark. 667, 678-79, 326 S.W.2d 889, 895 (1959) (court allows juror question to be made in the presence of counsel and jury upon juror's request); *Matchett v. State*, 257 Ga. 785, 786, 364 S.E.2d 565, 566 (1988) (juror had asked the court for information about witness's testimony, the State re-opened direct examination to ask a question and the juror orally asked another question during that examination); *Story v. State*, 157 Ga. App. 490, 490, 278 S.E.2d 97, 98 (1981) (court may allow juror question only when a juror, of his own initiative, asks the court permission to ask a question); *Stinson*

is that it confronts the procedural problems of juror interrogation only when the need arises. It prevents encouragement of juror questions by not informing the jury of the option, as in a pre-trial instruction. Still, once a juror requests permission to ask a question, counsel is placed in the dilemma of having to object to the procedure in the presence of the jury and thereby alienate the jury. If counsel does object, the court will have to set aside time in the middle of the trial to hear counsel's objections and to decide on an appropriate procedure (to which counsel might also object).

Such a procedure could also undermine one of the purposes for jury questions—allowing the jury to express its questions or confusion. If jurors are not informed of their right to ask questions, they might assume they may not ask questions; thus, a question in a juror's mind might go to the jury room unresolved.

Some trial courts which disallow juror questions specifically have instructed the jury before trial that it would not be allowed to ask questions.¹⁶⁰ One obvious benefit of this instruction is that it resolves all complications concerning juror questions. If a juror had considered asking questions, such an instruction would at least inform the juror to keep it to herself. If the court indicates its intention before the start of

v. State, 151 Ga. App. 533, 534, 260 S.E.2d 407, 409 (1979) (juror asked permission to ask a question); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 555-56 (Iowa 1980) (juror asked permission of the judge in chambers to ask a question; the judge instructed the jury on procedure for questions the next day, after examination of the witness); Miller v. Commonwealth, 188 Ky. 435, 439, 222 S.W. 96, 98 (Ct. App. 1920) (during deliberations, a juror asked the court to recall a witness for questioning from jury); People v. Stout, 116 Mich. App. 726, 732, 323 N.W.2d 532, 535-36 (1982); People v. Charles, 58 Mich. App. 371, 377, 227 N.W.2d 348, 352 (1975) (error for court to refuse to permit juror question on juror's request); Lucas v. State, 381 So. 2d 140, 144 (Miss. 1980) (court may allow juror question only "when some juror has indicated that he wishes such a point clarified"); Ray v. Collins, 274 S.W. 1098, 1099 (Mo. Ct. App. 1925); State v. Barrett, 278 S.C. 414, ___, 297 S.E.2d 794, 795 (1982), *cert. denied*, 460 U.S. 1045 (1983); State v. Martinez, 7 Utah 2d 387, 389, 326 P.2d 102, 103 (1958) (allowed only when the juror had indicated her confusion); State v. Anderson, 108 Utah 130, 134, 158 P.2d 127, 128-29 (1945) (allowed only when the juror indicated confusion); *see also* Dolezal v. Goode, 433 N.E.2d 828, 833-34 (Ind. Ct. App. 1982) (court has no duty to instruct jury of its right to question witnesses; once one question is asked, the trial court has wide discretion in determining the procedure for asking the question).

160. *See, e.g.*, State v. Taylor, 25 Ariz. App. 497, 499, 544 P.2d 714, 716 (1976) (allow prohibition); Carter v. State, 250 Ind. 13, 16, 234 N.E.2d 650, 652 (1968) (error to prohibit juror questions by preliminary instruction); Dolezal, 433 N.E.2d at 834 (error to prohibit juror questions); Charles, 58 Mich. App. at 378-79, 227 N.W.2d at 353 (error to prohibit juror questions, but reversible only if counsel object).

trial, counsel could make any objections before the court away from the jury. If the court discussed with counsel whether to allow juror questions and all parties agreed not to allow them, this instruction would be helpful to state for the record that juror interrogation was prohibited and would aid in preventing juror outbursts or requests to ask questions.

This procedure could not be used, of course, in those jurisdictions which disallow outright prohibitions of juror questions; it could be used only in those few jurisdictions that allow prohibitions.

E. When the Juror Interrogates

Courts vary as to when a juror may ask its question. In some instances, usually in courts with no particular procedure for juror interrogations, courts allow a juror to ask a question at any time during the trial. Courts have allowed jurors to ask questions during examinations of physical evidence,¹⁶¹ during re-cross examination,¹⁶² after re-direct examination,¹⁶³ and throughout a witness's testimony.¹⁶⁴ This method greatly favors juror questions over traditional trial procedure. The jurors become regular interrogators, indeed super-interrogators, in that they may intervene at any point in the trial to ask questions and even take over examination of the witness. The value of this procedure depends on the value one finds in traditional trial procedure. One certain problem is that if the questioning is not closely controlled by the judge a trial could easily become chaotic. This method also greatly encourages jurors to ask questions. The role of counsel as examiner and presenter of evidence is greatly diminished—counsel serves as such only until a juror decides to take over that role. So empowered, jurors would seem more likely to become advocates and prejudicial, especially if counsel repeatedly objected to jurors' questions, thereby thwarting their efforts to discover the truth.

161. See, e.g., *State v. Bradford*, 87 S.C. 546, 70 S.E. 308 (1911). While the jury was examining the criminal defendant's hands, a juror had asked defendant the origin of a scar. *Id.* at 549, 70 S.E. at 309. In that case the burglary victim had testified that she had bitten the perpetrator's hand. *Id.* at 548, 70 S.E. at 308. See also *Myers v. State*, 522 So. 2d 760, 762 (Miss. 1988).

162. See, e.g., *Byrge v. State*, 575 S.W.2d 292, 294-95 (Tenn. Crim. App. 1978).

163. See, e.g., *Stout*, 116 Mich. App. at 732-33, 323 N.W.2d at 535-36 (juror had raised hand to ask a question).

164. See, e.g., *Pacific Improvement Co. v. Weidenfeld*, 277 F. 224, 227 (2d Cir. 1921) (jury had interrupted testimony with "unnecessary questions" about 35 times).

One court required the jury to wait until each side had presented its case before the jury could ask any questions, at which time a witness could be recalled to the stand.¹⁶⁵ This procedure draws a compromise between traditional trial procedure and a trial with juror questions by forcing the jury to rely first on the evidence as presented by counsel. Counsel retains the opportunity to present evidence in the manner it chooses and only if that manner is defective—if jurors are still confused or unsure of a fact—may jurors commence their own investigation of witnesses. This way counsel is ensured at least initial control over strategy in the presentation of its evidence. This method gives preference to traditional trial procedure; only when necessary, when the traditional procedure is inadequate, are jurors' questions sought.

This method presents a number of difficulties. For one, it is cumbersome and inefficient. Counsel will be required to keep all witnesses available until the jury goes into deliberations in case a juror wishes to ask questions. This is both inconvenient to witnesses and costly for the parties. It also may be difficult for jurors to remember their questions and of whom they wished to ask such questions, especially in protracted litigation. Additionally, the jury may give greater weight to the evidence it elicits at the end of trial over the evidence adduced by counsel. Another problem is posed by counsel's right to cross-examination. If not allowed, counsel may suffer from unfavorable responses or unfavorable questions asked. Counsel similarly suffers if she is unable to re—open her case to present rebuttal testimony, especially if a new issue of fact is revealed by the jury's examinations. The extent to which these difficulties are outweighed by the benefits of this method will depend on the value a court places in traditional trial procedure over juror questions.

Some courts have allowed the jury to recall a witness for questioning after it has gone into deliberations.¹⁶⁶ This method is essentially similar to allowing questions after presentation of evidence except that the problems are greater. Now counsel must keep witnesses nearby until the jury returns with a verdict. The problem of counsel's inability to re-examine is more troubling if the jury's questions reveal where the jury is leaning in its deliberations.

165. See *People v. Knapper*, 230 A.D. 487, 491, 245 N.Y.S. 245, 250 (1930) (allowed on appeal).

166. See *State v. Martinez*, 7 Utah 2d 387, 389-90, 326 P.2d 102, 103 (1958) (specific procedure not questioned; reversal on basis of questions asked). In *Martinez* the jury was allowed to question a witness not called by either party. *Id.* This aspect of the case is described *infra* notes 169-71 and accompanying text. See also *Miller v. Commonwealth*, 188 Ky. 435, 222 S.W. 96 (1920) (procedure not questioned).

A benefit of this method is that any uncertainties the jury encounters in its deliberations may be resolved. Such a system would work best if the court screened jurors' questions not only for admissibility but for whether the issue inquired of has been sufficiently covered during the trial. If so, the court could send the jury back to consider the record before it.

Courts also allow juror questions after counsel's examination of each witness.¹⁶⁷ This method strikes a compromise between unregulated juror interrogation and postponing jurors' questions until after presentation of evidence. It gives respect to traditional trial procedure for each witness by allowing counsel to examine each witness unfettered. Any questions left unresolved after such examination may then be asked by the jury. This method minimizes unnecessary juror questions.¹⁶⁸ Respect for traditional procedure is enhanced if the court is vigilant in screening questions that may be answered later in counsel's presentation of evidence. Counsel may also modify its presentation of evidence based on the kinds of questions jurors ask early in the trial.

The preferred timing of juror interrogation of course depends on a court's preference for traditional procedure or juror questions. The better method likely is some variant of these methods. For example, allowing juror questions only after counsel's examination of each witness and allowing recall of witnesses at the end of the presentation of evidence preserves counsel's control over the presentation of evidence from each witness yet allows the jury the opportunity to resolve its doubts. This would also inform counsel of the jury's leanings and of any areas that require more development.

F. *Whom the Juror Interrogates*

The most radical use of juror interrogation occurred in *State v. Martinez*¹⁶⁹ where the trial court had allowed jurors to question a witness not called by either counsel.¹⁷⁰ This procedure most empowers the jury and most threatens traditional trial procedure. It seems the problems of an adversarial jury and offending the jury by objections are

167. See *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 n.1 (4th Cir. 1986); *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 555-56 (Iowa 1980); *Yeager v. Green*, 502 A.2d 980, 1001 (D.C. 1985). Judge Urbom also advocates this method. See Urbom, *supra* note 1, at 420.

168. *Yeager*, 502 A.2d at 1001.

169. 7 Utah 2d 387, 326 P.2d 102 (1958).

170. The interrogation occurred after the jury had begun deliberations; the jury asked over fifty questions. *Id.* at 389-90, 326 P.2d at 103 (reversing for abuse of discretion).

enhanced when jurors are allowed to choose their own witnesses. No other court has allowed this practice; indeed, the state appellate court reversed this case for abuse of discretion.¹⁷¹

G. *The Scope of the Question*

Beyond the minimal standard that the juror question asked must seek only admissible testimony, some courts place further restrictions on the scope of information jurors may seek. The state supreme court in *State v. Howard*¹⁷² recommended that its courts allow only those juror questions necessary to clarify evidence presented by counsel.¹⁷³ The court in *State v. LeMaster*¹⁷⁴ recommended a more restrictive scope: jurors may ask questions only "for the purpose of clarifying the testimony of that witness."¹⁷⁵

This restrictive standard gives the greatest deference to traditional trial procedure by restricting the jury's interrogation to the evidence adduced by counsel. Under this system, the jury's interrogative function is reduced to the barest minimum—the jury may interrogate only to clarify the evidence presented by counsel.

The federal appellate court in *DeBenedetto v. Goodyear Tire & Rubber Co.*¹⁷⁶ recommended that juror questions be allowed only in cases of compelling need. After reciting a number of problems involving juror questions, the court noted that "the practice of juror questioning is fraught with dangers."¹⁷⁷ Thus, it recommended that a question should be allowed only in "compelling circumstances."¹⁷⁸

Exactly what "compelling circumstances" means is unclear because the court did not apply the standard in that case.¹⁷⁹ The standard seems to be that a judge should allow only those juror questions which speak to a material issue of the case which has not been (or might not be) covered by counsel in its presentation of evidence. This appears to be the standard recommended by the state supreme court in *White v. Little*¹⁸⁰ which stated that "it is not error for a juror to interrogate

171. *Id.*

172. 320 N.C. 718, 360 S.E.2d 790 (1987).

173. *Id.* at 726, 360 S.E.2d at 795.

174. 137 Ariz. 159, 669 P.2d 592 (Ct. App. 1983).

175. *Id.* at ___, 669 P.2d at 597.

176. 754 F.2d 512 (4th Cir. 1985).

177. *Id.* at 516.

178. *Id.*

179. The court noted that the questions asked were generally technical and objective, that counsel did not object to the procedure at trial, and that the questions were not prejudicial. *Id.* at 517.

180. 131 Okla. 132, 268 P. 221 (1928).

witnesses where it is clear that such interrogatories are propounded in good faith and for the purpose of eliciting facts overlooked by counsel."¹⁸¹

This standard gives less deference to traditional trial procedure than the *Howard* standard because it allows the jury to interrogate concerning matters not presented by counsel. But counsel are given the first opportunity to develop the evidence; only when counsel have overlooked (or, perhaps, omitted) issues material to the case will the court rely on jurors as interrogators to develop evidence.

A standard less restrictive than *DeBenedetto* is that standard recommended by the state supreme court in *Lucas v. State*.¹⁸² That court recommended that a judge should allow only those juror questions which would "aid a juror in understanding some material issue involved in the case."¹⁸³ This standard is less restrictive because it allows jurors to interrogate about matters already presented by counsel, so long as the focus is material. Thus jurors assume a greater interrogative role, rising to a level almost equal to counsel in its authority to examine witnesses.

The least restrictive, and apparently most popular, standard allows any question which is admissible by the rules of evidence.¹⁸⁴ As part

181. *Id.* at 134, 268 P. at 222.

182. 381 So. 2d 140 (Miss. 1980).

183. *Id.* at 144; see also *State v. Martinez*, 7 Utah 2d 387, 389-90, 326 P.2d 102, 103 (1958) (court added that juror interrogation should only be allowed in exceptional circumstances). Both of these courts likely envisioned a more restrictive standard than presented here because they both required that the juror initiate the question, see *Lucas*, 381 So. 2d at 144; *Martinez*, 7 Utah 2d at 389-90, 326 P.2d at 103 (juror must indicate a wish that the point be clarified), whereas the *DeBenedetto* court allowed a pre-trial instruction inviting juror interrogation, *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 n.1 (4th Cir. 1986). For the purposes of this schematology this distinction is disregarded.

184. See, e.g., *Nelson v. State*, 257 Ark. 1, 4, 513 S.W.2d 496, 498 (1974) (approves screening of questions for admissibility by the trial judge); *People v. McAlister*, 167 Cal. App. 3d 633, 644, 213 Cal. Rptr. 271, 276 (1985) (court must screen improper questions); *Dolezal v. Goode*, 433 N.E.2d 828, 834 (Ind. Ct. App. 1983) (judge must determine admissibility of question); *Miller v. Commonwealth*, 188 Ky. 435, 441, 222 S.W. 96, 99 (1920) (jury has the right to ask competent questions); *Sparks v. Daniels*, 343 S.W.2d 661, 667 (Mo. Ct. App. 1961) (court must prohibit improper questions); *State v. Sickles*, 220 Mo. App. 290, 293-94, 286 S.W. 432, 433-34 (1926) (court has duty to screen improper questions); *State v. Kendall*, 143 N.C. 659, ___, 57 S.E. 340, 341 (1907) (allow questions which are "not in violation of the general rules established for eliciting testimony"); *State v. Rodriguez*, 107 N.M. 611, 614, 762 P.2d 898, 901 (Ct. App.), reh'g denied, 107 N.M. 546, 761 P.2d 424 (1988) (court shall screen question for impropriety); *Krause v. State*, 75 Okla. Crim. 381, 386-87, 132 P.2d 179, 182 (1942) (court

of this standard one court has ruled that the jury is not restricted to clarifying testimony elicited by counsel; rather, a juror may interrogate on matters not raised by counsel.¹⁸⁵ This standard gives the greatest deference to the jury as interrogators; a juror may ask any question on any matter in the trial so long as the question seeks testimony which is admissible by the court's rules of evidence.¹⁸⁶

H. *The Form of Presentation of the Question*

The area of most controversy concerns the proper form in which to present juror questions, namely, whether they must be written or may be asked by the juror orally.

Under a common procedure for written juror questions, the juror writes out its question and delivers it to the court. The court holds a bench conference with counsel to discuss objections and permissibility of the question submitted. Once the court is satisfied that the question is permissible (or has rephrased the question to proper form) the court asks the question of the witness.¹⁸⁷ This procedure significantly preserves traditional trial procedure. Jurors do not interrogate

must prohibit only those questions which are improper); *Rojas v. Vuocolo*, 142 Tex. 152, 156-58, 177 S.W.2d 962, 963-64 (1944) (court should instruct jury that it will not allow improper testimony); *State v. Anderson*, 108 Utah 130, 133-34, 158 P.2d 127, 128 (1945) (allow questions which are germane and not clearly prejudicial).

185. See *People v. Stout*, 116 Mich. App. 726, 732-33, 323 N.W.2d 532, 536 (1982).

186. Such deference is further enhanced in those courts which allow jurors to question witnesses not called by counsel. See *supra* notes 169-71 and accompanying text.

187. This procedure was recommended in the following cases: *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986); *State v. LeMaster*, 137 Ariz. 159, ___, 669 P.2d 592, 597 (Ct. App. 1983); *State v. Taylor*, 25 Ariz. App. 497, 500, 544 P.2d 714, 717 (1976); *McAlister*, 167 Cal. App. 3d at 637, 213 Cal. Rptr. at 273; *Matchett v. State*, 257 Ga. 785, 786-87, 364 S.E.2d 565, 566-67 (1988); *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 556 (Iowa 1980); *Rodriguez*, 107 N.M. at 614, 762 P.2d at 901; *State v. Howard*, 320 N.C. 718, 726, 360 S.E.2d 790, 795 (1987); *State v. Barrett*, 278 S.C. 414, ___, 297 S.E.2d 794, 795-96 (1982), *cert. denied*, 460 U.S. 1045 (1983).

This procedure was followed in the following cases: *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), *reh'g denied*, 591 F.2d 1343 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); *United States v. Gonzalez*, 424 F.2d 1055, 1056 (9th Cir. 1970); *McAlister*, 167 Cal. App. 3d at 644, 213 Cal. Rptr. at 276; *Yeager v. Green*, 502 A.2d 980, 982 (D.C. 1985); *Cheeks v. State*, 266 Ind. 190, 195, 361 N.E.2d 906, 910 (1977); *Rodriguez*, 107 N.M. at 614, 762 P.2d at 901; *Barrett*, 278 S.C. at ___, 297 S.E.2d at 795.

witnesses, rather, they notify counsel what issues need further development; by its written question the juror indicates what facts it would like elicited. Counsel and court then may take the inquiry and shape it into a proper and unprejudicial form. This aspect of the procedure is especially served if counsel is allowed to follow-up on jurors' questions. Counsel then may elicit testimony on an area the jury wishes development in the manner that best fits counsel's trial strategy.

This procedure answers a significant criticism of juror interrogation. It allows counsel to object to specific questions outside the presence of the jury. Counsel, thus, are better able to screen out prejudicial questions (or at least reshape them into less prejudicial forms) and preserve their objection on the record for appeal without the threat of alienating the jury.¹⁸⁸

A further benefit of this procedure is that it screens out inflammatory questions.¹⁸⁹ Left to ask a question orally, a juror could phrase or intone an otherwise proper question in such a way as to inflame passions or otherwise prejudice the other jurors. If such a question is submitted written to the court first, the court, with the aid of counsel, may reduce the question to a more appropriate and less inflammatory form.

One problem with this procedure is that it is cumbersome, especially when jurors have follow-up questions. This problem was demonstrated in *State v. Barrett*¹⁹⁰ in which the trial court initially received and asked a juror's written question. After the witness's response, the court asked the jury for follow-up questions, whereupon certain jurors asked seven more questions orally.¹⁹¹ Even if a court could maintain the written form, this procedure could significantly prolong a trial, especially if jurors have many questions.

A problem with the court and counsel rephrasing questions is that court and counsel might so rephrase the question that it is no longer the question asked by the juror. A similar incident occurred in *Matchett v. State*.¹⁹² In a murder trial, a juror had informed the court that it wanted to know how much alcohol defendants and the victim had drunk. Rather than ask the question directly, the court allowed the prosecutor to re-examine the witness on the issue. Unsatisfied with

188. See *Yeager*, 502 A.2d at 1001. It is arguable that a jury which has asked a question particularly slanted against one side could figure out who was responsible for having the question rejected. See defendant's argument in *Yeager*. *Id.* at 1000 n.26 (argument is unfounded).

189. See *id.* at 1000.

190. 278 S.C. 414, 297 S.E.2d 794 (1982), *cert. denied*, 460 U.S. 1045 (1983).

191. *Id.* at ___, 297 S.E.2d at 795. A similar problem occurred in *People v. McAlister*, 167 Cal. App. 3d 633, 637-38, 213 Cal. Rptr. 271, 273 (1985).

192. 257 Ga. 785, 364 S.E.2d 565 (1988).

counsel's examination, the juror interrupted and asked the question orally.¹⁹³

It is also possible that court and counsel might so amend the question to acceptable form that it is no longer comprehensible to a lay jury (or even a lay witness). An ancillary problem is that a jury, upon noticing the technical and legal form preferred by the court might decide to write such questions on its own and thereby take more time in phrasing its question than in listening to the testimony.

In one variation of the written question method, after examination of a witness the jury retires to the jury room where it writes out its questions. These questions are delivered to the court by the bailiff whereupon court and counsel discuss admissibility and, if necessary, redact the question. The jury is then returned to the courtroom and the question asked.¹⁹⁴ This variation greatly reduces the chances that the jury may be prejudiced by counsel's objections to certain questions. But it is even more cumbersome and time-consuming than the other procedures mentioned above, especially if the jurors have many questions.¹⁹⁵

There is also a difference of opinion over whether to identify the inquiring juror. One court has required that the identification of the juror be concealed,¹⁹⁶ while another has required the juror to write her name below the question.¹⁹⁷ Concealing the juror's name helps prevent the embarrassment (and consequent alienation) of the questioning juror,¹⁹⁸ although indicating the juror's name would be helpful in identifying a potentially biased juror.

Using written juror questions requires the court to decide who will ask the questions. Usually the judge asks the question, but one court has allowed either counsel to ask the juror's question, upon agreement

193. *Id.* at 786, 364 S.E.2d at 566. The state supreme court disapproved of oral questions, but upheld the decision for lack of prejudice. *Id.* at 786-87, 364 S.E.2d at 566-67.

194. This was the procedure followed by the trial court in *LeMaster*. See *State v. LeMaster*, 137 Ariz. 159, ___, 669 P.2d 592, 596 (Ct. App. 1983). The appellate court approved so long as the jury were instructed not to discuss its questions with each other. *Id.* at ___, 669 P.2d at 597.

195. The *LeMaster* appellate court raised the same criticism. *Id.* at ___, 669 P.2d at 597.

196. See *Yeager v. Green*, 502 A.2d 980, 982 (D.C. 1985).

197. See *State v. Rodriguez*, 107 N.M. 611, 614, 762 P.2d 898, 901 (Ct. App.), *reh'g denied*, 107 N.M. 546, 761 P.2d 424 (1988).

198. *Accord Yeager*, 502 A.2d at 1001.

of the parties.¹⁹⁹ If counsel agree to such a procedure there would seem to be no problems with it. Should counsel fear undue influence, counsel may object and request the judge to ask the question. It is difficult to conceive of when counsel would allow its opponent to ask a juror's question; the possibility of gaining a juror's favor from asking the juror's question would seem too great. One rationale for allowing this procedure would be if one counsel wanted to re-examine the witness and incorporate the juror's question into its examination. But for this reason, though, a court should ask the question itself and minimize the prejudicial effects for either side.

Apparently the more common procedure for taking juror questions, especially among older cases and in courts with no formal procedure, is to allow the juror to ask its question of the witness directly.²⁰⁰ Under a common formal procedure, the juror asks its question and if the court considers the question proper it directs the witness to answer.²⁰¹

199. See *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 556 (Iowa 1980). In *Rudolph*, the court asked if either counsel wanted to ask the question. Defendant's counsel refused and plaintiff's counsel asked the question. *Id.*; see also *Story v. State*, 157 Ga. App. 490, 490, 278 S.E.2d 97, 98 (1981).

200. The following cases allowed oral juror questions without a formal procedure: *United States v. Polowichak*, 783 F.2d 410 (4th Cir. 1986) (procedure disapproved); *United States v. Witt*, 215 F.2d 580 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954); *Ratton v. Busby*, 230 Ark. 667, 326 S.W.2d 889 (1959); *O'Nellion v. Hayes*, 122 Cal. App. 329, 9 P.2d 853 (1932); *Chicago, Milwaukee & St. Paul R.R. v. Krueger*, 23 Ill. App. 639 (1887); *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987), *cert. denied*, 109 S. Ct. 3174, *reh'g denied*, 110 S. Ct. 11 (1989); *Big Sandy & Cumberland Ry. v. Thacker*, 270 Ky. 404, 109 S.W.2d 820 (1937); *Stamp v. Commonwealth*, 200 Ky. 133, 253 S.W. 242 (1923); *Myers v. State*, 522 So. 2d 760 (Miss. 1988); *State v. Sickles*, 220 Mo. App. 290, 286 S.W. 432 (1926); *Sitrin Bros., Inc. v. Deluxe Lines, Inc.*, 35 Misc. 2d 1041, 231 N.Y.S.2d 943 (Cty. Ct. 1962); *White v. Little*, 131 Okla. 132, 268 P. 221 (1928); *Krause v. State*, 75 Okla. Crim. 381, 132 P.2d 179 (1942); *State v. Bradford*, 87 S.C. 546, 70 S.E. 308 (1911); *State v. Jeffries*, 644 S.W.2d 432 (Tenn. Crim. App. 1982); *Byrge v. State*, 575 S.W.2d 292 (Tenn. Crim. App. 1978); *Branch v. State*, 4 Tenn. Crim. App. 164, 469 S.W.2d 533 (1969); *Rojas v. Vuocolo*, 142 Tex. 152, 177 S.W.2d 962 (1944); *State v. Martinez*, 7 Utah 2d 387, 326 P.2d 102 (1958); *State v. Anderson*, 108 Utah 130, 158 P.2d 127 (1945).

The following cases allowed juror questions as part of a formal procedure: *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512 (4th Cir. 1985); *Nelson v. State*, 257 Ark. 1, 513 S.W.2d 496 (1974); *Maggart v. Bell*, 116 Cal. App. 306, 2 P.2d 516 (1931); *Stinson v. State*, 151 Ga. App. 533, 260 S.E.2d 407 (1979) (court prohibit); *People v. Stout*, 116 Mich. App. 726, 323 N.W.2d 532 (1982); *Sparks v. Daniels*, 343 S.W.2d 661 (Mo. Ct. App. 1961).

201. See *DeBenedetto*, 754 F.2d at 515 n.1. Other features of the *DeBenedetto* court's procedure are discussed elsewhere throughout this Comment. See also *Urbom*, *supra* note 1, at 420.

The greatest problem with oral juror questions is that it places counsel in the dilemma of having either to object to an improper question, thereby alienating the juror asking the question, or to allow an improper question. Some courts provide safety mechanisms for this problem. To the extent that such mechanisms exist greatly determines the validity of allowing oral juror questions.

One method many courts employ to address this problem is to require the trial court to interrupt an improper question without need for counsel's objection and to direct the witness not to answer.²⁰² One justification given for this rule is based on the theory that allowing juror questions is permissible as part of a trial court's inherent powers in the administration of justice. When a juror asks a question it represents the court and the court gives it the authority of counsel; thus, in that the court empowers the jury, the court has the duty to regulate the power given. This regulative duty arises from the empowering and thus does not need the request of counsel to be invoked.²⁰³ Other courts, mostly in older decisions, assert that the court has no duty to intervene against improper questions and that counsel must object to preserve the issue for appeal.²⁰⁴

One advantage of requiring counsel to object to improper questions is that it gives the court the opportunity to issue curative instructions,

202. See *People v. McAlister*, 167 Cal. App. 3d 633, 643, 213 Cal. Rptr. 271, 276 (1985) (applied in criminal cases); *Myers*, 522 So. 2d at 762; *Sparks*, 343 S.W.2d at 667; *Sickles*, 220 Mo. App. at 293-94, 286 S.W. at 433-34; *Howard*, 320 N.C. at 725-28, 360 S.E.2d at 794-95; *Krause*, 75 Okla. Crim. at 387, 132 P.2d at 182; *State v. Barrett*, 278 S.C. 414, ___, 297 S.E.2d 794, 796 (1982), cert. denied, 460 U.S. 1045 (1983).

203. *Sparks*, 343 S.W.2d at 667. A similar rationale, based on the court's duty of ensuring a fair and impartial trial, was given in *Sickles*, 220 Mo. App. at 293-94, 286 S.W. at 433-34.

204. See *Prather v. Nashville Bridge Co.*, 286 Ala. 3, 5, 236 So. 2d 322, 324 (1970); *Maris v. H. Crummey, Inc.*, 55 Cal. App. 573, 578-79, 204 P. 259, 261 (1921); *North Chicago St. R.R. v. Burgess*, 94 Ill. App. 337, 341 (1901); *Chicago Hansom Cab Co. v. Havelick*, 131 Ill. 179, 22 N.E. 797 (1889); *Louisville Bridge & Terminal Co. v. Brown*, 211 Ky. 176, 183, 277 S.W. 320, 322-23 (Ct. App. 1925); *Stamp v. Commonwealth*, 200 Ky. 133, 142-44, 253 S.W. 242, 246 (Ct. App. 1923); *State v. Crawford*, 96 Minn. 95, 100-01, 104 N.W. 822, 824 (1905); *Ray v. Collins*, 274 S.W. 1098, 1099 (Mo Ct. App. 1925); *State v. Rodriguez*, 107 N.M. 611, 615, 762 P.2d 898, 902 (Ct. App. 1988).

The *Maris* and *Crawford* cases are noteworthy. In *Maris*, the appellate court asserted that the argument that counsel was in the dilemma of offending the jury or allowing improper questions was groundless. *Maris*, 55 Cal. App. at 578-79, 204 P. at 261. The *Crawford* court asserted that the possibility of counsel offending the jury by objecting was irrelevant. *Crawford*, 96 Minn. at 100-01, 104 N.W. at 824.

correct any errors, and implement procedural safeguards, thereby precluding the need for reversal on appeal.²⁰⁵ The degree of this advantage varies with the effectiveness of curative instructions and the like.²⁰⁶

One court has used a procedure which compromises between these two positions. In *People v. Stout*²⁰⁷ defense counsel objected to a juror's question, the jury was removed, counsel argued its objection, the jury was returned, and the court made its ruling.²⁰⁸ This procedure alerts the court to objections counsel may have (which allows curative measures), yet conceals from the jury the particulars of the objection. The jury still knows who objected, but at least it does not know why. If the court explains to the jury why a question was rejected, juror bias may be reduced further. This procedure still raises the problem of counsel having to object in front of the jury.

One great benefit of oral juror question procedure is that it is efficient. The juror asks its question, the judge screens for impropriety, and the witness responds. Follow-up questions are also easier to accommodate. Hearing the juror ask the question also better reveals any underlying juror bias. The procedure significantly undermines traditional trial procedure; the jury is given equal freedom as counsel to interrogate witnesses (especially if a court allows the jury to call witnesses not examined by counsel).

There are many criticisms of oral juror questions. There is no procedure by which to keep inflammatory questions from reaching the other jurors. Once a juror states its pointed question the damage is

205. This rationale was stated in *Chicago Hansom Cab*, 22 N.E. at 797, and was implicit in *Ray*, 274 S.W. at 1099 (counsel should have objected or requested curative instruction).

206. Some courts assert that curative instructions effectively address the error. See *Maggart v. Bell*, 116 Cal. App. 306, 308-09, 2 P.2d 516, 517 (1931) (juror inquired about defendant's insurance); *Big Sandy & Cumberland Ry. v. Thacker*, 270 Ky. 404, 406-07, 109 S.W.2d 820, 821 (1937) (juror asked about plaintiff's attempts to settle); *Kelly v. Commonwealth Ins. Co.*, 23 N.Y. Super. Ct. 82, 99 (1862) (juror inquired about insurance); *Espinoza v. State*, 73 Tex. Crim. 237, 241, 165 S.W. 208, 210 (1914) (juror asked why defendant did not testify).

Some courts assert curative instructions are ineffective. See *Strawn v. State ex rel. Anderburg*, 332 So. 2d 601, 606 (Fla. 1976) (counsel had asked jury for questions without court permission); *Rojas v. Vuocolo*, 142 Tex. 152, 156-57, 177 S.W.2d 962, 963-64 (1944) (juror inquired about defendant's insurance).

207. 116 Mich. App. 726, 323 N.W.2d 532 (1982).

208. *Id.* at 732, 323 N.W.2d at 535-36.

done.²⁰⁹ But although written questions remove the juror's ability to make its statement in court, there is nothing to ensure the juror will not make the same statement during deliberations, thereby producing the same prejudicial effect. Indeed, hearing the juror's question in court could alert counsel and court to a biased juror.

The written question procedure better handles counsel's objections without prejudicing counsel in the jury's eyes. Even in a court which requires the judge to screen questions, a judge can only be so vigilant and might not see the impropriety counsel sees. Even if counsel is not required to object to preserve the issue for appeal, most courts require the improper question to have been prejudicial to a party's case to merit reversal.²¹⁰ This is a difficult standard for the appellant to meet, especially before an appellate court which did not experience the incident directly. Thus, the oral question procedure will be fair to objecting counsel only to the extent of the trial judge's perceptiveness. Resting trial fairness upon the perceptions of one person is precarious at best.

An example of this problem is found in *Stinson v. State*.²¹¹ That case concerned a criminal trial for possession of marijuana. Defendant was a passenger in a car in which the marijuana was discovered. After the detective who discovered the drug testified, the following exchange ensued:

- Juror: [W]hen you opened the sack [in which the detective found the drug] could you explain what [defendant's] reaction . . . was, as if the man knew it was there, or was it a surprise or what? . . .
- Court: Is your question was it in view if he had looked?
- Juror: Was it in view and did he act as if he knew what was there or if it was a surprise or what? [The court allowed the question; Defense counsel objected that the detective's opinion as to defendant's reaction was inadmissible]
- Court: Well, ladies and gentlemen of the jury, of course, the jurors-it's the discretion of the Court that they can ask questions, but they are subject to the same rules of evidence and objections as if an attorney had asked them. However,

209. See *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1986); *Yeager v. Green*, 502 A.2d 980, 1000 (D.C. 1985); *State v. Martinez*, 7 Utah 2d 387, 390-91, 326 P.2d 102, 104 (1958) (Worthen, J., concurring).

Judge Urbom asserts that this problem is exaggerated, that "[t]he juror merely asks a question; a question, however violative of the rules of evidence, has scant potential in itself for mischief." Urbom, *supra* note 1, at 419.

210. See *infra* note 239 and accompanying text.

211. 151 Ga. App. 533, 260 S.E.2d 407 (1979).

it's the court's opinion . . . that [witness] can say whether the bag of marijuana, as he opened it, was in view—plain view of the person in the passenger side had he looked and what the passenger's reaction was at the time. . . .

Witness: Whenever he was sitting there he made no reaction whatsoever whenever we walked up to the car or when we pulled it out of the brown paper sack. He just more or less turned his head and looked and that was all the reaction he made.

Court: What reaction was there at the time of arrest, if any.

Witness: He never said a word. [Objection from defense counsel]

Court: I asked what his reaction was and, of course, he has a right to remain silent and it should not be held against him. You ladies and gentlemen will not hold it against him, the fact that he made—didn't say anything, so to speak. We don't even know whether he was given an opportunity or not.²¹²

The appellate court relied on this exchange as support for prohibiting juror questions altogether, pointing out the juror's improper questions and the trial court's exacerbation of the damage.²¹³ Possibly had the juror written out the question this exchange would not have occurred. Also, had the trial judge been more vigilant in his scrutiny this exchange could have been better-controlled.

It seems that oral questions could more likely excite the jury and turn jurors into advocates. Jurors who want to become advocates will be encouraged seeing their peers successfully interrogate the witness; not wanting to miss out on such an opportunity they will want to join in the questioning.

Another problem with jurors asking their own questions is that a juror, not educated in the rules of evidence, may be unable to phrase a question properly. This problem arose in *Branch v. State*.²¹⁴ In that murder case defendant argued self-defense, claiming the victim had wielded a knife. A juror wanted to know where the knife was but phrased the question in such a way as to require hearsay.²¹⁵ The trial court intervened and instructed the juror and defendant against using hearsay testimony. Despite many attempts, the juror and defendant were unable to choose the correct words.

This problem may be addressed if the court intervenes and asks the question itself in proper form. This solution requires a skillful judge;

212. *Id.* at 535, 260 S.E.2d at 409.

213. *Id.* at 536-37, 260 S.E.2d at 410.

214. 4 Tenn. Crim. App. 164, ___, 469 S.W.2d 533, 534 (1969).

215. *Id.*

one who can phrase the question to satisfy the jury and both counsel and to elicit a suitable response from the witness.

I. *Explanation of Rejected Question*

One method for addressing potential juror prejudice resulting from a rejected question is for the court to explain to the jury why a question has been rejected.²¹⁶ The trial court in *Yeager v. Greene*²¹⁷ employed this method by delivering to the jury, upon rejection of a question, the following specific instruction:

Ladies and Gentlemen, I have decided not to ask this witness a question written out by one of the jurors because the question is not legally proper. I do not know what the answer to the question would have been, and I must direct the juror who submitted the question not to guess or speculate about the answer because it is not relevant to your consideration of this case. That juror must put the question out of his or her mind and may not consider it or discuss it with other jurors during deliberations.²¹⁸

Although the principle of explaining why a question was rejected is valid, issuing such a rigid instruction would seem ineffective if not more damaging. Because the question was written and not revealed to the other jurors, it seems the first thing the jurors would do upon entering deliberations would be to find out what was the question and then to speculate why it was rejected. It is questionable whether "not legally proper" will satisfy a juror's curiosity. If many questions are rejected for various reasons, this instruction will begin to lose its value after a few recitations. Eventually, the jury will figure out that it is a stock response and likely will ignore it and speculate among themselves the true reason for rejection and what was the forbidden answer.

Explaining to jurors why a question has been rejected would help to reduce jury speculation, whether the question was written or oral. For example, if a juror inquires about the defendant's insurance in a personal injury action or inheritance or taxes in a wrongful death action then it would resolve some questions in the jurors' minds if the court explained that the jury is not supposed to consider such matters.²¹⁹ If a juror asks why a criminal defendant did not testify it could be

216. See, e.g., *Yeager v. Green*, 502 A.2d 980, 1003 (D.C. 1985); *Story v. State*, 157 Ga. App. 490, 490, 278 S.E.2d 97, 98 (1981); see also, Urbom, *supra* note 1, at 418.

217. 502 A.2d 980 (D.C. 1985).

218. *Id.* at 1006.

219. In this case the *Yeager* instruction could be appropriate.

helpful to explain that a defendant has a constitutional right not to testify and that the State must prove its case against the defendant.²²⁰ Such an explanation would not necessarily prevent speculation by the jury, but it is an effort, and certainly does not hurt.

J. Re-examination of the Witness

Some courts expressly allow counsel to re-examine the witness after juror interrogation.²²¹ Of these courts, some restrict the scope of counsel's re-examination to the subject-matter raised by the juror question and the witness's answers; others do not.²²²

Allowing counsel to re-examine a witness after juror interrogation favors traditional trial procedure, unrestricted examination more so than examination restricted to the subject-matter of the juror question. The juror questions alert counsel to matters that may need further development with such development (to the extent it is not achieved by the juror question itself) achieved by the traditional procedure of evidence presentation. Re-examination serves a function similar to cross-examination. Counsel are given the opportunity to develop a witness's response beyond the scope of a juror's question; in this way counsel may mitigate any prejudicial effects of a witness's answer or a juror's question. This function becomes more important when the jury is more likely to be adversarial in its interrogation.

The problem with this procedure is that it consumes time. Counsel and jury could examine and re-examine for many rounds, especially in a complex trial with recalcitrant witnesses. The trial court will have to terminate the examination at some point. Thus, the effectiveness of the procedure requires a conscientious judge who can determine when the examination has become repetitive.

220. In this case the *Yeager* instruction might not be adequate. Judge Wright offered these hypothetical cases as examples of the need for personalized explanations. Wright Interview, *supra* note 15.

221. See *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 n.1 (4th Cir. 1985) (oral question); *State v. LeMaster*, 137 Ariz. 159, ___, 669 P.2d 592, 597 (Ct. App. 1983) (written question); *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 556 (Iowa 1980). Judge Urbom also recommends this procedure. See Urbom, *supra* note 1, at 420.

222. One court which so restricted was *LeMaster*, 137 Ariz. at ___, 669 P.2d at 597. Courts which did not so restrict include: *DeBenedetto*, 754 F.2d at 515 n.1; *Rudolph*, 293 N.W.2d at 556.

K. Objections

A contentious issue arising from juror interrogation concerns the dilemma faced by counsel who wish to object to the juror question procedure or to specific questions but who do not wish to alienate the jury. For reasons discussed below, objections to specific questions pose greater problems than objections to the use of juror questions generally.

Counsel faces this objection dilemma respecting juror question procedure in courts which require objection to preserve the matter for appeal.²²³ This problem is greater when a court holds counsel's failure to object to the procedure at the beginning of trial to be implicit consent to the procedure, thus barring an objection later in the trial.²²⁴

223. See, e.g., *DeBenedetto*, 754 F.2d at 515 (counsel could have objected to procedure at some point in trial outside of presence of jury); *Coffey v. Sutton*, 175 Ill. App. 331, 342 (1912) (must object at time or in motion for new trial); *Rudolph*, 293 N.W.2d at 555 (counsel had objected in post verdict motion for new trial); *State v. Williamson*, 247 Ga. 685, 686, 279 S.E.2d 203, 204 (1981) (could have objected after court's instruction to jury when jury in recess); *State v. Rodriguez*, 107 N.M. 611, 615, 762 P.2d 898, 902 (Ct. App.), *cert. denied*, 107 N.M. 546, 761 P.2d 424 (1988) (counsel could have requested bench conference or hearing without presence of jury); see *People v. McAlister*, 167 Cal. App. 3d 633, 643, 213 Cal. Rptr. 271, 275-76 (1985) (counsel objected after court instruction to jury); *Sitrin Bros., Inc. v. Deluxe Lines, Inc.* 35 Misc. 2d 1041, 1042, 231 N.Y.S.2d 943, 945 (1962) (counsel objected after jury retired); *White v. Little*, 131 Okla. 132, 133, 268 P. 221, 222 (1928) (counsel objected in motion for new trial); *Krause v. State*, 75 Okla. Crim. 381, 386, 132 P.2d 179, 181-82 (1942) (counsel objected after sixth jury question). See generally Annotation, *supra* note 10, at 889-90.

Conversely, some courts require objection when the trial court prohibits the use of juror questions. See, e.g., *Dolezal v. Goode*, 433 N.E.2d 828, 833 (Ind. Ct. App. 1982) (counsel objected after court instructed jury it might not ask questions); *People v. Wesley*, 148 Mich. App. 758, 761, 384 N.W.2d 783, 784 (1985), *aff'd*, 428 Mich. 708, 411 N.W.2d 159, *cert. denied*, 484 U.S. 967 (1987); *People v. Charles*, 58 Mich. App. 371, 379, 227 N.W.2d 348, 353 (1975).

224. One court has held that if counsel invites juror questions and then does not immediately object to a specific question, the procedure is presumed to have caused no prejudice to such party. *Superior & Pittsburgh Copper Co. v. Tomich*, 19 Ariz. 182, 188, 165 P. 1101, 1104 (1917), *aff'd*, 250 U.S. 400 (1919), *rev'd on other grounds*, 22 Ariz. 543, 199 P. 132 (1921). Another court has made the sensible ruling that counsel who consents to a juror's question may not later object to the procedure. *Singleton v. State*, 48 Okla. Crim. 276, 286, 291 P. 145, 149 (1930). One court has ruled that counsel's failure to object to the procedure constitutes counsel's implicit consent to the procedure, thereby barring appeal. See *Wallace v. Keystone Auto. Co.*, 239 Pa. 110, 119, 86 A. 699, 701-02 (1913) ("tacit permission"). See generally Annotation, *supra* note 10, at 882-83.

Counsel faces less of a problem in courts which do not require objection to preserve the matter for appeal.²²⁵

A requirement of procedural objections made to the trial court is beneficial for giving the trial judge, who has the greatest familiarity with the needs and problems of the trial, the opportunity to respond to the objection and attempt a remedy. This increases judicial efficiency by ensuring that only one trial will be necessary (by preventing the need for a new trial) and reducing the number of appeals.

As discussed above, the problem of procedural objections can be addressed via a pre-trial conference. Counsel may be forewarned of the use or prohibition of juror questions and in conference the court may hear counsels' objections, establish a record for appeal, or even tailor the juror interrogation procedure to a mutually agreeable form.²²⁶

Counsel's dilemma is most acute concerning objections to specific questions and to juror bias. Because such objections cannot be anticipated counsel faces the dilemma during trial and before the jury. For evidentiary objections, this problem is greatest in courts which require objections to preserve the matter for appeal.²²⁷ Even in courts

225. See, e.g., *Ratton v. Busby*, 230 Ark. 667, 679, 326 S.W.2d 889, 896 (1959) (counsel had been forewarned of jury question but did not object until motion for new trial on third day of trial); *State v. Barrett*, 278 S.C. 414, ___, 297 S.E.2d 794, 796 (1982), cert. denied, 460 U.S. 1045 (1983) (court had improperly allowed oral questions; counsel objected after seventh oral question in motion for mistrial); *State v. Martinez*, 7 Utah 2d 387, 326 P.2d 102 (1958); cf. *Scheel v. State*, 350 So. 2d 1120, 1121 (Fla. Dist. Ct. App. 1977) (appellant must prove jury question denies fair trial).

226. The pre-trial conference method was used in *Yeager v. Green*, 502 A.2d 980 (D.C. 1985), where immediate appeal was had via writ of mandamus.

227. The following courts have required objections be made to preserve the matter for appeal: *Prather v. Nashville Bridge Co.*, 286 Ala. 3, 5, 236 So. 2d 322, 324 (Ala. 1970); *Maris v. H. Crummey, Inc.*, 55 Cal. App. 573, 578, 204 P. 259, 261 (1922); *Louisville Bridge & Terminal Co. v. Brown*, 211 Ky. 176, 183, 277 S.W. 320, 322-23 (1925); *Stamp v. Commonwealth*, 200 Ky. 133, 143, 253 S.W. 242, 246 (1923); *State v. Crawford*, 96 Minn. 95, 100, 104 N.W. 822, 824 (1905); *Sparks v. Daniels*, 343 S.W.2d 661, 666-67 (Mo. Ct. App. 1961) (trial court ruled objection must be made once question asked; appellate court reversed); *Ray v. Collins*, 274 S.W. 1098, 1099 (Mo. Ct. App. 1925) (counsel could have avoided offending juror); *Rodriguez*, 107 N.M. at 615, 762 P.2d at 902 (counsel could have requested bench conference or hearing without presence of jury); *Singleton v. State*, 48 Okla. Crim. 276, 286, 291 P. 145, 149 (1930); see also Annotation, *supra* note 10, at 889-90.

The following courts did not require immediate objection to preserve the matter for appeal: *Ratton*, 230 Ark. at 682, 326 S.W.2d at 898 (counsel did not object until motion for new trial); *People v. McAlister*, 167 Cal. App. 3d 633, 643, 213 Cal. Rptr. 271, 276 (1985) (applied in criminal cases); *Myers v. State*, 522 So. 2d 760, 762 (Miss. 1988); *Sparks*, 343 S.W.2d at 666-67 (trial court ruled

which do not require objections, the problem arises because counsel is not guaranteed a reversal on appeal. Thus, counsel's dilemma is to object to a question to prevent prejudice but risk juror alienation or avoid juror alienation by not objecting and hope for no prejudice or a remedy on appeal.

To a degree this problem is resolved by requiring written juror questions.²²⁸ Despite this device, jurors could figure out who objected, especially with pointed questions, and discuss among themselves in deliberations who asked what questions.

Judge Wright, Chief Judge of the United States District Court for the Western District of Missouri, allows oral questions and attempts to resolve this dilemma in a three-step process. He scrutinizes the jurors' questions himself and rejects outright those he deems impermissible. On what he perceives to be close questions, Judge Wright calls counsel to the bench for objections and conference. For other questions, he watches counsel during juror interrogation and as soon as he sees counsel about to object he calls a bench conference.²²⁹

Judge Wright's method is valuable for focusing objections on the judge; throughout the trial the jury sees only the judge calling conferences and screening questions.²³⁰ This method works best with vigilant judges who pay close attention to the progression of the trial and who are sensitive to counsels' concerns. Most objections could be covered through the first two steps of Judge Wright's method. The third step addresses borderline questions. It is imperfect because a judge cannot always catch counsel as they are about to object. It also does not catch those questions to which counsel do not overtly object for fear of alienating the jury. But for oral questions it is probably the best method.

Another possible way to address the objection dilemma for oral juror questions would be to install a mechanical device which would allow counsel to indicate its objections to the judge out of the jury's sight. There is a question, though, whether the expense of such a system would be justified.

objection must be made once question asked; appellate court reversed); *State v. Howard*, 320 N.C. 718, 360 S.E.2d 790, 794-95 (1987); *Krause*, 75 Okla. Crim. at 387, 132 P.2d at 182; *Barrett*, 297 S.E.2d at 796 (S.C. 1982); see also Annotation, *supra* note 10, at 891-92.

228. This method was recommended in *State v. LeMaster*, 137 Ariz. 159, ___, 669 P.2d 592, 597 (Ct. App. 1983).

229. Wright Interview, *supra* note 15.

230. It is arguable, though, that a judge cannot always notice counsel and that the jury could sometimes figure out which counsel prompted the conference (if the judge saw it the jury probably saw it too).

Similar problems arise with respect to juror bias. Sometimes a juror's questions may reveal bias. Counsel is then faced with the dilemma of objecting to the biased juror and thereby suffering that juror's alienation if unsuccessful or suffering the juror's possible bias by not objecting. Concerning juror bias courts have generally required that counsel object either immediately or at some point during the trial to preserve the matter for appeal.²³¹

Requiring an objection at trial makes sense. Immediate objection allows a court to attempt a curative measure to address potential bias.²³² Because the trial judge is more familiar with the jurors and the progress of the trial, the trial judge, not the appellate court, is in the best position to determine whether a juror is biased. Also, it is unfair for objecting counsel to wait and determine whether the trial is going against its client before objecting to a biased juror.

Counsel's dilemma can be addressed if the court provides a time outside the presence of the jury for counsel to make its objection. This was done in *State v. Jeffries*²³³ where a juror had indicated possible bias by remarking "if I had somebody working for me and they had some offense committed . . ." ²³⁴ At the next jury recess counsel was allowed to move for a mistrial.²³⁵

L. Appellate Review

Appellate courts have taken a variety of approaches to reviewing juror question cases. For some courts, especially when juror questions are first used, certain actions are deemed outright reversible error such as the trial judge's failure to screen *sua sponte* prejudicial questions,²³⁶

231. Courts which have required immediate objection include: *Chicago Hansom Cab Co. v. Havelick*, 131 Ill. 179, 22 N.E. 797 (1889); *North Chicago St. R.R. v. Burgess*, 94 Ill. App. 337, 341 (1901) (counsel did not object until motion for new trial); *Chicago, Milwaukee & St. Paul R.R. v. Krueger*, 23 Ill App. 639, 643 (1887) (ruling that failure to object and allowing trial to continue constitutes waiver). One court which allowed objection later in the trial was *Big Sandy & Cumberland Ry. v. Thacker*, 270 Ky. 404, 407, 109 S.W.2d 820, 821 (1937) (counsel moved to discharge jury after presentation of evidence); *see also* Annotation, *supra* note 10, at 883-85.

232. *Chicago Hansom Cab Co.*, 131 Ill. at 181, 22 N.E. at 797.

233. 644 S.W.2d 432 (Tenn. Crim. App. 1982).

234. *Id.* at 434.

235. *Id.* at 434-35 (motion was denied; reversed on appeal).

236. *E.g.*, *State v. Sickles*, 220 Mo. App. 290, 292-93, 286 S.W. 432, 433 (Mo. Ct. App. 1926) (juror inquired about the criminal defendant's nationality and asked how long he had lived in the United States; counsel did not object); *Rojas v. Vuocolo*, 142 Tex. 152, 156, 177 S.W.2d 962, 964 (1944) (juror inquired of defendant's insurance; counsel did not object).

allowing oral questions,²³⁷ and prohibiting juror interrogation.²³⁸ Generally, courts will not reverse a trial court decision unless the appellant can prove prejudice.²³⁹ How much prejudice must be shown will vary with the appellate court's opinion of juror questions (the less favored the procedure the less prejudice need be shown). Examples of prejudicial error or abuse of discretion include cases where the jury at the court's invitation had asked over fifty questions and interrogated a witness not called by either counsel,²⁴⁰ where jurors had asked biased, prejudicial, and argumentative questions and "assumed the role of prosecutor,"²⁴¹ and where a juror had asked the victim why it took so long to identify the criminal defendant in court.²⁴²

237. *Story v. State*, 157 Ga. App. 490, 490, 278 S.E.2d 97, 98 (1981).

238. *E.g.*, *People v. Heard*, 388 Mich. 182, 188, 200 N.W.2d 73, 76 (1972); *cf. Cherry v. State*, 258 Ind. 298, 300, 280 N.E.2d 818, 820 (Ind. 1972) (not error for court to refuse to instruct jury on right); *Dolezal v. Goode*, 433 N.E.2d 828, 833 (Ind. Ct. App. 1982); *People v. Charles*, 58 Mich. App. 371, 379, 227 N.W.2d 348, 353 (1975) (if counsel does not object to prohibition at trial and there is no prejudice, then the appellate court will not reverse).

239. *See, e.g.*, *United States v. Gray*, No. 89-2053 (8th Cir. March 5, 1990) (1990 WL 19093); *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 517 (4th Cir. 1985); *State v. LeMaster*, 137 Ariz. 159, ___, 669 P.2d 592, 598 (Ct. App. 1983); *People v. McAlister*, 167 Cal. App. 3d 633, 643, 213 Cal. Rptr. 271, 272 (1985); *O'Nellion v. Haynes*, 122 Cal. App. 329, 9 P.2d 853 (Cal. Dist. Ct. App. 1932); *Scheel v. State* 350 So. 2d 1120, 1121 (Fla. Dist. Ct. App. 1977) (appellant must show the procedure denied him a fair trial); *Matchett v. State*, 257 Ga. 785, 787, 364 S.E.2d 565, 567 (1988); *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 555 (Iowa 1980); *People v. Stout*, 116 Mich. App. 726, 733, 323 N.W.2d 532, 536 (1982); *Myers v. State*, 522 So. 2d 760, 762 (Miss. 1980); *Smith v. State*, 81 Okla. Crim. 412, 419, 165 P.2d 381, 385 (1946); *White v. Little*, 131 Okla. 132, 134, 268 P. 221, 222-23 (1928); *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Ct. Crim. App. 1978) (juror asked question without permission of the court).

The Eighth Circuit in *Gray* has described the policy behind review for prejudice as follows:

A trial is a search for truth, subject to the burdens of proof imposed upon the parties and the requirements prescribed by the Constitution and the law. Trial judges must have substantial latitude in overseeing this search and they should be reversed on matters of trial procedure only when prejudice to one party or the other affects the outcome of the litigation.

Gray, 1990 WL 19093, at 2.

240. *State v. Martinez*, 7 Utah 2d 387, 389, 326 P.2d 102, 103 (1958) (counsel had not objected at trial).

241. *Krause v. State*, 75 Okla. Crim. 381, 132 P.2d 179 (1942).

242. *People v. Wilds*, 141 A.D.2d 395, 397, 529 N.Y.S.2d 325, 326-27 (1988).

One court has developed a specific test for determining prejudice from juror interrogation.²⁴³ The court examines three factors: the degree to which counsel was unable to object to improper testimony for fear of offending the jury; the degree to which a juror has lost its objectivity and become biased; the degree to which there was tension or antagonism between the juror and a witness.²⁴⁴ By balancing these factors the court determines the prejudice suffered by appellant.

IV. MODEL JUROR INTERROGATION PROCEDURE

Drawing from the variety of juror interrogation procedures used by United States courts as described in Section III, this section provides a model integrated juror interrogation procedure. This model adopts those procedures that most effectively enhance the jury's role in a trial for the purpose of improving juror understanding of the facts in issue, but defers to counsel's strategy concerns when such do not interfere with the jury's need to know. The model strikes a balance between the desire for full juror information and the need for substantial trial fairness.

A. *Pre-trial Warning to Counsel and Hearing for Objections*

When a judge first implements a juror question procedure the judge should notify all counsel with cases pending. Such notification should be given reasonably early to allow counsel adequate time to develop objections. The judge then should hold a pre-trial hearing on the matter to hear and rule on any objections or even to fashion an interrogation procedure satisfactory to all parties.

Such a notice and hearing allows counsel to object to juror questions outside the presence of a jury and allows the judge to consider fully-developed objections from counsel. Pre-trial hearings allow counsel to appeal the issue immediately; the appellate courts then may decide on the permissibility of juror questions before any trial begins. Upon the appellate court's decision, the trial judge may conduct the trial either with juror questions sanctioned by the superior courts or without juror questions forbidden by those courts.

Eventually, of course, as the appellate courts address all counsels' objections pre-trial notice and hearing will become unnecessary. But when juror interrogation is first attempted, it is helpful to address objections to the procedure at the beginning.

243. *People v. McAlister*, 167 Cal. App. 3d 633, 213 Cal. Rptr. 271 (1985).

244. *Id.* at 645, 213 Cal. Rptr. at 277.

B. Pre-trial Instruction to the Jury

The jury should be informed of its right to ask questions and the proper procedure to follow. Uninformed jurors might not ask questions troubling them and the whole purpose of juror questions is lost. To ensure orderliness of interrogation, the court must inform the jurors when and how to ask their questions.

Juror interrogation should supplement traditional evidentiary procedure; therefore, the court should instruct the jury that its primary duty is to decide the facts from the evidence presented by counsel. The court should instruct the jury that at the end of counsel's examination of each witness the judge will ask for questions from the jury. A juror who has a question should raise his hand and when recognized by the judge ask the question. The judge will determine whether the question is permissible. If it is, the judge will allow the witness to answer. If impermissible, the judge will either rephrase it or will tell the jury why the question was rejected. Such an instruction may read as follows:

During the trial each side will present witnesses and evidence for what they believe are the facts in this case. From these presentations you must decide for the court what are the true facts in this case and give us your verdict. After each side has questioned a witness I will ask you if you have any questions. If you are confused about something the witness said, raise your hand and I will let you ask your question. Sometimes your question will be legally improper. If so, I will either try to rephrase it or will tell you why you cannot ask it.

C. Allow Juror Questions After the Examination of Each Witness

The court should allow juror interrogation of a witness immediately after both counsel have examined the witness. Taking juror questions after the examination of each witness provides a compromise between counsel's and the jury's concerns. Counsel gets to control each witness's testimony and the jurors get to ask their questions when the questions are still fresh in their minds and the witnesses are still available.

D. Allow Any Proper Question

Jurors' interrogation should be limited only by the rules of evidence. The purpose for juror questions is to enhance the jury's knowledge of the case. So long as the inquiry is proper, the jury should be free to clarify any matters of confusion. The rules of evidence ensure that only legally proper evidence goes to the jury. Other constraints speak only to counsel's strategy for presentation of evidence. Such consideration should not supersede a juror's need to know.

One concession may be made to counsel's strategy concerns. A judge may ask a juror to delay a particular inquiry until counsel has had a chance to develop the evidence more fully. This deference is useful in complex cases where a number of witnesses will testify on an issue and the juror's question does not concern the specific testimony of the one witness. This allows counsel the fullest opportunity to inform the jury in the manner counsel chooses; only when that effort proves ineffective need jurors ask their questions.

E. Allow Oral Questions

The court should allow jurors to ask their questions orally. Written juror questions allow counsel to object away from the jury and help withhold inflammatory questions from other jurors. Still, the jury may be able to discern who objected to what question and jurors may discuss each other's rejected questions in deliberations. Although the virtue of a written question procedure is that it controls interrogation, it may control too much. The cumbersome procedure of writing out all questions, waiting for court and counsel to edit and choose certain questions, and then hearing the question asked may prove too much for some jurors, causing them to withhold some questions. If the court and jury are miscommunicating, the court's edited questions may not be what the jury intended to ask. The jury then must re-submit its questions in another form. If the court fails on the second round the cycle repeats, consuming a great amount of time to no one's satisfaction.

Oral questions allow direct communication between the juror and the witness. Such direct communication enhances understanding between them. The procedure is less cumbersome; questions and follow-ups are easily accommodated. It is also likely that jurors would prefer asking their own questions themselves. Although jurors may ask inflammatory questions, such questions likely would have been asked in deliberations anyway. At least in open court, the judge and counsel can detect the bias and attempt a remedy. Such statements also are preserved for appeal. The problem of counsel's need to object is addressed in large part by the judge's role in the procedure, as discussed in the next subsection.

F. The Judge Screens the Questions

For oral questions to work properly, namely, to be fair to the parties, the judge must be vigilant in rejecting improper questions. The judge must prohibit *sua sponte* clearly improper questions. On close questions, the judge should confer with counsel at the bench. In considering whether to call up counsel, the judge should defer to counsel's concerns. Even if the judge believes there is no valid objection,

if the judge believes either counsel may want to object, the judge should call counsel to the bench. For other questions, the judge should be alert for counsel's objections; if either rise to object, the judge should immediately call both up for a conference.²⁴⁵

Ultimately, even the best judge will not be able to catch all possibly improper questions. Thus counsel may be forced to object to certain questions. The court should require counsel to object. The objection allows the judge to attempt an immediate remedy. Objection also is fairer to the parties because it prevents one side from waiting out the verdict before searching for a basis for appeal. The court can reduce the prejudicial effects of such objections by requiring counsel only to request a bench conference to raise its objections.²⁴⁶

G. Explain Rejected Questions

When a judge rejects a juror's question, the judge should explain the rejection to the jury. Such an explanation helps prevent speculation by the jury, both as to the reasons for the rejection and the forbidden answer. The explanation also could help clarify for the jury what may appear labyrinthine and abstruse rules of evidence. Such clarification could render the trial process generally more understandable.

The explanation should not be a stock response, stating merely that the question asked is not permitted. The judge should explain to some extent why a question was rejected, for example, that a defendant has a constitutional right not to testify or that insurance is not a necessary factor for the jury's determination of damages.

H. Allow Counsel Re-examination

After the jury's interrogation, counsel should have the opportunity to re-examine the witness via the usual procedure for direct and cross examination. Counsel's re-examination should be restricted to the scope of the subject-matter of the jury's questions. This procedure maintains fairness to the parties by allowing counsel to address issues raised by the jury and promotes trial efficiency by precluding excessive, unrestrained examination and re-examination.

After counsel's re-examination, the jury should have no more questions. If they do, the court should hear them. The primary concern is the jury's understanding, which concern is paramount to trial efficiency. If the jury is confused about a matter or wishes further

245. This is substantially the procedure followed by Judge Wright. See *supra* note 229 and accompanying text.

246. Judge Urbom also recommends this method for objection. See Urbom, *supra* note 1, at 421.

information, the jury should be accommodated. But the jury's questions on re-interrogation should be restricted to the scope of the subject matter raised in counsels' re-examination. The jury already will have been given an opportunity to ask any permissible question. They should not need two such opportunities for the same witness. The jurors should have no further questions except those raised by counsels' re-examination. If confusion persists in the jurors' minds, then such confusion is part of the case and the jurors must take it with them into deliberations.

If the court allows re-interrogation, the court should also allow counsel the opportunity for another re-examination in the manner described above. Such subsequent rounds seem very unlikely; the court will have great discretion in determining when further examination by counsel and the jury is unnecessary.

I. Appellate Review

Because so much of juror question procedure is controlled by the trial court, there will be little room for appellate review. An appellate court generally will be left to find abuse of judicial discretion and prejudice to appellant to affect a decision. The initial stage of review must occur at the trial level after the jury has rendered its verdict. Through the use of a motion for a new trial or judgment n.o.v., counsel can make their arguments that certain jurors were biased or that the trial generally was unfair. Based upon his perception of the jurors' questions and responses to witnesses and counsel, the judge can decide the prejudice to the appealing party. In making this decision, the judge should consider the extent of bias or partiality in the jurors' questions and the degree of antagonism between jurors and counsel or witnesses, balanced against the weight of the evidence supporting the jury's verdict.²⁴⁷

On appeal, the appellate court must use the same standard. In other words, the appellate court really can only review the trial court's decision for abuse of discretion. It has but a cold transcript to decide matters that only those present in the court room could fully perceive. As such, the appellate court cannot determine prejudice or bias as well as the trial judge who heard the statements.

247. This standard is substantially the same as that stated in *People v. McAlister*, 167 Cal. App. 3d 633, 645, 213 Cal. Rptr. 271, 277 (1985), discussed *supra* notes 243-44 and accompanying text.

V. CONCLUSION

The fate of juror questions is as yet untold; judgment shall come only from time and experience. To date, experience has not shown juror interrogation to be a perfectly good or perfectly bad procedure. Nor has any one method of integrating juror questions into traditional trial procedure proven best. Juror questions work well in some cases and poorly in others; some techniques are best in some circumstances rather than others. For now, each judge must choose for himself or herself whether and how to use juror questions. In Section IV this Comment presented a model procedure from which a judge may work.

In devising a procedure for implementing juror questions, a judge should consider the goals sought and the perils to be avoided. At its best, juror interrogation can enhance the information on which the jury bases its verdict. By its questions, the jury can seek out important but neglected information, clarify matters of confusion, and indicate areas of misunderstanding and miscommunication. To the wary ear, jurors' questions can reveal underlying bias and improper considerations. But the jury uncontrolled can become a roving commission led by improper evidence and inflamed passions to unjust verdicts.

The most essential element in juror interrogation procedure is the trial judge. Only by the active role of the judge—screening improper questions, consulting counsel when necessary, and watching for bias and prejudice—can juror interrogation function properly and fairly. Counsel cannot be relied on exclusively to govern the procedure because counsel are in the dilemma of risking juror alienation from frequent objection. Judicial vigilance is the essential assurance of proper juror interrogation.

How active a role a judge is willing to take will determine the procedure for juror interrogation. A judge unwilling to monitor a trial more than the usual amount should not allow juror questions. The more willing a judge is to participate in trial procedure, the more liberal the juror interrogation procedure may be. The survey of procedures presented in Section III provide a wide range from which a judge may choose. Section IV presents a model procedure for consideration. And there certainly is room for more judicial innovation.

Whether to implement juror questions is an issue only the trial judge can decide. The appellate courts cannot decide for the trial courts. A successful juror interrogation procedure greatly depends on the trial judge's ability; only by the judge's careful regulation can juror interrogation operate fairly and properly. To force the practice on an unwilling judge is to invite all the problems of juror questions with little of the benefits. Experience with juror questions, however, has not shown the procedure to be so inherently prejudicial as to merit absolute prohibition. To deny a willing judge the opportunity to test juror questions

denies the courts a possibly beneficial judicial innovation. The ultimate judgment on juror questions can come only from the trial courts.

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