



New Rule 243 Allows Jurors to Ask Questions of Witnesses in Civil Cases

By Ted A. Donner

Effective July 1, 2012, Illinois law allows judges in civil cases to take questions from the jurors to be asked of witnesses during trial. Prior to the enactment of new Illinois Supreme Court Rule 243, the practice was already being allowed in a majority of the states as well as federal courts, and had been used in a number of state court proceedings in Illinois (usually in cases in which the parties agreed to its use). The new rule, though, both provides for specific practices to be followed in such cases and, as a practical matter, brings a unique innovation to the fore which, previously, did not warrant a great deal of attention in Illinois.

Rule 243's Requirements. Rule 243 specifically allows that written questions for witnesses may be submitted by jurors to the court for consideration. The Rule provides that:

(a) Questions Permitted. The court may permit jurors in civil cases to submit to the court written questions directed to witnesses.

(b) Procedure. Following the conclusion of questioning by counsel, the court shall determine whether the jury will be afforded the opportunity to question the witness. Regarding each witness for whom the court determines questions by jurors are appropriate, the jury shall be asked to submit any question they have for the witness in writing. No discussion regard-

ing the questions shall be allowed between jurors at this time; neither shall jurors be limited to posing a single question nor shall jurors be required to submit questions. The bailiff will then collect any questions and present the questions to the judge. Questions will be marked as exhibits and made a part of the record.

(c) Objections. Out of the presence of the jury, the judge will read the question to all counsel, allow counsel to see the written question, and give counsel an opportunity to object to the question. If any objections are made, the court will rule upon them at that time and the question will be either admitted, modified, or excluded accordingly.

(d) Questioning of the Witness. The court shall instruct the witness to answer only the question presented, and not exceed the scope of the question. The court will ask each question; the court will then provide all counsel with an opportunity to ask follow-up questions limited to the scope of the new testimony.

(e) Admonishment to Jurors. At times before or during the trial that it deems appropriate, the court shall advise the jurors that they shall not concern themselves with the reason for the exclusion or modification of any question submitted and that such measures are taken by the court in accordance with the rules of evidence that govern the case.¹

As explained in the Committee's comments, the rule "gives the trial judge discretion in civil cases to permit jurors to submit written questions to be directed to witnesses a procedure which has been used in other jurisdictions to improve juror comprehension, attention to the proceedings, and satisfaction with jury service."² Thus, the Committee explains, "[t]he trial judge may discuss with the parties' attorneys whether the procedure will be helpful in the case, but the decision whether to use the procedure rests entirely with the trial judge. The rule specifies some of the procedures the trial judge must follow, but it leaves other details to the trial judge's discretion."³

Illinois Chief Justice Thomas L. Kilbride has said of the new rule that, by its enactment, Illinois is encouraging a practice which has proven, in other jurisdictions, to be of value to the jurors themselves, encouraging their confidence in the system. "This proposal was the subject of much discussion—both internally by the Illinois Supreme Court Rules Committee at several of its meetings and at a public hearing in May 2011," he said. "Based on the comments of those who have used or seen the procedure at trials, such a rule enhances juror engagement, juror comprehension and attention to the proceeding and gives jurors a better appreciation for our system of justice."⁴

Studies Regarding Effectiveness of Juror Questioning of Witnesses. Since juror questioning began to develop, in recent years, as a more common practice in courts

throughout the United States, there have been a number of studies regarding the merits of the practice. As Kathy Kellerman summarized some of those studies, "[One group in 1994] conducted a national field experiment to explore the effects of juror submitted questions for witnesses. Their research compared 80 cases in 33 states where jurors were allowed to submit questions for witnesses to another 80 cases where jurors were not permitted to do so. Jurors did not ask inappropriate questions, become advocates, or become offended or embarrassed by objections. Jurors who were permitted to submit questions felt they were better informed."⁵



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In the course of the more locally based Seventh Circuit Jury Project, another group "examined the effects of juror questions for witnesses across 27 cases with 14 different judges.... Jurors submitted questions in 20 of the 27 cases. In the seven trials where jurors submitted no questions, the judge instructed jurors they could submit questions only once, before testimony began, and post-trial 62% of jurors were not aware they could do so. In the 20 trials in which jurors submitted questions, 10 of the 11 judges asked

the jury after each witness if there were any questions...."⁶

The Seventh Circuit Jury Project published its final report in September, 2008.⁷ The participating judges from the Northern District of Illinois included Judge Elaine E. Bucklo, Judge Geraldine Soat Brown, Judge David H. Coar, Judge John W. Darrah, Judge Morton Denlow, Judge Samuel Der-Yeghiayan, Judge Joan B. Gottschall, Judge James F. Holderman, Judge Matthew F. Kennelly, Judge Joan Humphrey Lefkow, Judge James B. Moran, Judge Sidney I. Schenkier, Judge Amy J. St. Eve, and Judge James

1 Ill.S.Ct. Rule 243.

2 Ill.S.Ct. Rule 243 (Comments).

3 Id.

4 Illinois Supreme Court Press Release, April 3, 2012.

5 Kathy Kellerman, www.kkcomcon.com/onlinejuryresearchupdatebytopic.htm, citing Heuer, L., & Penrod, S., Juror notetaking and question asking during trials: A national field experiment. *Law and Human Behavior*, 18, pgs. 121-150 (1994).

6 Id., citing Diamond, S.S., Juror questions at trial: In principle and in fact. *New York State Bar Association Journal*, 78, pg. 23 (2006) and Krauss, E., The latest in juries: What's happening around the country that's of interest to New York lawyers and judges? *New York State Bar Association Journal*, 78, pgs. 16-20, 22 (2006).

7 <http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf> ("Jury Project Final Report").

B. Zagel.⁸ The project was spear-headed by Seventh Circuit Bar Association president, James R. Figliulo, “with the goal of putting the jury principles articulated by the ABA American Jury Project into action.”⁹ Figliulo co-chaired the commission with Judge James F. Holderman, who has himself spoken repeatedly in favor of jury questioning of witnesses during trial.¹⁰ Three consultants worked with the Commission, Professor Shari Diamond of Northwestern University, Professor Stephen Landsman of DePaul University and Dan Wolfe, of TrialGraphix/Kroll Ontrack.¹¹

The Commission concluded:

“The procedure of permitting jurors to submit

written questions for witnesses during trial had the intended goal of enhancing juror understanding of the evidence presented at trial. Jurors in the Seventh Circuit Project jury trials generally used their questions for that purpose and the vast majority of jurors, eighty-three percent (83%) reported that the ability to submit written questions helped their understanding of the facts. Judges and attorneys who participated in trials in which jurors questions were permitted also responded very favorably to the procedure with seventy-seven percent (77%) of judges and sixty-five percent (65%) of attorneys reporting increases in jurors understanding. Moreover, seventy-five percent (75%) of judges and sixty-six percent (66%) of attorneys saw no reduction in efficiency associated with permitting juror questions. The Seventh Circuit Jury project Commission therefore strongly recommends use of this procedure in future state and federal jury trials.”¹²

The studies conducted on whether juror questioning of witnesses during trial has a positive or negative impact on the process thus appear to be fairly uniform in their

conclusions. The judges, attorneys and jurors who have participated in the process have confirmed the experience was a positive one and that it assisted rather than detracted from the jury’s ability to fairly decide whatever case was before it.

Trial Consultants’ Experience With Juror Questioning. A great many trial consultants from around the country also echoed these beliefs when we interviewed them

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for this article. Although some were quick to point out that juror questions may be a misleading indicator if relied upon to get a sense of what the jury as a whole is thinking, they repeatedly emphasized

that such questions provide counsel with at least some understanding of what the issues may be during deliberations. Kathy Kellermann, for example, said that, “My experience is that jurors ask good (relevant, pertinent, helpful) questions. I like that we can ‘see into’ jurors’ minds by the questions they ask. We learn what the issues are to jurors. There is only minimal feedback a litigant can obtain during trial, primarily nonverbal and that is very hard to read. Questions, on the other hand, tell you what concerns jurors have, and allow you to address those concerns.”¹³

Ken Brodha-Bahm, likewise, pointed out that, “Attorneys already know, from oral arguments, the value of being able to hear and adapt to a judge’s question mid-stream in the argument. It allows you to know what your decision-maker is thinking, and it allows you to target what might be their greatest obstacle to siding with your case. The same principle applies to juries. Knowing what they’re thinking helps you adapt, and the heart of persuasion is adaptation.”¹⁴

In this context, though, most of the attorneys and consultants we interviewed for this article also emphasized

8 *Id.*, pg. 8.

9 *Id.*, pg. 9.

10 See Jeffrey J. Kroll, *Jurors May Ask Questions in Civil Trial*, April 5, 2012 (“Another supporter of Rule 243, Chief Judge James F. Holderman of the U.S. District Court for the Northern District of Illinois, explained that he has been using questions from jurors for more than five years and once the jurors are deliberating, it appears that fewer questions come out of the jury room.”).

11 Jury Project Final Report, pg. 9.

12 *Id.*, pg. 13.

13 Interview with Kathy Kellermann of Kellermann Communication Consulting, Marina del Rey, California (April 10, 2012).

14 Interview with Ken Brodha-Brahm of Holland & Hart LLP (April 10, 2012) and Tracy Bollinger of Kellermann Communication Consulting (April 10, 2012). Tracy Bollinger likewise told us that the practice provides “a rare, and sometimes painful, glimpse into the developing verdict, but, it is also an opportunity to reassess strategy. We can observe the jury as they listen to a witness, but as with all people, it is the questions we ask, that are so often revealing of our true thoughts.” Interview with Tracy A. Bollinger, Armstrong Teasdale LLP, St. Louis Missouri (April 10, 2012).

that it is important to keep things in context and not read too much into the questions from jurors.¹⁵ They are not necessarily indicative of what the jury as a whole is worried about. Still, as Richard Gabriel explained, it can be invaluable to hear what questions are posed by particular jurors because, in the end, it is at least likely that any juror who elects to ask a question is one who would probably raise the same question during deliberations. “If you pay attention, the questions will give you some indication of where the jurors are heading,” Gabriel said, “[a]t the very least,

if there’s one juror asking a lot of questions, that tells you something about where the leadership is. People who ask more questions and are more vocal tend to be more dominant in deliberations. Now, some judges are sensitive to that and don’t want the jurors to put their names down for that reason. Still, if someone is vocal enough to bring an issue up in a question, they’re going to be vocal enough to bring it up in deliberations. When you get a series of questions from the jury, over time, that can give you a good sense of where the jury is going.”¹⁶

¹⁵ Michael Ford, for example, said that, “my experience has been that a majority of the questions concern inadmissible evidence and that judges generally do not provide an explanation to the jury as to why individual questions may not be asked. I have also found that lawyers tend to read too much into the questions being asked. Often a question may come from a juror who views the case very differently from the rest of the jury.” Interview with Michael Ford, Trial Consultant in Frisco, Texas (April 10, 2012). Theresa Zagnoli, a trial consultant in Chicago, likewise told us that she had just finished a trial in federal court in Texas when we called, in which the trial judge invited jurors to ask questions for the first time in his career. “As usual,” she said, “the lawyers rumbled and grumbled. Also, par for the course, after the first question was read by the judge the attorneys could barely contain themselves in anticipation of what the next question would be, guessing who wrote what and why.” It is “all good sport,” Zagnoli explained, “but the main advantage of the process is for the jurors who get reassurance that their collective comprehension of the issues matters. Interview with Theresa Zagnoli, Zagnoli, McEvoy Foley LLC, Chicago, Illinois (April 10, 2012).

The practice of juror questioning during trial thus poses both an interesting opportunity and potentially difficult challenge for trial lawyers in Illinois. Some control is certainly lost in the process (it is bound to be painful to hear a question from a juror that one was all too glad opposing counsel didn’t think to ask). But the trade-off is a more active and involved jury, whose questions are bound to provide some, albeit limited insight into what matters to them. Knowing that jurors who are willing to speak up during trial are likely to speak up during deliberations, attorneys can use juror questions both to help facilitate a more reasoned verdict and to address what matters to those jurors during the remainder of the trial and closing argument. □

¹⁶ Interview with Richard Gabriel, Decision Analysis, Los Angeles, California (April 11, 2012).