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Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?

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NOTES

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I. INTRODUCTION

Question: Mr. Smith, you have claimed that your ex-wife and her boyfriend were shot accidentally?
Answer: That is correct.
Q: Did the gun you were carrying have a safety?
A: Of course it did.
Q: Was that safety on when you first picked up the gun?
A: Yes it was.
Q: Was the safety on when you approached the victims?
A: No, it was not.[1]

The above line of questioning destroyed the defendant's chance of being acquitted.[2] Surprisingly, however, the questions that sealed the defendant's fate were raised by a juror after the prosecutor had failed to elicit the devastating facts.[3]

The notion of allowing jurors to question witnesses during a trial is not a novel one,[4] but the governmental entities responsible for supervising the court system never have encouraged the practice.[5] As a result, juror questioning is not widespread.[6] This situation, however, may be changing. During 1989 judges in at least thirty states, including New York, California, and Connecticut, agreed to conduct the first nationwide experiment in which jury members could question witnesses in both civil and criminal trials and inform the judges of any need for additional information.[7] The experiment has generated significant na-

1. This exchange was adapted from a *New York Times* description of a Wisconsin case in which the defendant was charged with shooting his ex-wife and her boyfriend. Wiehl, *The Law: After 200 Years, the Silent Juror Learns to Talk*, N.Y. Times, July 7, 1989, at B5, col. 3. The *New York Times* reported that the defendant "denied that he had ever intended to fire his weapon." *Id.*

2. *Id.*

3. *Id.*

4. Federal courts have allowed jurors to question witnesses in certain situations since 1954. *See* United States v. Witt, 215 F.2d 580 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954). One of the first reported cases allowing the practice was in 1907. *See* State v. Kendall, 143 N.C. 659, 57 S.E. 340 (1907). Some sources believe, however, that judges began allowing jurors to ask questions as early as the 1890s. *See, e.g.*, Maxwell, *Researching Jury Participation*, A.B.A. J., Dec. 1989, at 36.

5. Maxwell, *supra* note 4, at 36. *See generally* Annotation, *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 A.L.R.3d 872 (1970).

6. *See* P. DIPERNA, JURIES ON TRIAL 231 (1984); Maxwell, *supra* note 4, at 36; Annotation, *supra* note 5, at 872.

7. Wiehl, *supra* note 1, at B5, col. 3. The study involved more than 500 trials. *Id.* A $100,000 grant by the American Judicature Society and the State Justice Institute financed the study.

tional media attention and has sparked public debate among trial lawyers, judges, and jury psychologists.[8]

The jury's basic function is to resolve the questions of fact presented during the course of the trial and to do so within established trial procedure.[9] The jury is, however, under two severe handicaps. First, courtroom procedures often are foreign to the members of the panel. Second, attorneys present evidence through one-way communication—the attorneys talk and the jurors listen.[10] In most courtrooms in the United States today, two-way communication is allowed between the members of the jury and the lawyers only when the jury renders a verdict.[11] Considering that most interpersonal encounters in daily life use two-way communication, the one-way communication process utilized in American courtrooms is unusual.[12]

Researchers have concluded that two-way communication, in which one person talks while the other listens and eventually responds, is essential to transferring information from one person to another.[13] When people have direct conversations, they have an opportunity to refine and clarify each message by asking questions.[14] Without the implicit feedback of two-way communication, the sender often is unsure whether the message has been distorted or vital pieces of information have been omitted.[15] These uncertainties can arise whenever the receiver is prohibited from responding to the sender.

Heuer & Penrod, *Trial Lawyers in the Box?*, THE DOCKET, Fall 1989, at 4 (editor's note).

8. Heuer & Penrod, *supra* note 7, at 4 (editor's note); *see also* Landry, *Let the Jurors Ask!*, Nat'l L.J., Jan. 29, 1990, at 13, col. 1; Nolan, *Questions on Jury Questions Are Answered*, Nat'l L.J., Aug. 7, 1989, at 12, col. 2; Sherman, *Wider Role for Jurors Is Studied*, Nat'l L.J., July 10, 1989, at 3, col. 1; Wiehl, *supra* note 1, at B5, col. 3; *60 Minutes: Trial by Jury* (CBS television hroadcast, Apr. 23, 1989) (transcript availahle from Journal Graphics, Inc., 267 Broadway, New York, NY 10007).

9. Note, *The Questioning of Witnesses by Jurors*, 27 AM. U.L. REV. 127, 129 (1977).

10. *See* Cleary, *Evidence As a Problem in Communicating*, 5 VAND. L. REV. 277, 289 (1952); *see also* Note, *supra* note 9, at 129-31.

11. In fact, juror communication with a lawyer during the course of the trial can constitute sufficient grounds for a mistrial, and the court can hold the juror and the lawyer in contempt. The decision is ultimately in the trial judge's discretion. The most significant problem with these conversations is that they arouse suspicion that undermines confidence in the validity of the verdict. *See* Lindsey v. Watts, 273 Ark. 478, 621 S.W.2d 679 (1981); Cloutier v. Charland, 100 N.H. 63, 119 A.2d 96 (1955); Baker v. Ohio Ferro-Alloys Corp., 23 Ohio App. 2d 25, 261 N.E.2d 156 (Ct. App. 1970); Kansas City S. Ry. v. Black, 395 P.2d 416 (Okla. 1964); Printed Terry Finishing Co. v. City of Lebanon, 247 Pa. Super. 277, 372 A.2d 460 (Super. Ct. 1977), *rev'd*, 264 Pa. Super. 192, 399 A.2d 732 (Super. Ct. 1979); State Farm Mut. Auto. Ins. Co. v. Futrell, 209 Va. 266, 163 S.E.2d 181 (1968). *See generally* 89 C.J.S. *Trial* § 457 (1955).

12. Ironically, from the first day of law school, a lawyer is trained to become adept at the fundamentals of two-way communication through the Socratic teaching method.

13. *See, e.g.*, Cleary, *supra* note 10, at 277; Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601.

14. Note, *supra* note 9, at 130-31.

15. *Id.*

The implications of these findings have led academics and practitioners to advocate procedures that allow jurors to question witnesses.[16] The proponents usually note that lawyers and judges find it virtually impossible to evaluate juror comprehension.[17] If the jury must remain silent while the evidence is being presented, attorneys must rely on observations of the jurors' facial expressions and body language to discern whether the jury is becoming confused or believes that information has been omitted.[18] Admittedly, lawyers can, and will, omit information occasionally for strategic or evidentiary reasons, but often information is omitted inadvertently.[19] Several commentators contend that this overall lack of feedback forces the jury to resort to unnecessary or improper speculation during deliberations or causes the group to focus on incorrect or tangential issues.[20] These problems can hinder severely the jury's ability to fulfill its fact-finding function.

Many critics agree that the inherent problems of one-way communication are legitimate concerns,[21] but believe that the problems arising from juror questioning far outweigh any potential advantages to the judicial system.[22] A major concern is that juror questioning will compromise the jurors' ability to remain impartial[23] because they may become too involved in the trial.[24] Opponents of the process also contend that a juror may ask an improper or prejudicial question[25] since the vast majority of jurors are not trained in the law.[26] Additionally, critics have argued that this practice puts attorneys in the impossible position of having to decide between objecting to a juror question and alienating

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16. *See generally* Heuer & Penrod, *supra* note 7; Heuer & Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231 (1988); Note, *supra* note 9.

17. Heuer & Penrod, *supra* note 7, at 14; Heuer & Penrod, *supra* note 16, at 237; Note, *supra* note 9, at 130-31.

18. *See generally* R. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF EMOTIONS (1988) (discussing how human emotions convey information).

19. Note, *supra* note 9, at 131 & n.20.

20. *See id.* at 131 & n.21 (citing additional sources).

21. *See* sources cited *supra* note 16.

22. *See* Heuer & Penrod, *supra* note 7, at 14; Heuer & Penrod, *supra* note 16, at 257-58; Note, *supra* note 9, at 160.

23. *See* DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 516 (4th Cir. 1985). The notion of jury impartiality is grounded in the Bill of Rights. *See* U.S. CONST. amend. VI; *see also* Heuer & Penrod, *supra* note 16, at 237.

24. Heuer & Penrod, *supra* note 7, at 4; Heuer & Penrod, *supra* note 16, at 237.

25. Heuer & Penrod, *supra* note 7, at 4; Heuer & Penrod, *supra* note 16, at 237. Lawyers and judges, however, have been known to serve on juries. *See* P. DIPERNA, *supra* note 6, at 222. These cases are extremely rare because many jurisdictions still automatically exempt lawyers and judges from jury service. *Id.* In addition, even without an automatic exemption, trial lawyers may exercise a challenge and remove a lawyer or judge from the panel. Thus, more often than not, lawyers or judges serve on a jury only because the trial lawyers ran out of challenges.

26. Heuer & Penrod, *supra* note 7, at 4; Heuer & Penrod, *supra* note 16, at 237.

the jury[27] or not objecting and losing the right to appeal that issue.[28] Other criticisms concern the anticipation of potential questions[29] and the impact of juror questions on courtroom decorum[30] and trial speed.[31]

Although judges have allowed juror questioning of witnesses since the early part of the twentieth century,[32] the practice is receiving widespread attention only now. As a result, many judges still are deciding whether to allow jurors to ask questions in their courtrooms and, if so, under what circumstances. Others are debating what procedures to use for soliciting questions and handling their admissibility. Furthermore, because juror questioning of witnesses involves the issue of juror impartiality, the subject eventually may reach the Supreme Court.[33]

This Note examines the empirical research on juror questioning, with special emphasis on the differences between judicial and juror questioning. Part II of this Note traces the historical development of the American jury system. Part III describes the legal aspects of allowing persons other than counsel to question witnesses. Part IV discusses the procedural aspects of allowing jurors to question witnesses during a trial. Part V analyzes various arguments in favor of allowing juror questioning and the empirical studies in this field. Finally, Part VI evaluates the issue of juror questioning and concludes that although juror questioning does reduce the problems associated with one-way communication, the risks of the questioning process, including trial delay and juror bias, outweigh most of the advantages offered by the procedure; therefore, the questioning process should cease.

II. Historical Development of the American Jury

In the early days of the development of the jury system, jurors played a more active role in the trial process.[34] Opinions about the actual origins of the modern jury system vary.[35] Some scholars attribute

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27. Heuer & Penrod, *supra* note 7, at 4; Heuer & Penrod, *supra* note 16, at 237.

28. *See* Fed. R. Evid. 103. Under the federal rules, attorneys must make timely objections to preserve the right to appeal. In either situation, the attorney is faced with the possibility of a malpractice suit at the conclusion of the trial if the client is dissatisfied with the result of the case. Even if the malpractice suit is frivolous, the disgruntled client can file the case provided that the client is willing to pay the filing fee and can find an attorney willing to handle the case.

29. Heuer & Penrod, *supra* note 7, at 5; Heuer & Penrod, *supra* note 16, at 237. Concerns about juror questions include unwanted surprise and destruction of attorney strategy.

30. *See* sources cited *supra* note 29.

31. *See id.*

32. *See supra* note 4.

33. *See 60 Minutes: Trial by Jury, supra* note 8.

34. *See infra* notes 43-49 and accompanying text.

35. *See generally* White, *Origin and Development of Trial by Jury*, 29 Tenn. L. Rev. 8, 14-15 (1961).

the concept to the Athenians.[36] Others point to the continental European procedure of inquisition,[37] a royal device designed to obtain reliable information about imperial matters.[38] In an inquisition the king used his royal prerogative to force the most reputable men in an area to appear before the court.[39] Presumably, these men would have knowledge of the events in their community[40] and would be the most truthful.[41] Eventually, the right to invoke the royal prerogative was available to the public on demand.[42]

The king chose these early jurors because of their knowledge of a case's facts or their ability to discover the necessary facts.[43] If the members of the inquisition did not have personal knowledge of the case when summoned, the case would be delayed for two weeks so that the jurors could gather the necessary information to make a decision.[44] Because of their status in the community, the jurors were expected to be

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36. *See, e.g.*, J. GUINTHER, THE JURY IN AMERICA 2 (1988). Around 400 B.C. the Athenians created a system similar to the jury system. According to Aristotle, those citizens accused of wrongdoing under Athenian law could argue their cases before a tribunal of their peers. The tribunal was obligated to apply its understanding of "general justice," not to try to interpret the letter of the law. *Id.*

Jury members were selected by lots. Jurors, or dicasts, were all males over the age of 30. A criminal jury could have between 501 and 1501 members; a civil jury had 201 members. Odd numbers of members guaranteed a majority verdict. Judgments were final, but the loser did have the right to press perjury charges. In criminal cases the sentence was carried out immediately after the announcement of the verdict, and both the accuser and the defendant were at risk. Verdicts in civil cases were treated differently. Because the jury had no enforcement power, a victor in civil matters had to use any possible means to collect on a judgment. The jury system apparently died out when the Romans captured the Athenian world except for the continued use of juries for capital cases in Greece through the reign of Emperor Augustus. *Id.*

37. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 140 (2d ed. 1898). Ninth century Frankish royalty developed the inquisition procedure. *See* J. GUINTHER, *supra* note 36, at 7; Note, *supra* note 9, at 134-35.

38. J. GUINTHER, *supra* note 36, at 7; 1 F. POLLOCK & F. MAITLAND, *supra* note 37, at 141; Note, *supra* note 9, at 135.

39. *See* sources cited *supra* note 38.

40. Note, *supra* note 9, at 135 n.45.

41. *Id.*

42. *Id.* at 136. William the Conqueror and his fellow Norman advisors took the inquisition process to England during the eleventh century. Note, *supra* note 9, at 135 & n.47 (citing other sources); *see also* O'Connor, *The Transition from Inquisition to Accusation*, 8 CRIM. L.J. 351, 351 (1984). The right to use an inquisition remained with royalty until Henry II's reigu in the twelfth century, when, in an attempt to increase the popularity of the king's courts, Heury II extended the royal prerogative to the public. 1 F. POLLOCK & F. MAITLAND, *supra* note 37, at 144. The king, as a favor or for a fee, would use his royal prerogative to summon citizens to resolve disputes among private citizens. Note, *supra* note 9, at 136 (citing additional sources). The popularity of this procedure increased rapidly, and eventually the right to invoke the royal prerogative was granted as a matter of right and was available on demand. *Id.*

43. Note, *supra* note 9, at 136. *See generally* MCCORMICK ON EVIDENCE § 244, at 724-25 (E. Cleary 3d ed. 1984).

44. Note, *supra* note 9, at 136-37; *see* 2 F. POLLOCK & F. MAITLAND, *supra* note 37, at 627.

able to obtain the information.[45]

The jurors then would be required to swear to the truth of the matter.[46] The members of the jury were free to gather the information any way they could provided that they were able to recognize the truth in court.[47] Thus, jurors effectively served as witnesses. Yet, jury members were not required to be eyewitnesses to the incident[48] or to testify in court.[49] Calling witnesses into court did not become a common practice until the latter part of the fifteenth century.[50]

Historians and commentators have been unable to determine exactly why the jury system shifted from an extremely active form of participation to a passive one.[51] Some scholars have suggested that the attaint procedure prompted the change.[52] Under attaint a second jury could put the first jury on trial for rendering an incorrect verdict.[53] The attaint process was extremely unpopular because the second jury could enforce harsh penalties.[54] Many people also considered it unfair to convict one jury simply because another jury disagreed with the decision, especially when the second jury relied on different information than that collected by the first jury.[55] Many juries intentionally avoided reaching a verdict out of fear that a second jury would disagree.[56]

Eventually, the unpopularity of the attaint process made obtaining a conviction extremely difficult.[57] Therefore, the judge, rather than a second jury, began to determine the correctness of the initial jury ver-

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45. Note, *supra* note 9, at 137.

46. *Id.*; *see also* 2 F. POLLOCK & F. MAITLAND, *supra* note 37, at 627.

47. Note, *supra* note 9, at 137.

48. 2 F. POLLOCK & F. MAITLAND, *supra* note 37, at 628; Note, *supra* note 9, at 137.

49. Note, *supra* note 9, at 137; *see also* MCCORMICK ON EVIDENCE, *supra* note 43, § 244, at 724.

50. MCCORMICK ON EVIDENCE, *supra* note 43, § 244, at 725.

51. Note, *supra* note 9, at 137. The only certainty is that the shift occurred gradually over many years. *Id.* at 137 n.60 (citing MCCORMICK ON EVIDENCE, *supra* note 43, § 244, at 725); *see also* J. GUINTHER, *supra* note 36, at 13-15.

52. *E.g.*, Note, *supra* note 9, at 137.

53. *Id.*; *see also* J. GUINTHER, *supra* note 36, at 16.

54. J. GUINTHER, *supra* note 36, at 16. As Sir John Fortesque summarized in 1470:

> All of the first jury shall be committed to the King's prison, their goods shall be confiscated, their possessions seized into the King's hands, their habitations and houses shall be pulled down, their woodland shall be felled, their meadows shall be plowed up and they themselves forever thenceforward be esteemed in the eye of the law infamous.

Id.

55. Note, *supra* note 9, at 137.

56. J. GUINTHER, *supra* note 36, at 16. When a jury refused to reach a verdict the judge would use everything in his power to force a verdict. *Id.* In some cases, judges refused the jurors food and drink until they reached a verdict. Other judges would haul the jury around town in open tumbrils in all kinds of weather to force a decision. Because a finding of guilty was what the judge or the king usually wanted, the jurors were likely to return a guilty verdict under this type of not so subtle coercion. *Id.*

57. Note, *supra* note 9, at 138.

dict.[58] To review the verdict, the judge needed to be familiar with the facts that the jury members had used to reach their verdict.[59] Gradually, the modern procedure emerged by which jury members only may consider information presented to them in the courtroom.[60] This procedural shift naturally resulted in precluding jurors from asking questions outside the courtroom.[61] Yet, no logical connection exists between precluding jury members from searching for evidence outside the courtroom and the decline of juror questioning inside the courtroom.[62]

III. Legal Aspects of the Judge and the Jury Questioning Witnesses

The modern Anglo-American judicial system places the primary responsibility for eliciting the facts and issues in a case on the parties presenting the evidence.[63] As a result, this process has inherent limitations stemming primarily from the nature of the adversarial process, which gives the attorneys a strong incentive to slant the evidence in their favor. The adversarial system also creates an incentive for lawyers to omit important, but potentially damaging, pieces of evidence in the hope that their opponents also will fail to elicit the information.[64]

A. The Judge

To facilitate the ultimate goal of discovering the truth, a judge is allowed to question,[65] and even call,[66] new witnesses to clarify testimony

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58. *Id.*

59. *Id.*

60. *Id.* The members of the jury also are precluded from considering outside information that they might have learned prior to the trial. *Id.*

61. *Id.*

62. *Id.* In the seventeenth century, the jury system was brought to America because the colonists realized that it was a basic protection of their liberty. *Id.* Later, the right to a trial by jury was guaranteed in the Constitution and the Bill of Rights. *See* U.S. Const. art. III, § 1, cl. 3; U.S. Const. amends. VI, VII.

Several commentators have noted that this respect for the jury system and the implicit trust that the system was functioning properly have resulted in a scarcity of detailed documentation on the performance and function of the American system until the late 1800s. *See, e.g.*, Note, *supra* note 9, at 139 & nn.74-75 and materials cited therein. In turn, no evidence on why the American jury shifted from an active to a passive entity exists. *Id.* at 139. Thus, no historical reason for prohibiting juror questioning inside the courtroom can be cited.

63. *See generally* McCormick on Evidence, *supra* note 43, § 8, at 14-15.

64. *See generally* Note, *supra* note 9, at 147-48.

65. As Justice Oliver Wendell Holmes stated, "A party is privileged from producing the evidence but not from its production." Johnson v. United States, 228 U.S. 457, 458 (1913). In other words, a party is not required to produce relevant evidence, but the party may not prevent the opposing party from introducing the evidence. *See* Note, *Questions to Witnesses and Notetaking by the Jury As Aids to Understanding Complex Litigation*, 18 New Eng. L. Rev. 687, 701 (1983) (citing Holmes's famous statement in *Johnson* and other similar cases).

A judge's right to question a witness has been codified in Federal Rule of Evidence 614, which

or bring out needed facts that the parties have not elicited. The right to question a witness is completely at the judge's discretion.[67] Failure to exercise this right, which many courts have deemed an affirmative duty,[68] apparently has not led to any reversals on the appellate court level.[69]

A judge's right to question a witness, however, is not absolute.[70] In

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reads as follows:

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

FED. R. EVID. 614. The Advisory Committee has noted that "the judge is not imprisoned within the case as made by the parties." *Id.* 614(a) advisory committee's note; *see also* Griffin v. United States, 164 F.2d 903 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 857 (1948); People v. MaGee, 217 Cal. App. 2d 443, 31 Cal. Rptr. 658 (Ct. App. 1963), *cert. denied*, 376 U.S. 925 (1964); State v. Keehn, 85 Kan. 765, 118 P. 851 (1911); McLaughlin v. Municipal Court, 308 Mass. 397, 32 N.E.2d 266 (1941); State v. Riley, 28 N.J. 188, 145 A.2d 601 (1958), *cert. denied*, 359 U.S. 313 (1959); State v. Kirby, 273 N.C. 306, 160 S.E.2d 24 (1968). *See generally* MCCORMICK ON EVIDENCE, *supra* note 43, § 8, at 14-17.

66. *See* FED. R. EVID. 614(a); *see also* United States v. Agajanian, 852 F.2d 56 (2d Cir. 1988); Marin Water & Power Co. v. Railroad Comm'n, 171 Cal. 706, 714, 154 P. 864, 867 (1916) (stating that the commission, as a judicial tribunal, may call witnesses); Merchants Bank v. Goodfellow, 44 Utah 349, 353, 140 P. 759, 761 (1914) (allowing the trial court to call last endorser in suit on bill of exchange). *See generally* United States v. 141st Sheet Corp., 911 F.2d 870 (2d Cir. 1990); Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990); Hanson v. Walker, 888 F.2d 806 (11th Cir. 1989); MCCORMICK ON EVIDENCE, *supra* note 43, § 8, at 14-17.

67. People v. Palmer, 27 Ill. 2d 311, 189 N.E.2d 265 (1963) (stating that the circumstances of each case must determine the limits of the court's discretion).

68. *E.g.*, Grant v. United States, 407 F.2d 56 (5th Cir. 1969) (stating that a federal trial judge has not only the right, but also the duty to participate in examination of witnesses in a criminal trial to bring out matters insufficiently developed by counsel); United States v. Ostendorff, 371 F.2d 729 (4th Cir. 1966), *cert. denied*, 386 U.S. 982 (1967); United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952) (citing Simon v. United States, 123 F.2d 80, 83 (4th Cir.) (stating that "the function of a federal trial judge is . . . to see that justice is done in the cases heard before him; and . . . to see that a case on trial is presented in such a way as to be understood by the jury, as well as by himself"), *cert. denied*, 314 U.S. 694 (1941)); Pariser v. City of New York, 146 F.2d 431 (2d Cir. 1945) (stating that a judge who conducts a jury trial has a duty to see that the facts are presented clearly). Courts never have held that a defendant has a constitutional right to a confused trial. *See* United States v. Fluellen, 396 F. Supp. 1168 (D.C. Pa. 1975), *aff'd mem.*, 530 F.2d 965 (3d Cir. 1976). *But see* United States v. Carengella, 198 F.2d 3 (7th Cir.) (holding that a judge does not have the duty to caution or advise the prosecuting attorney to correct some deficiency in the government's proof), *cert. denied*, 344 U.S. 881 (1952).

69. Federal Rule of Evidence 614(b) indicates that a judge *may* interrogate witnesses. *See supra* note 65. In United States v. Trapnell, 512 F.2d 10 (9th Cir. 1975), the Ninth Circuit noted that the trial judge did not have a duty to question witnesses even though the defendant appeared without counsel. *Id.*; *see also* United States *ex rel.* Smith v. Povich, 568 F.2d 33 (7th Cir. 1978); MCCORMICK ON EVIDENCE, *supra* note 43, § 8, at 15. *But cf.* Note, *supra* note 9, at 140-41 & n.80 (discussing *United States v. Ostendorff*). In *Ostendorff* the Fourth Circuit held that a judge has a duty to bring out matters insufficiently developed by counsel. *Ostendorff*, 371 F.2d at 732.

70. *See, e.g.*, United States v. Norris, 873 F.2d 1519 (D.C. Cir. 1989) (stating that when judi-

the vast majority of states, a judge does not have the power to comment on the weight of the evidence and, as a result, must avoid making any implied comments.[71] If a judge asks a question suggesting the desired answer, the jury may infer that the question constitutes what the judge believes to be the truth.[72] Because of the impartial nature of the judicial position, however, a judge is not subject to the same rules prohibiting leading questions that govern attorneys.[73]

The federal courts and the courts of those states that have retained the common-law power to comment[74] have relaxed many restrictions on leading and impeaching questions.[75] Yet, the judge still must be careful not to appear to be an advocate or a prosecutor.[76] Numerous questions

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cial questions are designed to elicit answers favorable to the prosecution, it is better for the trial court to err on the side of abstention); Kramer v. United States, 408 F.2d 837 (8th Cir. 1969) (stating that a judge may ask questions and has the prerogative to comment directly on witnesses and their testimony, but a judge oversteps the bounds of propriety by becoming an advocate for one party); Texas Pac.-Mo. Pac. Terminal R.R. v. Welsh, 179 F.2d 880 (5th Cir. 1950) (stating that for a trial judge to maintain the required impartiality, the judge should monitor not only the number and type of questions, but also the manner in which they are propounded); *Pariser*, 146 F.2d at 431 (stating that judges can ask questions to fulfill their duty to ensure that evidence is presented clearly, but they should exercise self-restraint and preserve the atmosphere of impartiality); State v. Betsellie, 82 N.M. 782, 487 P.2d 484 (1971) (stating that the trial judge is more than a mere umpire or moderator and may propound questions to witnesses if the questions are within the bounds demanded by the trial judge position and if the judge displays no bias for or against either litigant).

71. People v. Gaston, 85 Ill. App. 2d 403, 229 N.E.2d 404 (App. Ct. 1967) (holding that the trial court's interruption of witnesses' testimony to clarify points was not error because the judge did not impugn the credibility of the witnesses or assume the role of an advocate); *see also* State v. Pokini, 55 Haw. 640, 526 P.2d 94 (1974) (stating that while it is within the discretion of the trial judge to examine witnesses to bring out needed facts not elicited by the parties, this discretion is circumscribed by the responsibility not to assume the role of an advocate or a prosecutor). *See generally* McCormick on Evidence, *supra* note 43, § 8, at 15.

72. McCormick on Evidence, *supra* note 43, § 8, at 15 (citing People v. De Lordo, 350 Ill. 148, 182 N.E. 726 (1932); Risley v. Moherg, 69 Wash. 2d 560, 419 P.2d 151 (1966)).

73. Attorneys are prohibited from asking leading questions on direct examination. Fed. R. Evid. 611(c). The exceptions to this general rule include a hostile witness, a child witness, a witness whose recollection is exhausted, and undisputed preliminary matters. *Id.* advisory committee's note.

Several prominent authorities have questioned the logic of distinguishing between leading questions asked by a judge and those asked by attorneys. McCormick on Evidence, *supra* note 43, § 8, at 15-16 (citing a remark in Commonwealth v. Berklowitz, 133 Pa. Super. 190, 2 A.2d 516 (Super. Ct. 1938)). These authorities have been concerned particularly with questions aimed at discrediting or impeaching the witness. Although these questions would be proper if asked by an attorney attempting to impeach a witness, when asked by a judge the questions may be perceived improperly as comments on the weight of the testimony. *Id.*

74. The power to comment on the weight of the evidence is not unbounded. Although it gives judges greater latitude in questioning witnesses, they still are precluded from acting as advocates or prosecutors. *See generally* McCormick on Evidence, *supra* note 43, § 8, at 16.

75. *Id.* These restrictions also are loosened in trials that are conducted without a jury. *Id.*

76. United States v. Norris, 873 F.2d 1519 (D.C. Cir. 1989); United States v. Victoria, 837 F.2d 50, 54 (2d Cir. 1988): United States v. Vega, 589 F.2d 1147, 1153 (2d Cir. 1978); Beetler v. Sales Affiliates, Inc., 431 F.2d 651 (7th Cir. 1970) (stating that a judge may question a witness in

and questions that are partisan in nature are the most likely indications that the judge has acted not as an impartial arbiter, but as an advocate.[77]

B. The Jury

1. Federal Courts

The Federal Rules of Evidence are silent on the question of jurors asking questions, neither explicitly allowing nor disallowing the practice.[78] The only guidance that a federal judge receives from the rules of evidence is the admonition in Rule 611(a) that the court should exercise reasonable control over the mode and order of interrogating witnesses.[79] The federal courts that have considered the issue have concluded that the practice is a matter within the discretion of the trial judge.[80]

Some courts even have noted that juror questions are neither analogous nor comparable to questioning of witnesses by a judge.[81] All of these courts have emphasized that a judge is present in the courtroom to see that justice is done.[82] Furthermore, in a jury trial, the judge's legal neutrality is not as important as the jury's since the jury makes the ultimate factual decisions.[83] Even if the judge did make these decisions, a judge could remain legally neutral more easily than the jury members because of the judge's legal training.[84]

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an *impartial* manner); Kramer v. United States, 408 F.2d 837 (8th Cir. 1969) (noting that a federal judge may ask questions and only when the judge becomes an advocate for one party or the other does the judge overstep the bounds of propriety in directing and governing the trial).

77. MCCORMICK ON EVIDENCE, *supra* note 43, § 8, at 16. In United States v. Brandt, 196 F.2d 653 (2d Cir. 1952), the defendant's conviction was set aside after the judge asked more than 900 questions during an eight day trial. *Id.*; *see also* United States v. Fry, 304 F.2d 296 (7th Cir. 1962) (observing that the judge asked over 1200 questions). To be successful on appeal, however, the appellant should focus on the nature of the questions rather than on the total number of questions asked by the judge. *See, e.g., Texas Pac.*, 179 F.2d at 680 (noting that to maintain the impartiality which proper trial technique demands, a trial judge, when asking questions, should be careful not only about the number and type of questions asked, but also about the manner in which they are asked).

78. *See* DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 515 (4th Cir. 1985).

79. FED. R. EVID. 611(a).

80. *See, e.g., DeBenedetto*, 754 F.2d at 515; United States v. Callahan, 588 F.2d 1078, 1086 & n.2 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); United States v. Witt, 215 F.2d 580, 584 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954).

81. *See* United States v. Johnson, 892 F.2d 707, 711-15 (8th Cir. 1989) (Lay, C.J., joined by McMillian, J., concurring); *DeBenedetto*, 754 F.2d at 516.

82. *Id.* (citing United States v. Rosenherg, 195 F.2d 583, 594 (2d Cir.) (quoting Simon v. United States, 123 F.2d 80, 83 (4th Cir.), *cert. denied*, 314 U.S. 694 (1941)), *cert. denied*, 344 U.S. 838 (1952)).

83. *See id.*

84. *See id.*

2. State Courts

On the state court level, only Georgia has concluded that it is inappropriate for jury members to ask questions under any circumstances.[85] The Georgia courts have not explained fully their reasons for refusing to allow jurors to ask questions.[86] The most extensive discussion is in *State v. Williamson*[87] in which the Georgia Supreme Court, using arguments that also have been used in several federal cases,[88] found that because the practice of jurors directly questioning witnesses is dangerous, it is prohibited.[89] The court noted that jurors are not schooled in the rules of evidence that govern the presentation of evidence in the trial and that jurors are likely to be offended personally if attorneys object to juror questions.[90]

In all other state jurisdictions, juror questioning generally is considered proper. The states that allow juror questioning fall into two basic categories: those that allow questions, but discourage them, and those that allow questions and actively encourage them.

The major concern for states that discourage questions is that a juror's question might bring incompetent or prejudicial evidence to the attention of the entire jury.[91] These courts also are concerned that the attorneys in the case might hesitate to object to inappropriate questions.[92]

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85. *See* Matchett v. State, 257 Ga. 785, 786, 364 S.E.2d 565, 566-57 (1988) (stating that juror questions generally are not permitted); State v. Williamson, 247 Ga. 685, 686, 279 S.E.2d 203, 204 (1981); Stinson v. State, 151 Ga. App. 533, 536, 260 S.E.2d 407, 410 (Ct. App. 1979) (noting that a juror should not be permitted to examine a witness under any circumstances).

86. In *Matchett* the court simply stated that the process of allowing jurors to ask questions during trials was "generally not permitted in this state." *Matchett*, 257 Ga. at 786, 364 S.E.2d at 567 (citing *Williamson*, 247 Ga. at 686, 279 S.E.2d at 204). In *Stinson* an equally short explanation was given. *Stinson*, 151 Ga. App. at 536, 260 S.E.2d at 410 (stating that "a juror should not he permitted to examine a witness under any circumstances").

87. 247 Ga. at 685, 279 S.E.2d at 203.

88. *See generally DeBenedetto*, 754 F.2d at 516-17 (discussing the various arguments).

89. *Williamson*, 247 Ga. at 686, 279 S.E.2d at 204.

90. *Id.* If questions are asked, however, the Georgia courts will determine whether the error was harmless. *Cf. Stinson*, 151 Ga. App. at 536, 260 S.E.2d at 410 (stating that even if jurors are allowed to question a witness, they have "no more right to ask an improper question than do the parties or their counsel"). In addition, failure to object to the first round of juror questioning can lead to a waiver of the right to prevent juror questioning. *See Matchett*, 257 Ga. at 786, 364 S.E.2d at 567.

91. *See* Smith v. State, 81 Okla. Crim. 412, 419, 165 P.2d 381, 385 (Crim. App. 1946), *rev'd*, 83 Okla. Crim. 392, 177 P.2d 523 (Crim. App. 1947); *see also* Raynor v. State, 1 Tenn. Crim. App. 556, 561-62, 447 S.W.2d 391, 393 (Crim. App. 1969) (stating that the efforts of jurors to ask questions of witnesses during trial often present delicate problems and should not be encouraged); Branch v. State, 4 Tenn. Crim. App. 164, 469 S.W.2d 533 (Crim. App. 1969).

92. *See, e.g.*, State v. Jeffries, 644 S.W.2d 432 (Tenn. Crim. App. 1982); *Raynor*, 1 Tenn. Crim. App. at 566, 447 S.W.2d at 391; White v. Little, 131 Okla. 132, 134, 268 P. 221, 222 (1928). The courts that discuss the subject note that failing to object is an obvious sign of an incompetent

The states that actively encourage the practice believe that juror questioning will enable the jury to obtain a better understanding of the facts and issues before it.[93] By implication, these states must have rejected the notion that trial lawyers should slant the case in favor of their clients as best they can without resorting to outright falsification of the facts and that the adversarial process itself will cause the jury to reach the correct verdict.[94] Thus, in *Louisville Bridge & Terminal Co. v. Brown*[95] the Kentucky Supreme Court approved the practice of jurors asking questions of witnesses.[96] The court noted that the practice aided the jury's ability to discover and analyze the facts of the case and to reach a proper verdict.[97] The North Carolina Supreme Court, in *State v. Kendall*,[98] stated that as long as the questioning was not improper and was designed to discover the truth, it should be allowed.[99] Furthermore, the court noted that jurors often asked pertinent and helpful questions that furthered the discovery of the truth.[100]

The *Kendall* court's belief that juror questions always are pertinent and helpful is probably an exaggeration. Most empirical studies have found that juror questions are more helpful in eliminating a juror's dissatisfaction with the trial process than in discovering intentionally concealed or previously unconsidered facts.[101] The states that discourage, but do not prohibit, the practice of juror questioning, probably made this assumption before researchers began empirical studies in this area.

Although much disagreement concerning the appropriateness of juror questions exists, courts do agree on several factors. First, if a juror is allowed to ask questions, the questions must be appropriate and must not violate the rules of evidence.[102] In addition, a trial judge cannot

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attorney. These courts contend that the practice of allowing jurors to ask questions when an attorney is afraid to object is so dangerous to the rights of the litigant that they will not encourage the practice of allowing jurors to ask questions. *Id.*

93. Annotation, *supra* note 5, at 880.

94. *See* Wheeler, *The Second Circuit Review*, 41 BROOKLYN L. REV. 841, 864-65 (1985). *See generally* Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

95. 211 Ky. 176, 277 S.W. 320 (1925).

96. *Id.*

97. *Id.* at 183, 277 S.W. at 322.

98. 143 N.C. 659, 57 S.E. 340 (1907).

99. *Id.* at 662-63, 57 S.E. at 341.

100. *Id.*

101. *E.g.*, Heuer & Penrod, *supra* note 7, at 10; Heuer & Penrod, *supra* note 16, at 237; Sand & Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 441-46 (1985) (noting the value of increased juror attentiveness, but failing to list the discovery of concealed information or previously unconsidered facts as a benefit). *See generally infra* Part V.

102. *See* Sparks v. Daniels, 343 S.W.2d 661, 667 (Mo. Ct. App. 1961) (stating that if jurors

compel a defendant to take the stand and testify through interrogation by the jury.[103] Although a court's refusal to allow a juror to ask a question is not error,[104] a court cannot issue a preliminary instruction that completely precludes jury questioning throughout the trial.[105] Finally, appellate courts will not reverse a verdict in a case solely on the basis of an improper juror question unless the error caused irreparable prejudice to the appellant.[106]

IV. The Procedural Process of Allowing Jurors to Ask Questions During Trial

If a judge decides to allow jury members to ask questions during a trial, a number of procedural issues must be settled. First, the judge must consider whether to use a preliminary instruction that actively encourages jurors to ask questions. Second, the judge must decide how questions will be presented. The judge can allow the juror to ask the witness questions directly. Alternatively, the jury member could present questions to the judge orally during, or immediately after, the witness's testimony. If the attorneys wish to object to the question they would object in front of the jury.[107] As another option, a juror could write out questions and present them to the judge; attorneys would object in the absence of the jury. The judge also must decide whether the jurors should be allowed to ask questions that extend beyond the scope of direct and cross-examination.

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are given permission to ask questions, the court must ensure that no improper questions are asked); *see also* Stinson v. State, 151 Ga. App. 533, 536, 260 S.E.2d 407, 410 (Ct. App. 1979).

103. United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1300 (1990). In another case, the Mississippi Supreme Court held that a defense attorney acted improperly by inviting jury members to ask questions of the defendant witness when no juror had voiced a need for clarification of any issue or testimony. Lucas v. State, 381 So. 2d 140 (Miss. 1980).

104. *See* People v. Wesley, 148 Mich. App. 758, 384 N.W.2d 783 (Ct. App. 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 (Ct. App. 1955), *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910 (1956).

105. *See, e.g.*, Carter v. State, 250 Ind. 13, 234 N.E.2d 650 (1968).

106. *See, e.g.*, People v. McAlister, 167 Cal. App. 3d 633, 213 Cal. Rptr. 271 (Ct. App. 1985). Although Georgia courts have stated that they do not permit juror questions under any circumstances, if a juror does ask a question and the trial judge allows the question, reversible error is not automatic. *Stinson*, 151 Ga. App. at 536, 260 S.E.2d at 410.

107. Conceivably, the judge could ask the jury to leave the courtroom immediately after a question was raised to determine the propriety of the question being asked. This option, however, would be extremely cumbersome and could lengthen significantly the time needed to complete the trial.

A. Preliminary Instructions

If a judge intends to allow and encourage members of a jury to ask questions during the trial, the judge should make an affirmative effort to notify the jurors of the availability of the procedure, although most jurisdictions do not require this action.[108] Because traditionally jurors have not questioned witnesses during trial, the vast majority of the American public may be unaware that jurors are allowed to question witnesses during a trial. Juror questioning of witnesses cannot remedy the problems associated with one-way communication if jurors remain ignorant of their right to question witnesses. The judge also should inform the jurors of both the duties and limitations associated with this ability[109] and the court-selected procedures for eliciting questions.[110]

Judges may use two basic methods to inform the jury members of the option of asking questions. The first method is a jury handbook, which would be issued to all prospective jurors.[111] The second method is an oral instruction, which would be read after the opening statements of counsel, but before the first witness was sworn.[112] With either method, the judge should inform the jurors of the opportunity to question the witnesses under procedures and times designated by the court,[113] and that counsel has the primary responsibility for presenting evidence.[114] The judge also should tell the jurors to use the procedure sparingly and only if they believe that their questions will not, or cannot, be answered by a subsequent witness.[115]

In further instructions the court should advise the jurors, either in oral or written form, that in some circumstances the judge will be unable to ask questions submitted by the jurors.[116] The court should explain that if a question cannot be asked, the jurors should not be offended, nor should they attribute the decision not to ask a question to an objection by any party in the case.[117] The pattern instruction should state that the judge's decision on whether the question can be used has

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108. *See* People v. Justice, 50 Mich. App. 55, 57, 212 N.W.2d 762, 764 (Ct. App. 1973) (noting that the court is not required to sua sponte instruct the jurors that they can question a witness).

109. Note, *supra* note 9, at 149-50 & n.137.

110. *Id.*

111. *See id.* at 149-50; Annotation, *supra* note 3, at 876-77.

112. *See* Sand & Reiss, *supra* note 101, at 477; *see also* Note, *supra* note 9, at 149-50; Annotation, *supra* note 5, at 876-77.

113. At this point, the judge should describe to the members of the jury the procedure for juror questioning that has been selected for use in that courtroom.

114. Sand & Reiss, *supra* note 101, at 477.

115. *Id.* The jury, however, has a difficult task in forecasting whether a certain question will be answered by a subsequent witness. Therefore, this type of preliminary instruction may tend to discourage questions.

116. *Id.*

117. *Id.*

nothing to do with the quality of the question,[118] but is based on technical rules of evidence, which must be followed in the courtroom.[119] Finally, the judge should inform the jurors that the judge might refuse to ask the question because a subsequent witness will address the information.[120]

Neither method of conveying this information to the jurors is perfect. Although jury handbooks have been an accepted form of jury orientation for more than a quarter of a century,[121] jurors may not read the handbook. At the same time, oral instructions can be too long and complicated and, therefore, difficult to understand and remember.[122] Additionally, if a juror is not paying attention during oral instructions, the juror may fail to utilize the procedure or may use it improperly. Thus, the judge should use a combination of these two procedures to inform the members of the jury properly. To be effective, both oral and written instructions must be short and to the point.

B. Procedures

The most important decision for the judge who will use jury questioning is choosing the procedure that the judge will employ to solicit questions from jurors during trial. Because virtually all jurors are lay persons, the judge must design a procedure that lessens the possibility of a reversal on appeal, but heightens the flexibility of the questioning process.[123]

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118. *Id.*

119. *Id.* In the typical instruction, the judge also should mention that the rules of evidence are complicated and that lay persons are not expected to know them. *Id.*

120. *Id.*

121. *See* Note, *supra* note 9, at 150 & n.138.

122. Even a relatively simple instruction can be ineffective if given in conjunction with several other instructions. *Cf., e.g.*, Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (discussing the "plain English" movement in the context of jury instructions); Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 614-15; Robinson, *Causing the Condition of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 52 (1985); Steele & Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. REV. 77, 77-78 (1988). Although these articles deal primarily with the problems of jury instructions at the end of a trial, their conclusions apply by analogy to instructions at the beginning of a trial.

123. Conceivably, a judge could decrease the risk of reversal on appeal to zero by using a strict screening procedure to enhance thorough consideration of the implications of a juror's question to a witness. By eliminating the risk of reversal entirely, however, the judge would add a significant amount of time to the trial process. Alternatively, the judge could ignore the risks of a reversal on appeal and allow the members of the jury wide latitude in the questioning process. This option certainly would lead to a shorter trial than use of a strict screening procedure; however, any time saved would be more than offset by the time lost in a new trial because of an improper juror question.

1. Timing of Juror Questions

The obvious starting place is the timing of juror questions. The judge has several options regarding when to allow questions. The judge could allow questions at any time, at the end of the witness's testimony, or at the end of the trial. The first option, allowing jurors to ask questions at any time, would increase the effectiveness of juror questioning. This advantage is outweighed, however, by the disruptions in counsel's line of questioning, particularly when counsel wants to enhance the jury's ability to comprehend the information by eliciting testimony in a deliberate order.[124] Under the third option, in which questions are delayed until the end of the trial, the jury may have difficulty linking the answer to the jurors' questions with the remainder of the witness's testimony. The advantages of allowing jurors to ask questions would be frustrated unnecessarily.[125] This method also could become extremely expensive for the parties in the case, especially if an expert witness had to remain in the courtroom for additional hours or days to answer juror questions. Thus, in most situations the judge utilizes the second timing option and holds questions until after the witness has finished testifying, but before the witness is dismissed.[126] If the jury members are allowed to take notes,[127] many of the problems with delay could be eliminated.

In several situations a judge should allow jurors to question a witness immediately. The most obvious example is during the testimony of an expert witness. If the jurors are unable to comprehend the basic information that an expert presents at the beginning of the testimony, subsequent testimony will have little value for the jury.[128] If the judge is concerned with unwieldy juror questioning, the judge could instruct the jurors to ask only definitional questions during the witness's testi-

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124. *See generally* Note, *supra* note 65, at 705.

125. *Id.*

126. Waiting until a witness has completed testimony is the most popular method of questioning since it serves to eliminate many of the potentially irrelevant and tangential questions that a juror might have thought of during the witness's testimony. *Id.*

127. *Id.* Allowing jurors to take notes is also an extremely controversial subject because of fears that jurors will spend too much time taking notes on irrelevant lines of testimony and miss important pieces of information. *Id.* at 710. A concern that they will record incorrect information also exists. *See id.* A New York state court recently ruled that juror note taking was inappropriate in a case in which the trial judge had allowed two jury members to take notes during a supplemental jury charge. *See* People v. Morales, 159 A.D.2d 86, 559 N.Y.S.2d 869 (App. Div. 1990). The court feared that the jurors would place great weight on their notes, which could be inaccurate or misleading. *Id.* The *Morales* court did not address the issue of juror note taking during the presentation of evidence. *See generally* Sand & Reiss, *supra* note 101, at 477; Note, *supra* note 65, at 687.

128. *See* Ratton v. Busby, 230 Ark. 667, 326 S.W.2d 889 (1959) (noting that members of the jury asked 45 questions about the technical nature and structure of an airplane). *See generally* Note, *supra* note 9, at 155.

mony and allow them to ask other questions at the conclusion of the expert's testimony. The judge also could collect the jurors' questions periodically during the testimony rather than waiting until the testimony is completed.[129]

2. Direct Questioning of Witnesses by Jurors

After addressing the timing of questions, the court must choose between direct and indirect questioning. Direct questioning of witnesses encourages maximum juror participation.[130] Because the jurors are asking the questions themselves, they become involved actively in the two-way communication process.[131] Under this system if the juror is unsatisfied with an answer, the juror can seek clarification. Studies have shown that distortion of information is lessened when questions and answers are integrated.[132] Any increases in trial time can be reduced because most of the delays relating to juror questioning come from any initial screening procedure.[133]

The drawbacks of direct questioning probably outweigh the advantages. Most significantly, the risk that an improper question will be asked increases dramatically for several reasons. First, by objecting in front of the jurors, attorneys risk antagonizing them.[134] Many attorneys have said that they wish to avoid this situation and sometimes would be reluctant to raise an objection.[135] The attorney who fails to object, in most jurisdictions, would be barred from arguing on appeal that the juror's line of questioning was improper.[136]

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129. Naturally, these procedures could be utilized for any type of witness.

130. Note, *supra* note 9, at 152.

131. This involvement is particularly important when an expert witness is testifying and the members of the jury must learn about a new suhject. If they are forced to use an indirect method of questioning, jurors may not comprehend the testimony because the witness has failed to discuss, or the members of the jury have failed to comprehend, the initial pieces of information that facilitate understanding of the important and more complex aspects of the witness's testimony. *See id.* at 152-53. For a discussion of the indirect questioning method, see *infra* notes 146-67 and accompanying text.

132. Note, *supra* note 9, at 152 n.144. The other methods of questioning discussed *infra* obviously can accommodate any follow-up questions that the juror may wish to raise, but the ability to raise these questions immediately is lost.

133. *See infra* notes 146-59 and accompanying text.

134. *See* Annotation, *supra* note 5, at 878.

135. In informal conversations, many attorneys in the Nashville area told the Author of this Note that they did not wish to be placed in a situation in which they might antagonize a jury member. Therefore, the attorneys noted that they might be reluctant to raise an objection. The Author's informal notes from these conversations are on file with *Vanderbilt Law Review* [hereinafter Informal Notes].

136. *See* FED. R. EVID. 103. The only exception would be situations in which the line of questioning was clearly plain error. *See* United States v. Land, 877 F.2d 17, 19 (8th Cir.), *cert. denied*, 110 S. Ct. 243 (1989).

Commentators and courts have proposed two solutions to these problems, but both have serious flaws. Some courts have held that the judge has an affirmative duty to rule on the impropriety of a question if the attorneys fail to object.[137] The judge, however, risks violating the prohibition against acting as an advocate. Some commentators suggest that the judge use a procedure similar to the one provided in Rule 614(c) of the Federal Rules of Evidence regarding objections to questions asked by the trial judge.[138] Under Rule 614(c), objections to the judge's questions of witnesses "may be made at the time or at the next available opportunity when the jury is not present."[139] The rule is designed to lessen the chance of embarrassment to counsel and possible prejudice incurred from objecting in front of jurors, while simultaneously assuring that objections are made in time to take corrective measures.[140]

This second suggestion has potential problems with retroactivity and juror bias. It gives attorneys the opportunity to object to a juror's question after learning that the juror has discovered some extremely damaging evidence. If the attorney waits until the next recess to object, the question already will have been asked and answered,[141] and the damage done. If the judge decides that a remedial measure is necessary, the jurors quickly will discover that the juror's question caused a problem, and the jurors may be able to discern which attorney objected, thereby eliminating any advantages that might have been gained by the attorney's attempt to invoke Rule 614(c). The problem is compounded further by the questionable effectiveness of remedial instructions.[142]

Even if an objection is raised and sustained in the presence of the jury, several problems remain. The witness may attempt to answer the question despite the objection. Although the witness could be held in contempt of court and the judge could instruct the jury to disregard the witness's answer, remedial measures may be ineffective and, in fact, may make the questioning juror feel uncomfortable or angry at being thwarted by rules of evidence that the juror does not understand.[143]

In addition, many jurisdictions do not allow members of the jury to

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137. State v. Crawford, 96 Minn. 95, 104 N.W. 822 (1905); Sparks v. Daniels, 343 S.W.2d 661 (Mo. Ct. App. 1961).

138. *See, e.g.*, Note, *supra* note 9, at 160.

139. FED. R. EVID. 614(c).

140. *See id.* advisory committee's note.

141. The attorney, of course, could ask for a side-bar conference immediately after the question has been asked and request that the jury be excused so that the attorney could argue over the propriety of the question. The jury quickly would see through this ruse.

142. *See, e.g.*, DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 516 (4th Cir. 1985).

143. *Id.*

discuss the case with anyone until deliberations have begun.[144] Although asking questions may not rise to the level of jury members beginning deliberations before the end of the trial, the spirit of the prohibition against beginning deliberations may be violated, and as a result, the jury may develop a particular opinion about a line of questioning.[145] If this process begins to happen, the jurors may lose their impartiality and reach a decision prematurely—before the parties have an opportunity to present their case.

3. Indirect Questioning with Judicial Screening

Many of the judges who use juror questioning choose the indirect method because of a perceived potential for lack of control with direct questioning.[146] The judge can implement indirect questioning in either of two ways.

a. Oral Questions

One technique requires jurors to direct their questions to the judge orally. The judge, having instructed the witness previously to refrain from answering any questions posed by a juror until after a ruling on the propriety of the question, considers any objections raised by the attorneys[147] during a side-bar conference out of the jury's hearing.[148] This precaution would reduce, though not completely eliminate, the risk that the attorneys will antagonize the jurors. If the question is found to be impermissible, the judge either simply refuses to ask the question or briefly explains the decision to the jury.[149] If the question is

144. *See* City of Pleasant Hill v. First Baptist Church, 1 Cal. App. 3d 384, 82 Cal. Rptr. 1 (Ct. App. 1969); Smith v. Brown, 102 Cal. App. 477, 283 P. 132 (Ct. App. 1929); State v. Washington, 182 Conn. 419, 438 A.2d 1144 (1980); Glasgow Realty Co. v. Metcalfe, 482 S.W.2d 750 (Ky. 1972); St. Louis Southwestern Ry. Co. v. Gregory, 387 S.W.2d 27 (Tex. 1965). This prohibition generally extends to any situation in which the jury members are not functioning as a jury. Cloudt v. Hutcherson, 175 S.W.2d 643 (Tex. Civ. App. 1943). The decision on whether to declare a mistrial is, of course, within the discretion of the judge. The conversations of jurors probably would have to occur several times and rise to the level at which the prejudice outweighs the jury's ability to reach a fair verdict. *See* Wilson v. California Cab Co., 125 Cal. App. 383, 13 P.2d 758 (Ct. App. 1932) (holding that discussions concerning a map which had been introduced into evidence were not sufficiently prejudicial to be grounds for a mistrial); Higgins v. Dean Gas Engine & Foundry Co., 140 Ky. 44, 130 S.W. 800 (1910) (holding that one juror expressing an opinion about the evidence to another juror was not sufficiently prejudicial to be grounds for a mistrial).

145. *See DeBenedetto*, 754 F.2d at 516-17; *see also Land*, 877 F.2d at 19.

146. *See, e.g., Land*, 877 F.2d at 19; United States v. Polowichaly, 783 F.2d 410, 413 (4th Cir. 1986); *DeBenedetto*, 754 F.2d at 515-17. *See generally* Note, *supra* note 9, at 156.

147. *See* Nelson v. State, 257 Ark. 1, 513 S.W.2d 496 (1974).

148. Without this side-bar conference, the attorney who wishes to object would have to object in open court, thereby eliminating many of the advantages of the indirect questioning method. *See* Note, *supra* note 65, at 707.

149. *Id.* A short, nontechnical explanation would be preferable because it might prevent the

deemed permissible, then the question remains as asked or the judge rephrases the question to avoid problems with form.[150] The judge also has the option of instructing the attorneys to discuss the matter.[151] Additionally, the judge should allow the attorneys to conduct another round of examination to clarify any issues raised by the jurors' questions.[152]

Although this type of indirect questioning eliminates virtually all of the problems associated with direct questioning of witnesses by the jury, this method is not perfect. The questions themselves might be so prejudicial that the judge must declare a mistrial because the jurors have heard the question. For example, the prejudice problem arises if a jury member asked questions relating to insurance coverage[153] or the defendant's failure to testify.[154] The problem would be exacerbated if the witness ignored the judge's instruction and answered the question. The seriousness of this problem depends on the effectiveness of a remedial instruction.[155]

b. Written Questions

The other method of indirect questioning requires jurors to write down questions arising during a witness's testimony.[156] After the witness has finished testifying, but before dismissal, the bailiff collects the questions and presents them to the judge.[157] The judge then screens the

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jurors from trying to guess the reason that the question was not asked. In turn, this measure should reduce the possihility that the jury will return an incorrect verdict.

150. Note, *supra* note 9, at 153; *see also* Steckler, *Management of the Jury*, 28 F.R.D. 190, 196-97 (1961). Naturally, the judge can ask follow-up questions as long as the judge does not violate the restrictions on the judiciary's right to ask questions. *See supra* notes 65-77 and accompanying text.

151. Note, *supra* note 9, at 153.

152. Note, *supra* note 65, at 705.

153. The Federal Rules of Evidence prohibit questions concerning insurance coverage asked for the purpose of establishing whether the person acted negligently or otherwise wrongfully. *See* FED. R. EVID. 411.

154. In criminal cases, the fifth amendment protects the defendant's right to refuse to testify. *See* U.S. CONST. amend. V.

155. In Maggart v. Bell, 116 Cal. App. 306, 2 P.2d 516 (Ct. App. 1931), the appellate court held that a juror's question regarding whether the defendant had accident insurance was harmless hecause the trial judge ordered the witness not to answer the question and immediately admonished the jury to disregard the question. *Id.* In Espinoza v. State, 73 Tex. Crim. 237, 165 S.W. 208 (Crim. App. 1914), no reversible error resulted when the court informed the jury that they could not consider the question of why the defendant did not testify. *Id.* Other courts, though, have questioned the effectiveness of a remedial instruction and have noted that in certain situations a judge would have no other choice but to declare a mistrial. *See, e.g., DeBenedetto*, 754 F.2d at 512.

156. *See* People v. Gates, 97 Cal. App. 3d Supp. 10, 158 Cal. Rptr. 759 (App. Dep't Super. Ct. 1979); State v. Barrett, 278 S.C. 414, 297 S.E.2d 794 (1982).

157. State v. Martinez, 7 Utah 2d 387, 326 P.2d 102 (1958) (suggesting that juror questions should be revealed privately to the judge).

questions in chambers in the presence of attorneys for both parties.[158] After each side has an opportunity to object to a question, the judge makes a ruling.[159] The entire procedure is conducted in the presence of the court reporter and is part of the official record of the trial.[160] After the conference the judge and lawyers return to the courtroom, and the judge poses the questions to the witness.[161]

The judge also has the option of briefly explaining to the jury that some of the jurors' questions will not be asked.[162] Naturally, the judge could rephrase any juror questions to satisfy the rules of evidence, or the judge could pursue any line of questioning raised by the jurors' questions. The traditional rules for questions from the bench govern any questions asked by the judge.[163]

Although this procedure would remove the spontaneity of the questions, eliminating jury exposure to an improper question and answer offsets this disadvantage.[164] Anonymity also eliminates any potential risk that a juror might try to violate the prohibition against beginning deliberations prior to conclusion of the trial by using the questioning process to communicate with the other jurors about the case. The risk of excessive questioning, however, remains a potential drawback.[165]

The direct method and the two indirect methods of questioning have their own inherent advantages and disadvantages. The circumstances surrounding the witness's testimony will dictate the method of soliciting juror questions. Since the procedures to be used are ultimately at the judge's discretion, the procedures could be varied according to the type of testimony. Thus, if an expert witness is testifying, the

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158. Note, *supra* note 65, at 705-07. One commentator has suggested that the judge could review the written questions and ask those questions that do not contain obvious relevancy or competency problems without consulting the attorneys. *See id.* at 707. This method would not eliminate, however, the problems associated with objecting to juror questions in front of the jury. *Id.* Because this suggestion fails to address this problem, this method tends to eliminate the value of soliciting questions in writing. *Id.*; *see* United States v. Land, 877 F.2d 17, 19 (8th Cir.), *cert. denied*, 110 S. Ct. 243 (1989).

159. *Id.*

160. Note, *supra* note 65, at 706-07.

161. *Id.* at 707.

162. *Id.* If the judge chooses not to inform the entire jury that one of their questions has been ruled inadmissible, the judge may antagonize only the juror who submitted the question. Obviously, if the jurors talk to each other during the case, the judge's decision to remain silent could backfire.

163. The judge's ability to rephrase the questions is included in the judge's right to ask questions. *See supra* notes 65-77 and accompanying text (discussing the traditional rules of judicial questioning).

164. Note, *supra* note 9, at 156.

165. Resolution of this issue ultimately depends on how seriously the members of the jury take their duty and whether the trial judge is willing to admonish the jurors to use restraint once juror questioning becomes excessive.

judge might allow jurors to ask any questions that relate to the definition of terms used in the testimony as the questions arise. On the other hand, if the witness is a victim of a violent crime,[166] for example, the judge might decide to delay juror questioning until after the witness has finished testifying. The judge also might choose to screen in chambers in the presence of both parties' attorneys any questions posed to the victim. Of course, the judge still has the option of utilizing only one screening procedure.[167]

4. Scope of Juror Questioning

Under the Federal Rules of Evidence, an attorney who cross-examines a witness generally is limited to questioning the witness on matters that have been the subject of direct examination.[168] The rules, however, do give the judge discretion to allow broader questioning when necessary.[169] Judges have the discretion to extend this notion to juror questions.[170] Ultimately, the issue is whether the judge can maintain effective control over the courtroom and the questioning process. The judge has the following options: (1) limiting the scope of juror questioning to those matters raised during direct and cross-examination, and (2) allowing any relevant questions that do not violate the rules of evidence.

If the juror is limited to asking questions that are within the scope of direct and cross-examination, the juror can clarify only information raised during the testimony. The juror cannot ask questions on subjects that the parties have omitted.[171] Under this approach, the judge reduces the opportunity for prejudicial, irrelevant, or otherwise harmful

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166. Rape victims, in particular, have difficulty testifying when only the prosecutor, defense attorney, and judge are allowed to ask questions. Allowing 12 more people to ask questions could turn the trial into an inquisition unnecessarily.

167. The parties usually outline the purpose and content of each witness's testimony for opposing counsel and the judge before the trial commences. Thus, the judge can choose a questioning method prior to trial.

168. FED. R. EVID. 611(b) states: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." *See generally* Note, *supra* note 65, at 700.

169. Note, *supra* note 65, at 700.

170. *See* People v. Knapper, 230 A.D. 487, 492, 245 N.Y.S. 245, 251 (App. Div. 1930) (discouraging juror questioning, but noting that courts have held that a juror question is not error if the juror clearly asked the question in a good faith attempt to elicit facts overlooked by counsel) (quoting White v. Little, 131 Okla. 132, 134, 268 P.2d 221, 222 (1928)); Note, *supra* note 9, at 157; Note, *supra* note 65, at 700. The Federal Rules of Evidence are designed to leave the operation of the courtroom and the questioning of witnesses almost entirely within the judge's discretion. FED. R. EVID. 611(a), (b).

171. *See* Note, *supra* note 9, at 157-58 (stating that courts are split over whether jurors can ask questions about omitted information); Note, *supra* note 65 at 702-03.

inquiries.[172] Furthermore, the relevance of the questions is ensured because the jury questions are limited to topics on the record.[173]

The second option allows jurors to ask questions that are germane to the issues.[174] The jurors can venture outside the realm of clarifying testimony and ask questions that they believe are necessary for making a proper determination in the case.[175] Jurors who use this method are more informed about the case than usual, but the risk of unnecessary and frivolous questions increases dramatically.[176] If the questioning process is not controlled carefully, this procedure also gives jurors the opportunity to turn the trial into an inquisition.[177] Some commentators have argued that the problems associated with this second method are offset by allowing general questions, which lessen the risk that counsel might attempt to hide evidence from the jury.[178] Unfortunately, the commentators making this argument have overlooked the fact that the judge already has the power to ask witnesses questions to prevent attorneys from hiding evidence.[179]

V. The Arguments in Favor of Jurors Questioning Witnesses: The Empirical Studies

During the past ten years at least three major studies have addressed juror questioning: a study conducted in the Second Circuit and two studies by Professor Stephen Penrod and Mr. Larry Heuer.[180] The studies are based on real trials during which jurors were allowed to pose

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172. Note, *supra* note 65, at 702-03. For example, the constraint of asking questions only on issues raised during direct and cross-examination automatically eliminates questioning on insurance and remedial measures since the attorneys do not ask these questions. *See supra* note 153. Thus, these issues would be placed outside of the permissible scope of juror questioning. *See supra* note 168 and accompanying text.

173. *See* Note, *supra* note 65, at 702-03.

174. *See* Nelson v. State, 257 Ark. 1, 513 S.W.2d 496 (1974); Note, *supra* note 9, at 157 & n.175.

175. *See* sources cited *supra* note 175.

176. Note, *supra* note 65, at 701.

177. *Id.* at 701-02.

178. *See* Note, *supra* note 65, at 701 (noting that because attorneys are not protected from attempts by the judge or opposing counsel to obtain information that has been omitted, no reason exists for denying this power from the jury).

179. *See supra* notes 65-77 and accompanying text.

180. The first study was conducted in the Second Circuit from 1982 to 1985. The results were published in 1985 in an issue of the *New York University Law Review*. *See* Sand & Reiss, *supra* note 101, at 423. Heuer and Penrod administered the other two experiments. One was carried out in Wisconsin and involved approximately 70 trials. Heuer & Penrod, *supra* note 16, at 237. The other was sponsored by the American Judicature Society and the State Justice Institute; the preliminary results were reported in *The Docket*, the journal for the National Institute for Trial Advocacy. Heuer & Penrod, *supra* note 7, at 4. A more complete discussion of the second Heuer and Penrod study was published as this Note was being printed. *See* Heuer & Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 Nw. U.L. Rev. 226 (1990).

questions to witnesses under an indirect questioning method in which the judge screened written questions.[181] Because the judges and lawyers in each Heuer and Penrod study agreed to participate in the study at the outset,[182] the results could be skewed in favor of allowing jurors to ask questions.

Significantly, in each of the studies, the jurors who could question witnesses were more satisfied with their jury service than those who were not allowed to ask questions.[183] This satisfaction stemmed from the additional involvement of asking questions.[184] Jurors claimed that they were less worried about an incorrect verdict because asking questions eliminated their concerns about insufficient information.[185] Despite this fact, however, several judges who participated in the Second Circuit study concluded that they would not allow juror questions in the future.[186]

The other important finding in the studies focused on the number of questions asked and the parties' satisfaction with the procedure. The Second Circuit study revealed no correlation between the number of questions asked and the judge's perception of the utility of the procedure.[187] One of the Heuer and Penrod studies, however, found that judges became more concerned with the utility of the procedure as the number of questions increased.[188]

The Heuer and Penrod studies also showed that the belief that jury questions uncover pertinent and helpful information[189] has been exaggerated.[190] Benefits in this area were modest at best.[191] Modern discovery methods and the adversarial process may have eliminated the

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181. *See* sources cited *supra* note 180. For a discussion of the indirect questioning method, see *supra* notes 146-65 and accompanying text.

182. Heuer & Penrod, *supra* note 7, at 4; Heuer & Penrod, *supra* note 16, at 237. In the Second Circuit study only the judges agreed to participate. Sand & Reiss, *supra* note 101, at 423.

183. *See* Heuer & Penrod, *supra* note 7, at 10. In the first Heuer and Penrod study, the results indicated that juror questioning decreased juror doubts about the testimony. Heuer & Penrod, *supra* note 16, at 231. The study, however, was unable to verify the hypothesis that juror questioning increases juror satisfaction with the trial procedure.

Four of the judges in the Second Circuit study noted that they had sensed that the questioning process focused the jurors' attention on important issues, increased jurors' sense of involvement in the case, and kept the jurors more alert. Sand & Reiss, *supra* note 101, at 446.

184. *See* Heuer & Penrod, *supra* note 7, at 10.

185. *Id.*; *see also* Sand & Reiss, *supra* note 101, at 444.

186. Sand & Reiss, *supra* note 101, at 444.

187. *Id.* at 446.

188. Heuer & Penrod, *supra* note 7, at 5; *see also* Heuer & Penrod, *supra* note 16, at 237.

189. *See* State v. Kendall, 143 N.C. 659, 57 S.E. 340 (1907); *see also supra* text accompanying notes 98-100.

190. Heuer & Penrod, *supra* note 7, at 10; *see also* Heuer & Penrod, *supra* note 16, at 237; *supra* note 101 and accompanying text.

191. *See* Heuer & Penrod, *supra* note 7, at 10; Heuer & Penrod, *supra* note 16, at 237.

surprises that, in the past, had arisen in the middle of a case.[192] The studies further revealed that juror questions provided little instruction about the jurors' understanding of the evidence and law in the case.[193] This discovery is surprising because juror understanding was one of the principal reasons that commentators have cited for the adoption of juror questioning.[194] In addition, the studies have not provided information on juror bias.[195] Since researchers are not allowed to watch actual jury deliberations, empirical proof in this area will be difficult.[196]

Notably, the Second Circuit study found a divergence between the views of attorneys for the prosecution or the plaintiff and those representing the defense.[197] Prosecutors and plaintiff counsel were overwhelmingly in favor of allowing jurors to ask questions.[198] On the other hand, defense counsel were split on the subject, with several attorneys strongly opposed to allowing jurors to ask questions.[199] Unfortunately, the study did not offer a reason for this important split.[200]

One potential explanation is that the defense attorneys believed that they were unable to hide information when jurors were allowed to ask questions. This explanation is unlikely, however, because even in the absence of juror questioning the judge could ask questions.[201] An alternative explanation is that the jurors became biased against the defense by the time the defense started to present its case. None of the studies have considered this possibility, but any juror bias should become apparent in the questions asked by the jury members.

VI. ANALYSIS

Juror questioning definitely can be a useful procedure in certain limited situations. The usefulness of juror questioning of witnesses dur-

192. *See* Heuer & Penrod, *supra* note 7, at 10; Heuer & Penrod, *supra* note 16, at 237.

193. *E.g.*, Heuer & Penrod, *supra* note 7, at 10; Heuer & Penrod, *supra* note 16, at 254.

194. Heuer & Penrod, *supra* note 7, at 10. This problem may stem from the fact that the screening procedures used to weed out potentially biased or improper questions are time consuming and, therefore, discourage jury members from asking questions.

195. *Id.* at 5 (stating that a "final concern is that when an objection to a juror's question is sustained, the jury will draw inappropriate inferences").

196. *Id.* Heuer and Penrod have assumed that judicial dissatisfaction with jury verdicts would increase if the jurors became biased. Many cases are close, however, and the jury could return with a verdict that favors one party without the jury bias being evident. In addition, the jury instructions that the judge gives can lead the jury to a verdict and have a great impact on the outcome of the case. Thus, the instructions may override any jury biases. Finally, the jurors in the Heuer and Penrod studies did not ask a significant number of questions; therefore, the judges had even more difficulty determining whether the jurors had become biased. *See id.* at 4.

197. Sand & Reiss, *supra* note 101, at 444-45.

198. *Id.* at 445.

199. *Id.*

200. *Id.*

201. *See supra* notes 65-77 and accompanying text.

ing trials, however, has been exaggerated. The proponents of the process have overlooked several important factors.

A. Ineffectiveness of Remedial Instructions

Proponents of jury questioning have made the fundamental assumption that a judge easily can rectify problems arising from an improper juror question with a remedial instruction. Unfortunately, a remedial instruction often fails to achieve its stated purpose.[202] Jurors have great difficulty ignoring a piece of information simply because a judge has instructed them to disregard it.

B. Problems Arising from Either Failing to Object or Objecting to Juror Questions

Another negative consequence of juror questioning is the added possibility that issues will be waived on appeal. If attorneys fail to object to questions, they risk forfeiting the ability to appeal an issue arising out of the line of questions posed by jurors.[203] Attorneys who fail to preserve issues on appeal drastically increase the possibility of a malpractice suit, and prosecutors jeopardize their jobs.

Although the malpractice suit filed by the disgruntled client may have no chance of succeeding, these nuisance suits remain costly because of the effect on the lawyer's malpractice insurance premiums, the lost billable time associated with defending oneself, and the cost of settling when the lawyer is not insured. An attorney's reputation is also in danger of being tarnished. This risk is likely to increase further if other states follow the Florida decision eliminating the "gag" rule, which had precluded disgruntled clients from publicly discussing their claims against their attorneys.[204]

Problems with failing to object are great, but the problems associated with objecting are equally significant. If lawyers do object to juror questions, they risk antagonizing the jury.[205] Proponents of juror questioning have argued that indirect screening of questions lessens the risk of antagonizing the jury.[206] This risk should not be underestimated

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202. *See* DeBenedetto v. Goodyear Tire & Ruhber Co., 754 F.2d 512, 516 (4th Cir. 1985).

203. *See supra* note 136 and accompanying text.

204. *See* Resnick, *Florida Gag Rule Is Abolished*, Nat'l L.J., Mar. 5, 1990, at 3.

205. In United States v. Lewin, 900 F.2d 145, 147-48 (8th Cir. 1990), the Eighth Circuit noted that although juror questioning is not per se improper and is within the discretion of the trial court, *id.* at 147 (citing United States v. Land, 877 F.2d 17, 19 (8th Cir.), *cert. denied*, 110 S. Ct. 243 (1989)), it could not condone the practice of inviting juror questions, especially when the procedure utilized required jurors to pose questions aloud or required attorneys to object within the hearing of the jury. *Id.*

206. *See supra* notes 146-67 and accompanying text.

since jurors should be able to discern who is objecting to their questions.[207] Objecting does not eliminate the possibility of malpractice actions. Attorneys may face malpractice suits for antagonizing the jury with too many objections.[208]

C. *Potential Abuse of the System*

Another suggested advantage of juror questioning is that the attorneys would benefit from knowing what issues the jury is considering and whether the jurors are confused about certain issues or areas of testimony.[209] While this reason is legitimate, the attorneys also can abuse the system.[210] For example, even if the judge decides to prohibit a juror's question as a violation of a rule of evidence, the attorney still can reveal the prohibited information in the examination of another witness or in a closing statement. A clever attorney, therefore, can circumvent the judge's ruling and get the information to the jury.[211]

D. *Adverse Effects on Trial Efficiency*

Commentators also have argued that jury questioning will not add significant amounts of time to the trial process.[212] This proposition is true, however, only if the judge discourages jurors from asking large numbers of questions.[213] Yet, discouraging jurors from asking questions reduces or eliminates the advantages of the questioning process. This discouragement might explain why many of the lawyers and jurors who participated in the two Heuer and Penrod studies found the questioning procedure to be only marginally helpful.[214] If the process is only marginally helpful, it may not be worth the added risk of a reversal on

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207. *See* J. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY (1987). *See generally* T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES (1988).

208. Federal Rule of Evidence 11 and many state courts allow a party to seek the recovery of attorney's fees stemming from the defense of a frivolous law suit. *See, e.g.*, Boone v. Superior Court, 145 Ariz. 235, 700 P.2d 1335 (1985); Stevens v. Kiraly, 24 Ohio App. 3d 211, 494 N.E.2d 1160 (Ct. App. 1985); Wilson v. Henkle, 45 Wash. App. 162, 724 P.2d 1069 (Ct. App. 1986). *See generally* Annotation, *Attorney's Liability for Fees*, 56 A.L.R. 4th 486 (1987). The attorney still will not be compensated, however, for the lost billable time or a damaged reputation.

209. *See supra* notes 17-18 and accompanying text. Courts should allow the attorneys to ask a witness additional questions to clarify any issues that the juror questioning might have raised. *See* Note, *supra* note 65, at 705-06 & n.125 (noting that Federal Rule of Evidence 611(b) gives a judge discretion to allow redirect questioning).

210. *See* Informal Notes, *supra* note 135.

211. *Id.*

212. Heuer & Penrod, *supra* note 7, at 5; *see also* Heuer & Penrod, *supra* note 16, at 238, 254-55.

213. Heuer & Penrod, *supra* note 7, at 4.

214. In each of the Heuer and Penrod studies, the typical pretrial instruction reminded the jury that the questioning of witnesses is primarily the lawyers' responsibility and that they were encouraged strongly not to ask too many questions. *Id.*

appeal.

The obvious way to foster satisfaction with juror questioning is to make it easier for jurors to ask questions. Unfortunately, encouraging questions dramatically increases the risk that jurors will become too involved in the case and lose their sense of impartiality.[215] If the jury becomes partisan, the entire concept of trial by a fair and impartial jury is threatened, especially if a few jurors start to question witnesses in an attempt to deliberate with other jurors before the completion of testimony.[216]

E. Problems with Discouraging or Halting Juror Questions Mid-Way Through Trial

If juror questioning becomes unwieldy or time consuming a judge may discourage or even halt juror questioning entirely, as in the Texaco-Penzoil case.[217] If juror questioning builds rapport between the lawyers and the members of the jury and if the questioning is halted after only the plaintiff has utilized the process, then the defense would be at a severe disadvantage. When a judge limits questioning, the jury might infer that the party who was being hurt by the questioning brought about the judge's decision, regardless of the reason for the judge's decision. Discouraging or halting juror questioning mid-way through the trial is potentially more dangerous to the right to an impartial jury than jury antagonism resulting from a lawyer's repeated objections to juror questions.

F. Juror Questioning in Complex Litigation

The proponents of juror questioning have argued that this process would be extremely valuable in complex litigation, particularly when the testimony describes complicated business practices that are difficult for a lay person to grasp.[218] Several of the most famous business trials of the 1980s, including the Texaco-Penzoil battle over Getty Oil,[219] the GAF insider trading case,[220] and a shareholder derivative suit arising out of the Continental Illinois bankruptcy,[221] used juror questioning

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215. *See* Heuer & Penrod, *supra* note 16, at 237.

216. *Id.*

217. The judge halted juror questioning in the Texaco-Penzoil case in the middle of the trial because the judge found that it was too time consuming and unwieldy. Steinbreder, *The $10-Billion Misunderstanding*, FORTUNE, Dec. 23, 1985, at 6 (discussing the $10 billion verdict in the Texaco-Penzoil case).

218. *See id.* at 6.

219. *Id.*

220. Riley, *Case of the Uncharged Co-Conspirator*, N.Y. Newsday, Dec. 27, 1988, at 33.

221. Weiner, *Whose Fault: Continental Illinois or the Auditor?: As Civil Trial Enters Fourth Month, the Legal Bills—and Tensions—Begin to Mount*, AM. BANKER, May 18, 1987, at 2.

during at least part of the trial.[222] Jury questioning in complex cases may not be the proper response, however. In fact, many of the participants in these cases questioned the utility of the procedure.[223]

Because of the complexity of these trials and the difficulty of the issues, few people would argue that a juror who does not understand a term used in expert testimony should be precluded from asking the witness to explain the term. In complex litigation jurors also are likely to have a large number of questions and to develop proprietary interests in these questions. As a result, they may lose the objectivity needed to reach a just verdict.[224]

Many of the problems with complex litigation can be avoided by using other less risky procedures instead of allowing jurors to ask more than definitional questions. The most obvious solution is for the parties to opt for a nonjury trial.[225] This option is not likely to occur, however, because if one side expresses a desire to avoid a jury trial, the opponent will request one for strategic purposes. Another option is to preinstruct the jury on the relevant points of law to be discussed in the case.[226] The preinstruction would guide the jury through the many hours of evidence during the course of the trial by helping the jury members identify the lines of testimony relevant to their deliberations.[227] At the end of the trial, the judge again would charge the jurors to refresh their memories and to provide further instruction on any additional information that had developed during the course of the trial.[228] Finally, the judge could aid the jury further during the course of the trial by periodically summarizing the information presented for the jury or allowing counsel to do so.

G. Threats to Jury Impartiality

The most compelling argument against juror questioning, however, is that the jury's role will be distorted regardless of the selected method and the utilization of elaborate screening mechanisms. The problem, as

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222. *See supra* note 217.

223. For instance, the first judge in the Texaco-Penzoil case abandoned the practice during the trial because he felt that the delays associated with the questioning process outweighed any utility that it might have. Steinbreder, *supra* note 217, at 6.

224. *See generally* Note, *supra* note 65, at 706. When these concerns are combined with the fact that attorneys attempt to select jurors who are biased in their favor, a major problem exists.

225. Moreover, it probably would be unconstitutional for Congress to mandate nonjury trials merely because the litigation is complex. *See* U.S. CONST. amends. VI and VII. Informal surveys of judges have indicated that judges encounter cases too complex for a jury at least once during their careers on the bench. *See* Goodman, Greene & Loftus, *What Confuses Jurors in Complex Cases*, TRIAL, Nov. 1985, at 65.

226. *See* Sand & Reiss, *supra* note 101, at 437-42.

227. *Id.*

228. *Id.*

noted in a concurring opinion in *United States v. Johnson*,[229] is that the jury is intended to be a neutral fact finder in the adversary process. This neutrality is naturally at risk whenever the jury is afforded an opportunity to ask questions that move beyond basic elements of a witness's testimony.[230] Cases in which other members of the jury hear the questions that the judge refuses to ask are especially problematic because both the juror who raised the question and the other members of the jury may retain the opinion generated by the question.[231] Chief Judge Donald Lay and Judge Theodore McMillian argued in *Johnson* that even an innocent response to a question that appears to be innocuous can influence a juror's appraisal of the credibility of the witness and the parties to the case.[232] Although this viewpoint may be extreme, it is fundamentally sound especially when the ultimate fact finder in the case has chosen sides prematurely. Biased jurors might not be receptive to further suggestions of a different outcome of the case. As Judges Lay and McMillian noted, nothing can assure that the jury will remain open-minded, but neutrality is fostered when jurors are kept out of the advocacy process.[233]

VII. Conclusion

Recent discussions among legal scholars about juror questioning of witnesses have generated a significant amount of favorable press for the procedure. Many of the commentators who have written on the subject, however, have exaggerated the importance and effectiveness of juror questioning. Admittedly, two-way communication is more effective than one-way communication, and jurors probably should be able to ask questions about the basic elements of a witness's testimony. Once the questioning extends beyond the simple clarification of a definition or a piece of testimony, however, the risks of prejudicing the jury and unreasonably delaying the trial increase drastically. In fact, the constitutional guarantee of a fair and impartial jury may be jeopardized. In the end, the risks outweigh the utility of the questioning procedure, and thus the experiment of juror questioning should cease.

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229. 892 F.2d 707, 713 (8th Cir. 1989) (Lay, C.J., joined by McMillian, J., concurring).
230. *Id.* (Lay, C.J., joined by McMillian, J., concurring).
231. *See* United States v. Land, 877 F.2d 17, 19 (8th Cir.), *cert. denied*, 110 S. Ct. 243 (1989).
232. *Johnson*, 892 F.2d at 713 (Lay, C.J., joined by McMillian, J., concurring).
233. *Id.* (Lay, C.J., joined by McMillian, J., concurring).