THE FLORIDA BAR TRIAL LAWYERS SECTION

The Advocate

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The Language of Law

By Robert C. Cumbow[1]

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."
— Lewis Carroll, Through the Looking Glass

We speak a strange language in our profession. I suppose law is not so different from other professions in that respect. We use certain words that most nonlawyers rarely if ever have occasion to use (such as "tort," "laches," or "quash"). And there are other words to which we ascribe different meanings from most of the rest of society (such as "execute," "willful," "malice," "equity").

I'm not sure which of those two categories the word "preponderance" fits into. I suspect that most people never use it at all, but I also suspect that those who do use it regard it differently from the way the law does. Its sheer length, especially combined with its incorporation of the term "ponder," makes it seem as if it should mean "overwhelming weight." Indeed, one dictionary defines it as "a superiority that outweighs all other considerations."

In law, of course, the term simply means "the greater weight." A "preponderance of the evidence" means — as judges, lawyers, and jury instructions repeatedly caution jurors — that the thing alleged is more likely than not to be the case. Unlike the "beyond a reasonable doubt" measure of certainty that applies in criminal cases, the "preponderance of the evidence" measure means that if a jury sees a thing as 51 percent likely to be true and 49 percent likely to be false, they should decide that it is true.

Now no matter how you drum this into jurors' heads, they have a natural resistance to it. Case in point: A jury recently cleared two New York police officers of sexual harassment of junior officers, but the verdict was thrown out when it was revealed that, during deliberations, the jurors had asked for a dictionary, and the foreman had read aloud to the jury the dictionary definition of a key word.

The word was "preponderance."

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Chair's Message

By Mark P. Buell, Chair, Trial Lawyers Section

The Section has continued its efforts to protect Florida's citizens' rights to access the court system. As new issues or attacks occur, we will continue to be heard on matters which affect trial lawyers and Florida citizens. It is unclear as I write this column what new legislation will be proposed by our Legislature. As we are confronted with new issues, we anticipate lobbying on behalf of Florida's trial lawyers or petitioning the Supreme Court as appropriate.

The Trial Lawyers Section appeared before the Florida Supreme Court on November 30, 2005 for oral argument regarding the Florida Medical Association's (FMA) Petition to Amend the Rules Regulating The Florida Bar to limit the amount a trial lawyer may charge her client in a medical malpractice action. The Section was ably represented by Arthur I. "Buddy" Jacobs who prepared the brief filed on behalf of the Section.

The Florida Supreme Court was apparently unimpressed with the FMA's arguments that, unlike other constitutional rights, the constitutional amendment limiting attorneys fees in medical malpractice cases could not be waived. On December 14, 2005, the Florida Supreme Court issued an order directing The Florida

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Thus not only may a case turn on the meaning of a word, but also a mistrial can be triggered by a jury's reliance on a dictionary definition rather than a legal definition. That's a profound lesson in how different legal English is from ordinary spoken English.

Plain Talk

For some time now, many have held that there shouldn't be such a gap between "Legalese" and "plain English." Indeed, this conviction is the foundation for most law school and CLE legal writing programs, and for widespread efforts to make statutory, regulatory, and contractual writing closer to the language we all speak every day.

California recently became the first state to rewrite its criminal and civil jury instructions from scratch. Several other states are following suit; yet many others still adhere to older, more formal and complex instructions, or have no standard instructions at all.

Many have argued that there should not be a gap between "legalese" and "plain English."

Some lawyers regard the new California instructions as "dumbed down" and so simplistic as to be actually less clear than the old instructions. Others have applauded the new instructions as likely to improve communication between officers of the court and jurors, and thus improve the chance that justice will be done.

One improvement to the California jury instructions is the elimination of the phrase "preponderance of the evidence" in favor of "more likely than not." Compare, for example, the old civil instruction on "burden of proof" with the new one:

Old: "Preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it."

New: "When I tell you that a party must prove something, I mean that the party must persuade you, by the evidence presented in court, that what he or she is trying to prove is more likely to be true than not true. This is sometimes referred to as 'the burden of proof.'"

You can see how the new definition of "burden of proof" incorporates the phrase "more likely than not" and avoids any use of the windy and easily misunderstood term "preponderance."

To Forget or to Misrecollect

Another of the old California

CHAIR'S MESSAGE

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Bar to draft and submit to the Court a proposed amendment to Rule 4-1.5(f)(4)(B) to include, at a minimum, the following:

1. An acknowledgment of the provisions of Article I, Section 26 of the Florida Constitution;
2. An affirmative obligation on the part of an attorney contemplating a contingency fee contract with a potential client to notify the client with a medical liability claim of the provisions of Article I, Section 26; and
3. A procedure in which a medical liability claimant may knowingly and voluntarily waive the rights granted by Article I, Section 26, including the possibility of judicial oversight or review of the waiver and the possibility of a standard waiver form for the protection of the rights of a potential medical malpractice client.

The Bar was directed to submit its proposed amendment within 60 days of the date of the order, which was extended for an additional 10 days for the Board of Governors to consider it.

In response to the Court's order, The Florida Bar has directed a proposed amendment be drafted by a committee made up of representatives appointed by the Board of Governors, the Trial Lawyers Section, and the Florida Chapter of the American Board of Trial Advocates. Former Chairmen, Howard Coker of Jacksonville, and Tom Masterson of St. Petersburg, as well as Randy Ogden of Tampa, volunteered to work on this important project along with committee members appointed by The Florida Bar and FLABOTA. It is anticipated a new rule will soon be in place which allows a victim of medical malpractice to retain experienced counsel on terms of her choosing. The Section thanks Buddy Jacobs, Tom Masterson, Howard Coker, and Randy Ogden for their service to the trial lawyers of the State of Florida on this very important issue.

At the Mid-Year Meeting of the Bar in Miami, the Trial Lawyers Section's Annual Chester Bedell Mock Trial Competition was held between 16 competing teams from 8 different Florida law schools. The presentations by the law students were extremely impressive and competitive over the 3 day competition which was won by the team of Angie Torrents and Art Rios from Stetson Law School coached by Roberta Flores. Co-Chairs, Eileen Moss and John Lynn, are to be thanked for their hundreds of hours of hard work in putting together the annual competition.

I continue to be gratified by the many volunteer hours committed by Florida trial lawyers to improve our profession and enhance professionalism. In addition to those mentioned above, our annual Advanced Trial Advocacy Workshop will be held this May in Gainesville, Florida, as it is every year. The Advanced Trial Advocacy Workshop consists of 5 days of intensive, hands-on training for young and old trial lawyers alike. It presents the opportunity to work with some of Florida's finest trial lawyers and to fulfill a portion of your Board Certification requirements at the same time. I hope you will consider attending.

instructions reads: "Failure of recollection is common. Innocent misrecollection is not uncommon." Now this construction is in itself intriguing, for at least two reasons. First, it demonstrates once again how fine distinctions that many people don't make at all are not only made but considered extremely important in the law. "Failure of recollection" and "innocent misrecollection" are two different things. Both are opposed to accurate recollection, and both are ways in which testimonial evidence may be false or incomplete without deliberate lying.

The second thing that makes this instruction so interesting is that its drafter chose to use the opposing constructions "is common" and "is not uncommon." Why, one wonders, was that decision made? To understand, we'd need to know whether "common" and "uncommon" are mutually exclusive terms, or are simply opposite ends of a continuum of possibility. If they are mutually exclusive, then everything is either common or it is not. "Uncommon" means the same thing as "not common." Thus it would have been clearer, smoother, friendlier, and a lot less pompous to say, "Failure of recollection and innocent misrecollection are both common."

Now it may be that the author of the original instruction didn't want to cover both "failure of recollection" and "innocent misrecollection" in the same sentence, thinking that it would be simpler and clearer to devote a separate sentence to each. Fair enough. But the decision to end the second sentence with "is not uncommon" may still be explained in either of two ways. First, perhaps the author thought that it would be boring and repetitious to say "is common" again, or to say "is also common," so he hit upon the double negative "is not uncommon" as a way of saying the same thing without actually repeating the same words.

But a second possibility is that, to the author, "not uncommon" does not mean the same thing as "common." Rather, there is a spectrum, at one end of which one finds things that are "common" and at the other things that are "uncommon." Lying between the two extremes are things that are neither common nor uncommon, and that may thus be fairly described as "not uncommon." Of course, such things, one presumes, must also be fairly described as being "not common." The problem with that is that it leaves us in the awkward position of maintaining that "not common" and "uncommon" mean two different things. What the difference may be is anyone's guess — or perhaps a matter for further speculation, but let's not burden ourselves with it here.

Simpler and clearer use of language does not always mean shorter.

In any event, it must at this point be amply clear why someone felt that the old rule ought to be rewritten. The author of the new version, in a moment of inspiration, realized that the important point of the original instruction was not how common or uncommon are "failure of recollection" and "innocent misrecollection," but rather that the two are different phenomena, and the law distinguishes between them for important evidentiary reasons. Hence, the new version:

"People often forget things or make mistakes in what they remember."

The degree of commonness of these phenomena is relegated to the use of the term "often." It no longer matters whether these are more or less common occurrences. The important thing is that there are two ways of having your memory fail: being unable to remember something and remembering it incorrectly. Why is this important?

For the simple reason that the person who has forgotten something knows he doesn't remember it (when asked about it, he can truthfully say, "I don't recall"); while the person who misremembers something thinks she remembers it accurately, and doesn't realize she is mistaken. We begin to see why this distinction is so important, because it goes to the degree of conviction with which a witness might testify, the level of certainty she might have or seem to have, and, ultimately, the witness's credibility.

Besides showing how, at least in this case, the California rewrite got it right, and produced a much more understandable and illuminating jury instruction, this little exercise also illustrates my earlier point that the law uses words in ways that most people don't, and that's because lawyers think in ways that other people don't. In fact, we go to school for three extra years to learn to think differently from others.

Most folks would figure that either somebody remembers a thing or they don't, that not remembering it at all is pretty much the same thing as remembering it incorrectly, and that both are examples of "forgetting." But "forgetting" is just one thing, what traditionally was called "failure of recollection," and in law, for reasons I touched on above, it is emphatically not the same thing as misrecollection.

You begin to see, I hope, why it is important for jurors to understand this, and thus for it to be explained to them in terms that do not obscure

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the issue (as the "common"/"not uncommon" pairing in the old instruction did) but illuminate it. Reading the new instruction, anyone can easily see that making a mistake in what you remember is not the same thing as forgetting. In fact, forgetting is not a "mistake" at all, and this fact may also have importance in the weight a juror is likely to give a witness's testimony.

Keep It Simple – but Take Your Time

It's important to recognize, though, that simpler and clearer do not necessarily mean shorter. We are talking about the best use of language, not the briefest. To illustrate, one more example:

Old: "Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. A factual inference is a deduction that may logically and reasonably be drawn from one or more facts established by the evidence."

New: "Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as 'circumstantial evidence.' In either instance, the witness's testimony is evidence that a jet plane flew across the sky."

Notice that the new version is longer, but that it is also clearer, and, once again, emphasizes the important point that the old instruction's windiness obscured: that both direct and circumstantial evidence are evidence that a thing has occurred.

Of course the making of fine distinctions and the precise use of language are not the exclusive property of lawyers. It helps when witnesses, too, recount their evidence with precision. Consider the refined legal system of the world of Robert Heinlein's Stranger in a Strange Land, in which professionals known as "fair witnesses," such as Anne in the following passage, are paid for the precision of their testimony as expert observers:

"Anne was seated on the springboard: she turned her head. Jubal called out, 'That new house on the far hill — can you see what color they've painted it?'

"Anne looked in the direction in which Jubal was pointing and answered, 'It's white on this side.' She did not inquire why Jubal had asked, nor make any comment.

"Jubal went on to Jill in normal tones, 'You see? Anne is so thoroughly indoctrinated that it doesn't even occur to her to infer that the other side is probably white, too. All the King's horses and all the King's men could not force her to commit herself as to the far side . . . unless she went around and looked — and even then she wouldn't assume that it stayed whatever color it might be after she left . . . because they might repaint it as soon as she turned her back.'"

In such a world, the jobs of lawyers, jurors, and judges would be a lot easier.

Endnotes

[1] Robert C. Cumbow is a lawyer in Seattle, Washington, and also teaches at Seattle University School of Law and has written extensively on law, film, and language.

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The Case for Allowing Jurors to Submit Written Questions

By Eugene A. Lucci[1]

Juror questioning of witnesses is neither a new nor an innovative concept in the common law and American jurisprudence.[2] Jurors have questioned witnesses in England since the eighteenth century, and the practice has existed in America since 1825.[3]

At common law, those charged with capital crimes were not afforded counsel unless legal issues needed debating. The judge and jury were authorized to ask questions. With the lack of counsel and few procedural and evidentiary rules, criminal trials were solely in the hands of judges As the English court system evolved, more emphasis was placed on fair procedure. Defense counsel played an increasing role, while the role of jurors as active participants diminished. The emphasis on the quality of evidence, shaped by examination by counsel, relegated the juror to the role of passive neutral observer.[4]

Originally, juror questions were more like "juror outbursts."

The practice of juror questioning of witnesses in federal courts dates back as far as 1954.[5] By allowing juror questioning, courts sought to promote clarification of facts and the discovery of truth. At least 30 states and the District of Columbia permit jurors to question witnesses. A few states prohibit the practice.[6] Every federal circuit that has addressed the issue of juror questioning of witnesses agrees that it is a practice that should be left entirely within the court's discretion.[7] In most military hearings, members of court-martial panels have the opportunity to question witnesses.[8]

The first American court to address the validity of jury questioning of witnesses, in 1895, asserted that the practice was not prejudicial to either party in the suit and emphasized that it was a commendable practice since it helped the jury to "properly determine the case before them."[9]

Originally, juror questioning was known as "juror outbursts," which gives some idea as to the formality of the procedure. If a juror had a question, the juror would simply blurt it out in open court. During the 1950s and 1960s, courts began establishing more formal procedures. The earliest case in which a court created formal procedures for juror questioning was decided in 1926.[10]

Controlling the Process

Certain procedural safeguards can reduce or eliminate the risks of jury questioning of witnesses. The demeanor of the judge and how the judge addresses the issue make the difference. The judge decides whether a witness should be asked questions posed by jurors. This applies to both civil and criminal cases. The judge should give preliminary limiting instructions about the procedure being available, what questions will be allowed, and the technical rules involved. He or she should explain that questions are not encouraged but are to be sparingly used. Jurors should be told that they are not advocates, and must remain neutral. The should also be told that they are not to draw any inference if their question is not asked, because the rules of evidence and rulings by the judge in the case will limit even the parties' questioning, and that they are not to reveal any unasked question to the other jurors.

Is the truth-seeking function of a jury trial enhanced by juror questions?

Jurors should be told that the judge is the "gatekeeper" and determines which questions will be asked, and in what format. Juror questions should be limited to matters attested to during direct and cross-examination, and to clarifying information already presented. The questions should be of the type that a fact-finder, and not an advocate, would ask. They should be factual, not argumentative. Questions should not be asked to express views on the case or to argue with a witness. The juror questions should come only after the witness is finished testifying, but before that witness leaves the stand.

Questions should be in writing, collected by the bailiff and submitted directly to the judge, and never to the witness. Questions should not be discussed with the other jurors and should not be signed. The parties should be given the opportunity to object to the questions, outside the hearing of the jurors, and the questions should be made a part of the record. The judge, and not the attorneys or jurors, should pose the questions to the witness in a neutral, non-intimidating, non-argumentative manner. Each party should have the opportunity to further question the witness on issues raised by the juror questions. The trial court should, in its discretion, withhold juror questioning of witnesses if it will not be beneficial to the case and aid jurors in the execution of their responsibility. Juror questioning is simply an extension of the court's own power to question witnesses in accordance with the rules of procedure.

Observations

I am currently in my fifth year of allowing jurors to propose written questions, and have done so in well over 100 trials.[11] Over that period I have made the following observations: (1) the vast majority (over 90 percent) of juror questions are good questions and many are excellent; (2) most questions seek clarification of testimony regarding topics that have already been touched upon by the witness, including testimony not heard or which was vague or ambiguous; (3) when jurors submit questions that seek to inquire into areas not already covered by a witness's testimony, it is rarely because counsel intentionally avoided inquiry into

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those areas as part of a trial strategy–instead, it is often because counsel has simply overlooked inquiring into those areas, i.e., "not seeing the forest for the trees"; (4) trial counsel often appreciate the opportunity to get mid-stream glimpses of how the jurors are processing the information coming into evidence and being able to shore up a point they thought they were making, and after experiencing jury questioning of witnesses first-hand, most attorneys approve of and embrace the practice; and (5) jurors universally approve of and appreciate the ability to clear up confusion by asking questions, and, combined with the ability to take notes and having written jury instructions on the law, when jurors are allowed to ask questions they feel very satisfied that they reached the correct verdict.[12] In short, I have found that juror questioning has not led to a breakdown of the adversarial system.

Why gamble with a cross examination - trying to convert the witness into being "more helpful rarely works.

Juror questioning of witnesses is especially helpful: (1) when the trial is lengthy or complex; (2) attorneys are unprepared or obstreperous; (3) facts become confused and neither side is able to resolve the confusion; (4) to resolve ambiguity in testimony and bring forth additional relevant information; (5) when jurors misunderstand the words used by the attorney or witness, or fail to hear a word; (6) when a witness is difficult or is not credible and the attorney fails to adequately probe the witness, or if a witness becomes confused; and (7) when attorneys for both sides avoid asking the witness a material question because the attorneys do not already know the answer.

Reasons for Opposition

Unpredictable testimony. Several attorneys oppose jury questioning of witnesses because they think it will upset their well-laid plans in the construction of their case and its execution. But the attorneys are not the sole arbiters of the scope and content of testimony. The judge can ask questions. And in the judge's discretion, the jury also can ask questions. In addition, live testimony is inherently unpredictable. Juror-inspired questions do not inevitably mar the careful orchestrations of trial counsel. If testimony in court were so predictable, then trial counsel would have no need for carefully-indexed and cross-referenced depositions, and all witnesses would testify via pre-recorded video. The parties do not get to "choose" what the witnesses say when they testify. Nor should they get to decide whether the jury inquires of the witness. In addition, the mere fact that testimony was elicited by a juror's question does not mean that the entire jury will not properly compare and weigh that testimony along with everything else in the trial.

Delay. Some advocates have argued that allowing jurors to submit written questions is inefficient and will result in needless interruption and delay.[13] However, that has not been my experience. The trial is not "interrupted" or "delayed" by juror questions, any more than the trial is "interrupted" by objections from counsel, or "delayed" by requiring counsel to lay the foundation for admitting an exhibit, or by lengthy sidebar discussions. When allowed by the judge, juror questions are an integral part of the trial process. Questioning is likely to save time with improved understanding by the jurors, reduced questioning of other witnesses, and shorter jury deliberations.

Premature deliberation. Another objection has been that the very process of formulating questions invites a juror to begin deliberating before all the evidence has been submitted. But jury deliberation is far more than merely giving consideration to the evidence. Jurors necessarily give consideration to the evidence as it comes in. As individuals, they watch, listen, assess demeanor, and give private consideration to everything that happens in the courtroom. They also inevitably formulate questions in their mind about the evidence. Occasionally, in courts where juror questions are allowed, they articulate those questions to the judge, and sometimes their questions get asked and answered. Jury deliberation is the group *process* of formulating answers to the questions posed by the evidence and the law. In fact, group deliberations cannot take place effectively unless individual jurors already have begun to formulate questions in their minds about the evidence. When a witness answers an individual juror's questions, it helps to lay the proper foundation for effec-

tive deliberations by the jury as a group. Juror questioning of witnesses is no more indicative of a prematurely made-up mind of a juror than a judge's questioning of witnesses in a bench trial is of the judge's premature decision.

Curing Confusion

If the jury is confused about the evidence, then jurors should be allowed to ask questions designed to alleviate the confusion. If, after clarifying their confusion, the jury is not persuaded, then they should decide against the party with the burden of persuasion. The idea that justice is somehow served by a confused jury that is not allowed to express its confusion and seek clarity of understanding is flat wrong. If the failure to persuade results from curable juror confusion, then the party with the burden of proof is not the only one who suffers. The entire community suffers because a miscarriage of justice has occurred. And that miscarriage of justice will undermine public confidence in the judicial system as disgruntled parties and lawyers and jurors all become ambassadors of cynicism. To say that the party with the burden of persuasion or proof must make its points clear or suffer the loss at trial ignores the fact that a jury may just as easily rule in favor of the opposing party (the one without the burden) if the jurors are confused about the evidence.[14]

The Burden of Proof

Some say that the duty of the jury is to decide not what the truth is, but whether the party with the risk of non-persuasion has satisfied its burden of proof.[15] Of course, such an artful framing of the question conflicts directly with the common experience of jurors. That is not how jurors think. In deciding whether the party with the burden of proof has met its burden, the jury also must decide what the truth is. How else can they possibly decide that the burden has been met? The "burden of proof" is the burden of proving that something is true.

In deliberations, the jury does more than merely assess the credibility of the witnesses and weigh the evidence. The jury also uses its common experience to assemble the testimony and evidence into a coherent representation of reality. Often, as a necessary precondition for deciding whether the burden of proof has been met, the jury first decides which party has presented the most coherent representation of reality-the one that best accounts for the testimony and the facts in evidence. Indeed, the closing arguments of counsel are often an effort to influence the jury in deciding which party's version of the truth best accounts for the testimony and the evidence.

If the witness fears and respects you, cross examination will be more effective than if the witness fears and hates you.

It should be no surprise that an experienced advocate-whose relationship with the "search for truth" is necessarily subordinated to his duty to represent his client-would downplay the truth- seeking function of a trial judge and jury in the courtroom. It serves his or her purposes to reduce the truth-seeking function of the judge and jury to the most passive role possible. For an advocate, the search for truth is helpful only to the extent that the truth is on the side of his client. And in a jury trial, the truth serves only one party at best. To quote Judge Marvin E. Frankel, "[T]ruth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time."[16]

If the "search for truth" has no place in a jury trial, then one would expect that statement to have persuasive value in a closing argument to a jury. Counsel could use a portion of closing argument to "remind" the jury that their deliberative duties have nothing to do with searching for the truth. Of course, such an argument would likely offend the sensibilities of most jurors who-as the bedrock of the common law-are not generally conversant with the skewed, anti-truth perspective of an advocate.

In short, jurors are naturally and commonly concerned with figuring out, based on the evidence and the testimony, what really happened. Certainly, they must do so within the structure of deciding whether the party with the burden of proof has proved his case, but the mere fact that this structure exists does not eliminate the jury's search for enough truth to decide what really happened. Juror questioning of witnesses helps the trial to be more than a mere contest of advocacy; it helps the trial to maintain a proper focus on the search for truth.[17]

Confusion Vs."Reasonable Doubt"

Criminal defense attorneys frequently object to jury questioning of witnesses because they think juror confusion will inure to the benefit of the defendant by creating reasonable doubt. The premise is faulty-not all juror confusion will result in an acquittal. Further, jurors are instructed on the law: Reasonable doubt "is a doubt based on reason and common sense."[18] Reasonable doubt is not a doubt based on confusion, misinformation, and ambiguity. In the conduct of the most important of a juror's own affairs, would the juror act upon confusion, misinformation, and ambiguity-or would the juror seek clarity by asking questions? The hallmark of the American trial is the pursuit of truth.[19] Such truth-and, in the end, justice-is attainable in all cases, including criminal, only if the jury makes its decision based on reason and common sense.

The Search for Truth

Notwithstanding the partisan role of the advocates, and the rules protecting various rights, one of the main objects of the litigation process is still the search for truth.[20] To the extent that a juror's question assists in the search for truth, and to the extent that the trial judge exercises his or her discretion to allow it, the juror's question should be asked.

Certainly, there are benefits of juror questioning of witnesses. Questioning facilitates juror understanding, attentiveness, and overall satisfaction, improves communications, and corrects erroneous juror beliefs. Some contend it promotes the search for truth and justice.

When a court allows jurors to pose written questions, the court is neither abolishing the common practice

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of muzzling jurors, nor is it adding a new practice. The court is exercising its discretion to use a centuries-old, common law procedure to enhance the truth-seeking function of the jury trial.[21] The search for truth is central to the legitimacy of a trial's function. If the trial does not effectively develop the facts and comprehensibly present them to the factfinder, justice is serendipitous. Any concerns that jurors might become advocates for one party or another are alleviated by the role of the judge who decides whether the question should be asked, and if so, then how the question should be asked.[22] In short, when a judge asks questions that have been submitted by a juror, it is a procedure that has historically and traditionally been committed to the sound discretion of the trial court to serve the search for truth.[23] The fact that the question originated with a juror is less important than the fact that the judge deems the question worthy of being asked.

End Notes

[1].Eugene A. Lucci is a judge of the General Division of the Common Pleas Court, Lake County, Ohio.

[2].M. Hale, The History of the Common Law of England, 164 (C. Grey ed. 1971) (1st ed. 1713) ("[b]y this Course of personal and open examination, there is Opportunity for all Persons concerned, viz. The Judge, or any of the Jury . . . to propound occasional questions, which beats and boults out the Truth").

[3].See Sir William Blackstone, Commentaries on the laws of England, 373 (William D. Lewis ed. 1922) (1765) (commenting on the practice in English history); Barry A. Cappello & James G. Strenio, Juror Questioning: The Verdict Is In, 36 Trial 44 (2000) (commenting on the practice in American history).

[4].Robert Augustus Harper & Michael Robert Ufferman, Jury Questions in Criminal Cases, 78 Fla. B.J. 8 (Feb. 204).

[5].State v. Witt, 215 F.2d 580 (2d Cir. 1954).

[6].Sarah E. West. The Blindfold on Justice is not a Gag: The Case for Allowing Controlled Questioning of Witnesses by Jurors, 38 Tulsa L. Rev. 529 (2003).

[7].Emma Cano, Speaking Out: Is Texas Inhibiting the Search for Truth by Prohibiting Juror Questioning o Witnesses in Criminal Cases?, 32 Tex. Tech. L. Rev. 1013, 1017-18 (2001).

[8].Robinson O. Everett, Military Justice in the Armed Forces of the United States, 185-186 (1956).

[9].Schaefer v. St. Louis & Suburban Railway Company, 30 S.W. 331 (Mo. 1895). See also, Chi., Milwaukee & St. Paul R.R. Co. V. Krueger, 23 Ill.App. 639 (1887);Miller v. Cmmw. 222 S.W. 96 (Ky. 1920); Chi. Hansom Cab Co. V. Havelick, 131 Ill. 179 (1889); State v. Kendall, 57 S.E. 340 (N.C. 1907).

[10].West, supra n. 5.

[11].I have used most of the innovations suggested by the 2004 "Report and Recommendations of the Ohio Supreme Court's Task Force on Jury Service." In its report, the task force strongly recommended that the following policy be adopted by Ohio courts: "Jurors are entitled to ask questions of witnesses unless the court, in its discretion, finds in a specific case that the process will not contribute to the search for truth." In support of this recommendation, the task force referred to the overwhelmingly positive response of jurors, judges, and the moderately positive response of trial attorneys, to the use of juror-initiated questions during the Ohio pilot project from April until mid-November 203.

[12].In my court, all jurors are mailed an anonymous exit survey to complete and return.

[13]. Richard S. Walinski, Ouestioning by Jurors: A Flawed Idea. 19 Ohio Lawyer 32 (Jan/Feb 2005).

[14]. Walinski, id., seems to assume that any confusion will always inure to the detriment of the party with the burden of proof, so that there is no risk in confusion to the party without the burden.

[15]. !d.

[16]. *The Search* For *Truth: An Umpireal View*, 123 U. PA. L. Rev. 1031 (May 1975).

[17]. Carrie Shrallow, *Expanding Jury Participation: Is It a Good Idea?* 12 U. Bridgeport L. Rev. 209, fn 183 (1991).

[18]. Revised Code Section 2901.05(D) defines "reasonable doubt" as being "present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his (or her) own affairs."

[19]. *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio2761.

[20]. *United States v. Callahan*, 588 F2d 1078, 1086 (5th Cir. 1979); Sims v. ANR Freight Systems, Inc., 77 F.3d 846 (5th Cir. 1996); Morse Boulger Destructor Co. v. Arnoni, 376 Pa. 57, 101 A.2d 705).

[21]. See, Blackstone, supra n. 2 ("[T] he occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled . . . .").

[22]. *United States a Bush* (1995), 47 Fad 511.

[23]. *United States v. Sutton* (1992), 970 R2d 1001, 1005. In the context of expressing reservations about allowing jurors to ask questions in criminal trials, the court also acknowledged in footnote 3, "To be sure, the balance is not completely one-sided. Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the juror's minds, clearing tip confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror."

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The Florida Bar Continuing Legal Education Committee and the Trial Lawyers present

Advanced Trial Advocacy 2006

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: May 9-13, 2006
University of Florida Fredric G. Levin College of Law • Gainesville, FL

Course No. 0351R

The Advanced Trial Advocacy seminar is hands-on, learning-by-doing trial skills training. It is intended for attorneys who have practiced a minimum of 5 years and are involved in a full time litigation practice. Jury experience is preferable but not required. The case file is used as a source of facts and law for the training. Following the lectures, discussion and demonstrations, you will learn primarily through participatory exercises. Following your performances, you will receive suggestions by experienced Florida trial lawyers on how you can be more effective. Your presentation will be videotaped and you will receive a one-on-one video performance review.

Forty-eight (48) attorneys will be selected. Selection is based on a "first come, first served" basis. When your application is processed, you will receive program materials in advance of the program. Your advanced preparation is critical to the success of the program and your own learning. You are expected to attend all sessions. If you cannot, please do not apply.

Tuesday, May 9, 2006

6:00 p.m. – 7:00 p.m.
Registration at Levin College of Law

7:00 p.m. – 9:15 p.m.
Introductory Remarks
Demonstration of Opening Statements

Wednesday, May 10, 2006

8:30 a.m. – 5:30 p.m.
Opening Statements and Case Analysis
Jury Selection Tutorial Part I
Faculty Demonstration:
Direct and Cross Examination of the Expert Witness
Direct and Cross Examination of the Lay Witness

6:30 p.m. – 8:00 p.m.
Informal Reception and Material Science Tutorial for all Participants, Faculty, Spouses and Guests at the Hilton University of Florida Conference Center

Thursday, May 11, 2006

8:30 a.m. – 5:30 p.m.
Direct and Cross Examination of Material Science Engineers and Physical Education Experts
Jury Selection Tutorial Part II and Part III

Friday, May 12, 2006

9:00 a.m. – 5:30 p.m.
Direct and Cross Examination of the Medical Experts
Ethics
Faculty Demonstration: Closing Arguments

6:45 p.m. – 9:00 p.m.
Reception and Dinner at the Hilton University of Florida Conference Center

Saturday, May 13, 2006

8:30 p.m. – 12:00 noon
Closing Arguments
Inside the Jury Room

Note: Certification Standards and Policies, Civil Trial Law state in Rule 6-4.3(a)(2): minimum standards state that successful completion of an advance trial advocacy seminar approved by the committee which either through teaching or attending includes as part of it curriculum active participation in simulated courtroom proceedings may substitute as one jury or non-jury trial in certification or re-certification.

CLE CREDITS

CLER PROGRAM
(Max. Credit: 32.5 hours)

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Ethics: 2.0 hours

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Prior to your CLER reporting date (located on the mailing label of your Florida Bar News) you will be sent a Reporting Affidavit or a Notice of Compliance. The Reporting Affidavit must be returned by your CLER reporting date. The Notice of Compliance confirms your completion of the requirement according to Bar records and therefore does not need to be returned. You are encouraged to maintain records of your CLE hours.

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- Marital & Family Law
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