

JURY QUESTIONNAIRES: THE ROYAL ROAD TO TRUTH

Many of us remember our basic critical thinking courses in college: “Socrates is a man, all men are mortal, therefore Socrates is mortal.” Specific to this article, all judges are lawyers, all lawyers study the law, therefore all judges study the law. As lawyers and judges, you are expected to bring into the courtroom an expertise and understanding of all the legal ramifications a trial involves. Conversely, attorneys are often unfairly expected to be experts in the field of social psychology. Psychology and human behavior are actually the forte of the behavioral scientist or trial consultant. The combination of legal and behavioral art forms should result in an instrument capable of identifying biased jurors and eliminating those jurors from a prospective panel. Ideally, the juror questionnaire would reflect the efforts of both disciplines. The use of a suitable juror questionnaire increases the probability of fairness at trial. Additionally, the use of the questionnaire protects the juror and his or her privacy during the selection process.

From a juror perspective, the courtroom is an alien place. The protocols and physical environment are very unfamiliar and often threatening. In this threatening and frightening environment, we ask jurors to openly disclose personal information about themselves, and we commonly ask them about their deepest prejudices and personal biases. When we ask for information in this open environment, the opportunity for gaining honest and meaningful information is substantially reduced, and in some cases entirely eliminated. Social scientists appreciate the fact that individuals wish to fit in with their peer group. Well-adjusted people want to be accepted and, therefore, tend to give the socially acceptable answer to questions. For example, if an open group of people is asked, “Do you have prejudices against any races or classes of people?” the socially acceptable answer is “No”. I believe prejudice is on a continuum, and we all fall at one point or another on the scale. If one juror is brave enough to give the socially unacceptable answer, other jurors will see the additional attention brought on that juror and hear the follow-up questions. We therefore teach them what the “right” response to the question is if they want to be acceptable to the group. Matters can sometimes be made worse when an attorney or judge will stay to the juror, “Surely you can put your prejudice aside and judge this case on just the evidence.” The socially acceptable answer is intrinsic to the question. This simply causes the juror to go through the motions of being honest.

Many people have a significant fear of speaking in public. In spite of our knowledge of this, we expect jurors to stand in an open courtroom and answer what are sometimes intimate or private questions. We ask them if they break the law on a regular basis while driving their car, we ask them if they drink to excess, we ask them about some of their sexual activities, and we often ask them about their finances. These inquiries can cause great embarrassment to the jurors and, even worse, can result in the seating of a juror who is wholly inappropriate to hear a particular case.

Extensive research in psychology, sociology, communications and law has examined the issue of non-disclosure by participants in surveys and trials. Again and again, studies have found that people are willing to be more candid and to reveal more personal information regarding sensitive questions on a self-administered written questionnaire than they are in verbal, person-to-person interviews, and in voir dire. (Spaeth, 2001)

When jurors are provided a level of privacy in their written responses on jury questionnaires, they are much more likely to be honest and revealing than their oral responses would be in the group setting of voir dire. Jurors who, in the public setting of the courtroom, might hesitate to reveal private information relative to the jury service are more likely to be candid in filling out a private questionnaire. (Krause and Bonera, 1985)

The juror, unfamiliar with the courtroom, wants to fit in and be respected by their peers. More importantly, they want the father figure, the judge, to accept them. Like a father figure, the judge is all-powerful and sets the example of behavior. “Judges usually do not realize they are seen by jurors as both powerful and fair, and this attitude on the part of jurors creates an expectation in their minds that they should say they can be fair and impartial, whether or not this is true. Jurors want to be accepted and approved of by the judge. They want to say the right things to him.” (Bennett, 1977) Jurors are particularly reticent to provide personal information involving their sex lives, substance abuse, alcohol use, and carelessness. These are often the very issues that are the focus of the matter before the court and the jury. It is logical to then conclude that a jury questionnaire will be more fair to the participants at bar, risk less injury to the members of the panel, and serve to give us the “best truth”.

Rule 47(b)(2), Arizona Rules of Civil Procedure, states, in relevant part: “The court shall conduct a thorough oral examination of prospective jurors.” Further, the rule states, “Nothing in this rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination.” Additionally, Rule 47(D) Arizona Rules of Civil Procedure states in part: “The examination of the jurors touching their qualifications to serve shall not be restricted to the grounds of challenge for cause, but may extend to any legitimate inquiry which might disclose a basis for exercise of a peremptory challenge.” (Shaw, 1999) Clearly, these rules provide a framework for the construction of a jury questionnaire that will be both legal and socially sound. Empirical research abounds showing that increased honesty improves with anonymity.

Ten years ago, social scientists conducted research that showed jurors tended to be dishonest during voir dire for the reasons disclosed in this paper. In one of those studies, only 8% of the jurors, in open voir dire, admitted they were closely associated with anyone who had worked for a police department or law enforcement agency. During private post-trial interviews of these same jurors, 30% of the jurors admitted to having friends or relatives in the field of law enforcement. In the same study, jurors were asked if they or their friends or relatives had ever been victims of a crime. Fully one third of

the jurors who should have said “yes” were untruthful during open voir dire. (Seltzer, Venuti, and Lopez, 1991)

In addition to the issues of honesty and social science, the jury questionnaire can also be used to considerably reduce the in-court time used for jury selection. In an ideal situation, the jury panel would be identified, the approved questionnaire would be mailed to them by the courts, the questionnaire would be completed by the panel member in the privacy of their own home, and the questionnaire would be returned to the trial judge on a fixed due date. The questionnaires would be maintained as part of the private record and would be shared only with the attorneys from each side. The attorneys, and their support staff, would have the opportunity of evaluating the questionnaires and making motions to strike certain jurors based on answers to the questionnaires. All of this is done with very little use of the court’s time.

Recently, I was involved in a case of bad faith involving an insurance company. The questionnaire asked persons to use a phrase that best described how they felt about insurance companies. The jurors were protected by the anonymity of the instrument and their expectation of privacy; this resulted in blunt and brutal honesty. Comments were made such as, “Insurance companies evolved from the mafia”, “Insurance companies are the evil empire”, “Insurance companies are always out to get the little guy”, and “You pay your premiums every year and then the insurance companies never want to pay when there’s a claim”. In that case, approximately one fourth of the jurors were so biased against insurance companies that they were stricken for cause without any undo delay.

In summary, well-constructed jury questionnaires can be brief and time saving instruments. They can aide in the discovery of true predispositions and can assist in better guaranteeing a fair trial for all parties.

References

Bennett (1977). Psychological Methods of Jury Selection in the Typical Criminal Case, CRIMINAL DEFENSE 11, 13 (No. 2, April)

Krause, A. and Bonera, B. (1985). Jury Work: Systematic Techniques, 2.08 at 2-44.

Seltzer, R., Venuti, M., and Lopez, G. (1991). Juror Honesty During the Voir Dire. Journal of Criminal Justice, 19 451-462.

Shaw, C.A. (1999). Memorandum on Motion to Request the Right to Use a Jury Questionnaire. Superior Court of Arizona in the County of Yavapai, CV97-0294. June, 1999.

Spaeth, J.M. (2001). Swearing With Crossed Fingers. Arizona Attorney 39-40 (January 2001)

Thomas P. Baggott, PhD, is a litigation consultant and the President of Jury Behavior Research Corporation, located in Tucson, Arizona. If you have any questions about this article or would like further information, he can be contacted through his company's website, www.juryadvisor.com, or via telephone at (520) 297-9691. You may also write to his office at 7925A North Oracle Road, PMB 369, Tucson, AZ 85704.