

Trial Techniques

Juror Questionnaires Can Supplement Voir Dire

Marjorie Fargo

The use of written juror questionnaires to supplement voir dire examination is gaining increased acceptance in both federal and state courts. For example, the *Handbook on Jury Use in the Federal District Courts* recommends prescreening questionnaires in high-publicity cases.¹ Lengthy questionnaires were administered before the trials of William Kennedy Smith, Marion Barry, Oliver North, and John DeLorean.

Courts also have permitted the use of juror questionnaires in criminal and civil cases involving issues ranging from pornography and child sexual abuse to asbestos-related health problems and other personal injuries.²

In these cases, judges acknowledged that disclosures in open court about the ability to serve on a jury may be extremely embarrassing to the potential juror, and that failure to identify relevant bias could contaminate the jury panel. To avoid a prolonged individual voir dire examination, judges permitted juror questionnaires.

Nearly every criminal or civil case involves some sensitive issues that require individual examination of potential jurors. A juror's experience as a victim or witness to a crime, as the victim of a personal injury, or as a litigant is highly relevant to the juror's ability to be neutral in evaluating trial evidence. Examination of these issues either by attorney or judge is a time-consuming, monotonous, and often frustrating process.

The time required to examine jurors can be greatly curtailed by using ques-

tionnaires that are completed by jurors before voir dire. Only those people who indicate a significant problem on the questionnaire require individual questioning. Also, attorneys' review of questionnaires before voir dire may result in joint agreement to excuse certain jurors, thereby saving the court some additional time.

Time saved on these routine issues could be allocated for other voir dire purposes, like allowing attorneys to conduct a short and focused examination

The courts are interested in methods of inquiry that yield forthright responses while protecting privacy.

of the jury panel. The use of juror questionnaires and limited attorney-conducted voir dire are two of the recommendations made by federal judges who participated in an experimental jury study conducted by the Judicial Council of the Second Circuit.³

Despite increased acceptance of juror questionnaires by the courts, the average attorney may be unfamiliar with the mechanics of their use. This article addresses the following basic questions:

- ▶ What types of questions should be included in the questionnaires?
- ▶ How and by whom are the questionnaires constructed?
- ▶ How are they administered to the jury panel?
- ▶ How can an attorney get them admitted by the court?

Every questionnaire should contain questions designed to elicit the following types of information:

Demographics. This information includes age, race, sex, address, education, occupation, employer and length of employment, marital status, number of children, and occupational information about a juror's spouse and children.

Media exposure. This information includes questions about favorite newspapers, news programs, and magazines. These may indicate whether a juror has been exposed to media coverage of the case or the issue. The juror's range of interests and intellectual abilities may also be indicated. If a juror has written letters to the editor of a publication, that may reveal leadership potential or strong feelings about case-related issues, like gun control, police misconduct, or jury awards.

Special interests. Additional questions may reveal important clues about the personality and interests of the juror that are relevant to peremptory challenges. Questions about spare-time activities and hobbies and participation in organized civic, religious, political, or professional activities should be included.

Legal experience. This information includes any experience with the criminal justice system; training and/or employment in law, law enforcement, and the courts; previous jury experience; experience as a crime victim; and experience with lawsuits, investigation, and expert testimony. It is important to inquire about experiences of the juror's immediate family and close personal friends, as it is through hearing about their experiences that many prospective jurors form strong negative predispositions.

Marjorie Fargo is president of Jury Services, Inc., in Alexandria, Virginia.

Case-specific experiences. Questions should elicit information about the subject matter of the litigation, like health care, psychiatry, and scientific or business specialties. Questions about the training and employment of the juror, family members, and close friends in the relevant area are crucial. Questions about the juror's membership and affiliation with groups that have taken a public stand or may have a stake in the outcome of the case should also be included.

Attitudes. Attitudinal questions may identify jurors who hold strong predispositions against certain litigants or case issues. Important attitudes on criminal issues may focus on gun control, illegal drugs, racketeering, electronic surveillance, undercover law enforcement activities, white-collar corporate crime, child sexual abuse, or the death penalty. Attitudes relevant to civil cases may focus on foreign litigants, banks, insurance, the medical profession, sexual harassment, workplace discrimination, or punitive damages.

Juror hardship. Areas for hardship excusal include health problems, disabilities, and responsibility for the care of dependent family members, as well as an employer's unwillingness to pay the juror during his or her service. These issues are of crucial importance in lengthy trials and cases where the jury may be sequestered for significant periods of time.

Construction of the Questionnaire

A few rules of thumb are key to structuring an effective juror questionnaire. First, the shorter the questionnaire, the better. Most jurors have filled out detailed forms for job or loan applications, so questionnaires of three to six pages should pose no problem for them. However, a too-lengthy questionnaire may intimidate jurors. In the typical case with low media exposure, questionnaire length should be from four to six pages. The attorney can request that follow-up questions be allowed in the oral voir dire.

The introduction to the questionnaire should be a short paragraph that clearly explains its purpose, encourages candor in responses, and assures jurors that answers will be used only for jury selection. A typical introduction may read as follows:

This questionnaire will be used only to assist the judge and attorneys in the jury selection process. The informa-

tion requested is strictly confidential and will not be used for any other purpose. Please read all questions carefully, answer them fully, and notify court personnel if you need any assistance or have any questions. Do not discuss the questions or answers with fellow jurors. It is very important that your answers be your own. You are sworn to give true and complete answers to all questions.

Questions should be arranged in a logical sequence beginning with basic demographic questions about the juror and family members. Cluster questions by topic, and separate each section to en-

■■■■■

*Open-ended questions allow
jurors freedom to express
themselves in their own
words.*

■■■■■

able jurors to move quickly from one section to the next without having to recall responses. Avoid long or redundant questions.

Follow the demographic section with questions dealing with media exposure and the juror's special interests. These are easy for the juror to answer.

Next include a section of questions about the juror's (and relevant family members') experience with legal matters and the courts. These questions should be followed by a section dealing with experiences specifically related to the case at hand.

Then inquire about the juror's exposure to pre-trial publicity or media coverage of the case issue and general knowledge of the case. Open this section with a special introduction that explains the purpose of these questions. For example:

This trial involves a civil claim of wrongful death brought by the family of Laura Petrified against *GI Joe Magazine*. Local and national news media have produced coverage of the investigation of this case. It is important for all parties to have an understanding of what prospective jurors have read or heard about the case. Please answer the following questions as fully and completely as possible.

It is important to ask prospective jurors to describe in detail what they have heard and what impressions they have formed. This should be accomplished by asking *open-ended* questions that allow jurors ample freedom to express

themselves in their own words.

The open-ended questions are preferable to the closed-ended or leading ones traditionally asked in open court. These may prevent jurors from providing useful information about their real feelings and opinions about the case.

Two examples of appropriately worded open-ended questions on media exposure are: "Please describe anything you may have read, seen, or heard discussed in the media about Mr. John Doe." "Please describe your impression of Mr. Doe's guilt or innocence based on what you've read or heard about this case."

Additional questions about attitudes and opinions should be near the end of the questionnaire to avoid possible contamination of a juror's answer about knowledge or opinion of the case.

Questions about hardship should be asked at the very end of the questionnaire. A final question should enable a juror to bring any other information about his or her jury service to the court's attention before the voir dire examination begins. For example: "Are there any other matters that you think you should bring to the attention of the court regarding your service on this case? If so, please describe them here."

Although attorneys can use these guidelines to design juror questionnaires, counsel may benefit from contacting a jury-and-trial consultant to help with this project. Many trial consultants specialize in the construction of juror questionnaires and have successfully worked with attorneys to obtain court permission to use them.

Administration of the Questionnaire

Most questionnaires are distributed to jurors on the day of jury selection by the judge or jury clerk. Jurors fill them out in the jury assembly room. In high-profile cases where the length of the trial or jury sequestration is also at issue, the court may send questionnaires to prospective jurors along with the summons for jury selection.⁴

To reduce the costs to the court, counsel for the party who initiated the questionnaire usually offers to supply the court with enough copies for the panel to complete and may offer to help the clerk collect and organize the questionnaires. Trial counsel should also offer to make photocopies for distribution to the court and opposing counsel. Usually one or two copies are made per party involved.

Costs for photocopies are minimal in

comparison to the value of the information obtained. These costs may be shared proportionately by all the parties. However, it is sometimes more efficient for the court to make and distribute copies.

Completed questionnaires are distributed to the lawyers for each party to review. Counsel are usually allowed a fixed amount of time to review the information. This may vary from one or two hours in cases involving no publicity to two weeks, as in the federal trial of General Manuel Noriega of Panama. In that case, about 1,200 questionnaires were mailed out and more than 300 prospective jurors appeared in court for the voir dire examination.⁵

The questionnaire responses provide the parties and the court a crucial overview of juror attitudes. Counsel can use this information to make preliminary decisions about peremptory challenges as well as to identify jurors who may be challenged for cause.

The judge's staff may also prescreen the questionnaires for hardship. Sometimes, the judge meets with counsel in a short pre-trial conference to discuss which jurors should be excused for hardship before the voir dire examination.

At the end of the trial, the original copy of each questionnaire is made part of the record. Often, counsel are asked to return their copies to the court. Some courts seal this information; others do not. A few have even made the questionnaires available to the press, as was done in the federal criminal trial of former District of Columbia mayor Marion Barry.⁶

Court Approval

Most courts are receptive to using juror questionnaires. That interest can be attributed to several factors.

Many judges view the questionnaire as an effective and equitable tool to facilitate the voir dire examination. The intelligent exercise of cause and peremptory challenges is the major purpose of voir dire.⁷ Case law supports the use of certain questions in voir dire, and these same questions are proposed for use in juror questionnaires.⁸ Consequently, many judges view questionnaires as appropriate vehicles that permit all parties and the court equal access to information without overburdening the court.

Courts are also concerned about juror sensitivity and privacy. Jurors must be asked personal and potentially invasive questions in certain cases, and the courts are interested in methods of inquiry that yield full and forthright responses while protecting privacy.

Courts are also aware of the risk of contaminating the jury panel during open-court voir dire. Use of questionnaires followed by individual voir dire examination on selected issues avoids this.

For all these reasons, judges often agree to the use of juror questionnaires once they fully understand their purpose and how to use them. It is the trial attorney's job to educate the judge about the advantages of questionnaires and how they might be administered.

Most attorneys request to use a questionnaire by written motion, attaching a copy of the proposed questionnaire. Also, since one strong reason to use questionnaires is that they provide information about prospective jurors to all parties, counsel may want to tell opposing counsel about the motion *before* filing it. If both parties join in a motion, the court may be more likely to grant it.

Often, opposing parties agree on the use of a questionnaire but disagree about

the questions to be asked. If these differences cannot be resolved, both parties must submit separate questionnaires to the court with supporting documents like affidavits from trial consultants and copies of media articles that might have prejudiced jurors. The court often selects questions from each proposal and may add a few of its own.

The final product is a thorough questionnaire and courtroom tool that meets the needs of the parties, the court, and the prospective jurors. □

Notes

- 1 JODY GEORGE ET AL., HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS (1989).
- 2 See JURYWORK: SYSTEMATIC TECHNIQUES, Fig. 2.6 (Elissa Krauss & Beth Bonora eds., 1992). Readers may also contact the author for a list of additional cases where questionnaires have been permitted. Write to Jury Services, Inc., 1009 Duke St., Alexandria, VA 22314.
- 3 JUDICIAL COUNCIL OF THE SECOND CIRCUIT, REPORT OF THE COMMITTEE ON JURIES (1984).
- 4 United States v. DeLorean, 561 F. Supp. 797 (C.D. Cal. 1983).
- 5 United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991).
- 6 United States v. Barry, 740 F. Supp. 888 (D. D.C. 1990).
- 7 Swain v. Alabama, 380 U.S. 202, 218-21 (1965); United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973).
- 8 See JURYWORK, *supra* note 2, at 2.05 [3] [c], 2.06 (a summary of case law supporting a wide range of demographic, experiential, and attitudinal voir dire question areas).