

## THE JUROR QUESTIONNAIRE SPEAKS VOLUMES

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*"You can tell whether a man is clever by his answers. You can tell whether a man is wise by his questions."*  
**Naguib Mahfouz, Egyptian writer, winner 1988 Nobel Peace Prize for Literature. b. 1911- d. 2006.**

The California Legislature bestowed upon trial lawyers some invaluable gifts that took effect on January 1, 2012: In civil court, the right to have a reasonable juror questionnaire presented to a jury pool for completion, and a reasonable amount of time for counsel to review and evaluate each completed questionnaire. To help facilitate the jury selection process, the law states that the judge in civil trials should provide the parties with both the alphabetical list and the (random) list of prospective jurors in the order in which they will be called into the jury box. CCP section 222.5. While the definition of "reasonable" remains subject to interpretation by each trial judge, this newsletter discusses the components of an effective questionnaire and what jurors say about it.

### **Compose an Organized Questionnaire**

Juror questionnaires are not one size fits all. To be effective and efficient, a questionnaire is tailored to each case's facts and issues. Most questions in a juror questionnaire should be crafted to spotlight the potential jurors who would be detrimental to counsel's case. But, a questionnaire that includes a question or two favorable for the other side appears more balanced. Thus, opposing counsel may be inclined to approve and accept the original version with few, if any, changes. With the two opposing sides reaching consensus, thereafter, the court may be less inclined to make extensive changes.

Drafting a concise and specific questionnaire reflects the general subject and targets the core issues of a case. Specifically, the questionnaire begins with the demographic questions. This serves to reassure the more inexperienced jurors who sometimes express concern that the questionnaire could be an intelligence test seeking opinions on "legal matters." Therefore, the beginning should be standard, routine, and easy. There are no trick questions or hidden agendas; rather, the purpose is to gather demographic facts about age, residence, occupation, marital status, educational background and other basic facts.

The most valuable question on page one is occupation because it serves to highlight the juror's skills, self-identity, and potential for involvement in the deliberative process. Occupation could indicate if a person might hold opinions that could be a hindrance or a help during the jury's evidence analysis, based on one's work - life experiences and interactions with others. For the attorney and jury consultant evaluating the totality of the responses, having demographic information readily available on the first page presents a quick reference guide of each juror at a glance.

### **Questions Should Show Some Variety**

The outlier questions form the second layer of interrogatories as the questionnaire works toward the core case issues. These outliers add another dimension for counsel's consideration as to the depth of understanding and experience of a related though not direct issue in the case. Accordingly, a certain response may not be enough cause to necessitate using a peremptory strike. Therefore, in a wrongful termination case, an example of an outlier question would probe the prospective juror's education, training or work experience in the specific areas of human resources, psychology, management, career counseling, unemployment administration, and so forth.

Another outlier question inquires into the occupations of deceased or living family members, mother, father, siblings, and any relative or close relation. One's economic status as a child often influences adult perceptions of the plight of others, work ethic, and even empathy. For example, counsel should consider that one prospective juror is the daughter of a heart surgeon and who knows economic comfort and security, especially throughout childhood; on the other hand, another juror grew up the son of a used car salesman, and feels acutely aware of financial instability within a family.

### **The Core Substance**

The core issue questions probe jurors' knowledge and experiences that parallel the facts most problematic to the case. For instance, in a case involving employment retaliation, a core question for either side probes a juror's direct experience with or observation of management's policy, if one exists, and its enforcement in response to whistleblowers. In an illegal gun possession case, core questions focus on whether the prospective juror is a gun owner and why, whether one grew up in a gun owning environment, is a trained marksman, served in the military, holds membership in the NRA, discourages or refuses to buy toy guns for their children, as well as opinions about gun violence in the community (especially schools), and how that affects family decisions about educational choices.

Stylistically, the core questions are drafted with a wide net to capture the experiences of the prospective juror, and also those of close friends and family, e.g., "Have you, family member or friend ever..." with continuous probing for elaboration after the Yes or No responses. Also important are the "How do you feel about..." inquiries, or the "What is your opinion about..." The open-ended questions also allow counsel to assess how a prospective juror expresses opinions and reveals biases that may mimic prevalent opinions in the media—such as "too many frivolous lawsuits," because America has the "get rich quick" mentality, or certain folklore—the one still mentioned in every jury selection process—that the McDonald's verdict was "ridiculous."

In reviewing and evaluating the responses to a questionnaire, counsel should not be dissuaded from keeping on the jury a person who appears to have little knowledge or experience about the core case issue. The reason is simple: Better that counsel can develop their thinking on this topic by teaching the case issues rather than having a juror draw upon their "knowledge" in such a way that may not accurately engage with the facts. Indeed, this may create a skewed analysis and reasoning when answering the verdict form.

### **Language Used**

A concise and strategic questionnaire employs a subtle use of words that carry powerful implications. The words chosen for a plaintiff or defense drafted questionnaire should set the tone for what the jurors will hear in the opening statement. For example, a plaintiff question would ask about involvement in a motor vehicle "collision," whereas for the defense, the terminology should be motor vehicle "accident." In a wrongful death action, plaintiff would pose the question of whether one has ever "suffered" the loss of a child; by contrast, a defense questionnaire would state whether one has ever "experienced" the loss of a child.

### **Include the 21st Century Questions**

A juror questionnaire should assess whether prospective jurors (especially, the older folks), have moved into the 21st century with social media. A person willing to share personal information about lifestyle and opinions on Facebook, a blog, tweet, or other social media, and consistently update it, are more likely to be persistent in expressing a perspective in deliberations. Therefore, if a juror is engaged in social media, then counsel must take the time to research what that person chooses to reveal to the outside world.

### **Damages, Empathy and the Sensitivity Questions**

For plaintiff questionnaires, the wrap-up must include inquiries about damages and tort reform beliefs, and the basis from which the prospective juror formed this belief—personal experiences, others' experiences, education, media and other life influences. Counsel's task is to determine whether optimism or cynicism seems to underlie a prospective juror's response to those open-ended questions seeking opinions on emotional distress damages, loss of consortium, or future wage loss to name a few.

Other questions that give some hints about a prospective juror's personality might be detected in a response about volunteer activities, parenting philosophy, or a life changing experience. To the question, "What opinion did you once have but no longer believe due to a life experience?" a politically conservative father stated he felt more open-minded towards gays and lesbians after his only son came out about his sexuality. Or, asking a juror to describe oneself in five words captures some candid self-assessments of one's personality.

### **Abusing the Use of a Questionnaire in Conjunction with Voir Dire**

Counsel loses jurors' support when oral voir dire continues beyond a reasonable amount of time. This happens when counsel appears oblivious to the time used up, takes advantage of the bench's leniency, or ignores jurors' looks of chagrin and impatience at being asked to respond to additional, but superfluous questions in open court.

As one juror recently complained after completing an 11 page questionnaire and sitting through three days of oral voir dire, "What was the purpose of filling out that questionnaire? It did not save time as they promised!" Of course, the attorney who taxes jurors' patience suffers a loss of credibility and potentially jeopardizes the outcome of the case for the client.

In the end, a juror questionnaire allows counsel to evaluate written responses composed when a prospective juror does not sense the spotlight or pressure of communicating aloud in a public forum, as with voir dire. Following that, voir dire offers counsel the opportunity to assess whether a potential juror could graciously interact with others in deliberations, or by contrast, project a bossy and uncompromising tone that might offend others.

### **Conclusion**

There is a simple edict to an effective juror questionnaire, the three S's:

- Simple (written to be comprehended by a smart 9th grader),
- Succinct (does not repeat questions), and
- Stylistic (thought provoking and appropriate choice of words).

Counsel, take the Legislature's gifts of the right to a questionnaire and its accompanying benefits and use them wisely.

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