

# Juror Questions During Trial: An Idea Whose Time Has Come Again



**By Stephen R. Kaufmann  
and Michael P. Murphy**

Why not allow jurors to ask questions during trial under the strict control of the judge, as the federal courts and several states do, the authors ask. Doing so keeps the jury engaged and gives lawyers a chance to refine their case in response to juror queries.

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*Stephen R. Kaufmann <srk@heplerbroom.com> is a partner in the Springfield office of HeplerBroom, LLC. He represents clients in a variety of cases, including personal injury, product liability, and employment discrimination. Michael P. Murphy <mpm@heplerbroom.com> is an associate in HeplerBroom, LLC's Springfield office. The authors acknowledge the contributions of Jason D. Sweat, a second-year law student at the University of Illinois, in the preparation of this article.*



In September 1859, Abraham Lincoln was defending Peachy Quinn Harrison, a young man accused of murder.<sup>1</sup> In *People v Harrison*, one of three Lincoln trials for which a transcript exists, Lincoln prevailed by eliciting crucial testimony from Rev. Peter Cartwright – grandfather of the defendant and one of Lincoln’s longtime political adversaries – regarding the victim’s deathbed confession of responsibility for his own death.<sup>2</sup>

One little-noted aspect of the trial is that during questioning of a witness by the prosecution, a juror directly addressed the witness with a question. He did so without objection or comment by either the prosecutor or Mr. Lincoln. The witness gave an extensive answer, and the trial proceeded.<sup>3</sup>

While this juror’s question was not the climactic moment in the case, it *was* a sign of something important in its own right: the jury deeply cared about understanding the facts and issues, and the court, without objection by Mr. Lincoln, allowed the jury to be actively involved in reaching the correct verdict. The time has come again in Illinois to allow the jury to ask questions during trial, subject to the trial court’s management.

We live in a technology-driven world dominated by short-hand-filled text-messaging on cell phones, instant information on Google or Wikipedia, and continuous updates on Facebook and Twitter.<sup>4</sup> Instantaneous feedback is an undeniable part of modern life, and jurors today have an expectation that their questions can and should be answered quickly,<sup>5</sup> leaving them with a strong temptation to use their Blackberries and iPhones for extra-judicial research, despite admonitions from the trial judge.<sup>6</sup>

We propose that the solution to holding jurors’ attention, providing immediate responses, and – most importantly – achieving a just result is for Illinois courts to give jurors an opportunity to be active participants while the trial is underway, not merely during the final moments in the deliberation room. In this article we review past efforts to establish this process, the perceived (but unfounded) dangers, and the proven benefits of allowing juror questions.

### A juror-question pioneer

Following Lincoln’s era, the practice of allowing jurors to question witnesses was abandoned. More recently, however, Warren D. Wolfson, retired justice of the first appellate district and interim dean of DePaul Law School, promoted juror questioning as a Cook County trial judge. Beginning in 1986, Wolfson took the initiative to implement juror questioning of witnesses in several trials.<sup>7</sup> The following year, he provided a glimpse of what those experiences revealed in a seminal article for the *Chicago Bar Association Record*.<sup>8</sup>

Wolfson’s<sup>9</sup> article described a series of five cases in which he had allowed the questioning of witnesses by juries (with the consent of both parties and employing a strict procedure that provided juror anonymity, safeguards against frivolous or irrelevant questions, and the opportunity for both parties to object prior to the asking of the questions).<sup>10</sup> In this brief analysis of his experiences, he concluded that the questioning of witnesses

by jurors fundamentally improved the trial process.<sup>11</sup>

Even so, he identified several potential “drawbacks” of the practice: 1) in responding to a question, a witness might provide inadmissible testimony; 2) jurors might abandon their roles as triers of fact and become adversaries of the witness; 3) jurors might be influenced by the perceived prestige of having a question asked in court, competing for the most questions or becoming angry at the denial of a question; 4) time will be added to the trial; and 5) jurors may decide that a witness is irrelevant if the judge decides not to allow him or her to be questioned.<sup>12</sup>

That said, Wolfson responded that those drawbacks i) were present in nearly every case and out of his control (drawbacks 1 and 2), ii) were outweighed by the good produced (drawback 4), or iii) were perceived but not real dangers (drawbacks 3 and 5).<sup>13</sup>

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## A study by the National Center for State Courts showed that many Illinois judges thought they were prohibited by state law from allowing jurors to question witnesses. This view is incorrect.

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He found that the questions served three general purposes: 1) they elicited vital testimony or clarification of prior testimony, without which jurors would have been in a worse position to do justice;<sup>14</sup> 2) they enabled lawyers to change course or provide additional testimony on issues that were worrying or confusing jurors;<sup>15</sup> and 3) they made jurors more observant during testimony, increasing the likelihood that they would be fully informed during deliberations.<sup>16</sup> In essence, juror questions furthered the overarching goals of fairness and justice that underlie the judgment of a jury of one’s peers.<sup>17</sup>

While Justice Wolfson’s experiences in those five cases convinced him of the value of juror questioning (ultimately lead-

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1. Herbert Mitgang, *The Law; Lincoln as Lawyer: Transcript Tells Murder Story*, NY Times (Feb 10, 1989) online at <http://www.nytimes.com/1989/02/10/nyregion/the-law-lincoln-as-lawyer-transcript-tells-murder-story.html?pagewanted=all>.

2. *Id.*

3. Mara Tapp, *Quandary Over Juror Queries, Lawyers Debate New Trial Precedent*, Ill Legal Times 1, col 1 (May 1989).

4. See Chief Judge James F. Holderman, S. Ann Walls, *As Generations X, Y, and Z determine the jury’s verdict, what is the judge’s role?*, 58 DePaul L Rev 343 (2009).

5. *Id.* at 343-44.

6. Andrea F. Siegel, *Judges Confounded by Jury’s Access to Cyberspace*, Balt Sun (Dec 13, 2009), available at [http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13\\_1\\_deliberations-period-florida-drug-case-jurors](http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13_1_deliberations-period-florida-drug-case-jurors).

7. Hon. Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses*, CBA Rec (Feb 1987) at 12.

8. *Id.*

9. Although Justice Wolfson’s article discusses his actions as a trial court judge, for purposes of consistency we will use the honorific of Justice throughout.

10. Wolfson, *Experiment in Juror Interrogation* (cited in note 7).

11. *Id.* at 17.

12. *Id.* at 16.

13. *Id.*

14. Wolfson, *Experiment in Juror Interrogation* (cited in note 7).

15. *Id.* at 16-17.

16. *Id.*

17. *Id.* at 17.

ing him to repeat the process on at least 20 occasions),<sup>18</sup> his personal campaign for change did not produce a revolution. For whatever reason – fear of the potential drawbacks, of not being in full con-

result of being allowed to ask questions. The time has come in Illinois to create a rule allowing questions by jurors. I would initially make the rule applicable in only civil cases and provide that it is permissive rather than mandatory.<sup>19</sup>

### Research supports juror questioning

Over the past two decades, numerous other jurisdictions have experimented with and then implemented juror questions.<sup>20</sup> As recounted in a 2010 article by Professor Nancy S. Marder of the Chicago-Kent College of Law in the *Loyola University Chicago Law Review*, states across the nation – from Florida to Washington to even

neighboring Indiana – have incorporated questioning of witnesses by jurors into their trial procedures.<sup>21</sup>

According to Marder's research, three states – Arizona, Colorado, and Indiana – have actually mandated the inclusion of juror questions in trial procedure for all jury trials.<sup>22</sup> Moreover, numerous investigations – from pilot programs to empirical studies to anecdotal responses of judges – have confirmed Justice Wolfson's belief: the opportunity to present ques-

tions to witnesses provides the jury with a valuable tool, with no real downside.<sup>23</sup>

In her article, Marder examines the powerful effect juror questions can have on the trial experience. She thoroughly analyzed the voluminous body of work done in this state and others over the last 25 years and came to a clear conclusion: justice is best served when the jury is fully informed of the facts and law of the case, and allowing jurors to question witnesses is an effective way of achieving that goal.<sup>24</sup>

Professor Marder also addressed the fears of some trial lawyers and judges. She learned that the fears are not borne out by the empirical and anecdotal studies<sup>25</sup> and the lack of clear guidance from the Illinois Supreme Court is one of the greatest impediments to the implementation of juror questions.<sup>26</sup>

As recounted by Marder at the 2006 Allerton Conference on Jury Reform in Illinois, numerous judges expressed an enthusiasm for permitting juror questions. But those same judges believed that “forging a new path” as Justice Wolfson did was not an option for them. They said they needed guidance from the supreme court in the form of a clear rule on the practice.<sup>27</sup>

Another study by the National Center for State Courts (NCSC) showed that many Illinois judges thought they were prohibited by state law from allowing

18. Interview with Justice Warren D. Wolfson (retired) (July 28, 2010) (notes on file with author). In fact, one of the authors, Stephen R. Kaufmann, participated in one of those subsequent trials in Justice Wolfson's courtroom in which jurors, with consent of the parties, were allowed to ask questions. *CIPS Co v American Empire Surplus Lines Ins Co*, 267 Ill App 3d 1043, 642 NE2d 723 (1st D 1994). The authors also participated in a federal court trial in the United States District Court for the Central District of Illinois, Judge Michael M. Mihm presiding, in which juror questions were allowed for the first time by Judge Mihm in a civil lawsuit.

19. Interview with Justice Warren D. Wolfson (cited in note 18).

20. See, for example, Seventh Circuit Bar Assn, *Seventh Circuit American Jury Project Final Report* (Sept 2008), online at <http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf>. See also Jury Subcomm, NJ Sup Ct Civ Prac Comm, *Report on Pilot Project Allowing Juror Questions 3*, available at <http://www.judiciary.state.nj.us/jurypilot/jurypilot.htm>.

21. Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 *Loyola U Chi L J* 727, 747 (2010) (summarizing Gregory E. Mize & Paula Hananford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning From Each Other*, 1 *J Ct Innovation* 189, 214 note 39).

22. *Id.*

23. See, generally, Marder, 41 *Loyola U Chi L J* 727 (cited in note 21).

24. *Id.*

25. *Id.* at 748.

26. *Id.* at 749.

27. *Id.*

## As Judge Holderman noted, jurors will have questions during trial regardless of whether they have the opportunity to voice them. Why not ensure that they are as well informed as possible?

trol of questioning, of change – Illinois lawyers and judges held back. In a recent interview with the authors, Wolfson said he remains convinced of the merit of juror questions:

I never had a problem with juror questions. No appeal issues were created. Jurors absolutely loved the process and I actually received letters after trials from jurors praising the process. There is no question but that their attention and comprehension improved dramatically as a

### A proposed juror-questioning rule

*The authors presented this proposed rule to the Supreme Court Rules Committee, which considered it, amended it in some respects, and submitted it for a public hearing held May 20. The ISBA executive committee voted early last month to support this proposal.*

#### Proposal 10-11 (PR 0184)

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

(b) Objections. Out of the presence of the jury but on the record, the court will read, or provide a copy of the questions to all counsel and give counsel an opportunity to object to the question. If any objections are made, the court will rule upon the objections at that time and the question submitted by the juror will be either allowed to be read as written, allowed to be read as modified, or excluded.

(c) Questioning of the Witness. If the question is allowed as written or as modified, the court or counsel will read the juror's question to the witness in the jury's presence, and the witness will answer the question. The court will then provide all counsel with the opportunity to ask follow-up questions limited to the scope of the new testimony.

(d) Admonishment to Jurors. At times before or during the trial that the court 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.

jurors to question witnesses. No authority was provided (or found in the research of NCSC staff) for this belief. As is evidenced by Justice Wolfson's example, this view is incorrect.<sup>28</sup> The supreme court could clear up this confusion by expressly endorsing the practice of permitting juror questions.

### Judge and lawyer attitudes

Now, nearly 150 years after the juror in *People v Harrison* interjected the question "Who took you?" and 25 years after Justice Wolfson's pioneering use of juror questions at trial, others are keeping the practice alive. For the last five years, Chief Judge James F. Holderman of the United States District Court for the Northern District of Illinois has used juror questions in every civil trial before him.<sup>29</sup>

Like Justice Wolfson before him, Judge Holderman's experiences with juror questions began as an experiment. Beginning in 2005, the seventh circuit participated in the American Jury Project, which rigorously tested several proposed innovations for jury trials.<sup>30</sup>

Trial lawyers will likely recognize several of those innovations as common-sense improvements: 12-person juries, jury selection questionnaires, and preliminary jury instructions on applicable substantive law.<sup>31</sup> Juror questioning of witnesses is no different. As Judge Holderman noted in a recent interview in connection with this article, jurors will have questions during trial regardless of whether they have the opportunity to voice them – so it makes sense to ensure that the finders-of-fact are as well informed as possible.<sup>32</sup>

Judge Holderman's experiences and the American Jury Project's findings bolster Justice Wolfson's anecdotal experiences.<sup>33</sup> In 50 cases in the seventh circuit, jurors, attorneys, and judges were exposed to the use of jury questions. Following the trials, the parties reported their feelings in over 400 responses.<sup>34</sup>

Eighty-three percent of jurors reported that their understanding of the facts and issues was improved by the addition of questions; 73 percent of judges and 62 percent of attorneys agreed.<sup>35</sup> While the numbers alone should convince anyone that the result is an improved verdict, Judge Holderman's response should remove all doubt.

Holderman adopted jury questions in every civil trial he has adjudicated for the past five years. He was not always such

a staunch advocate, though.<sup>36</sup> When the seventh circuit first proposed the experiment, Holderman was a self-proclaimed "skeptic." But after only a few trials, he was convinced of the value of allowing jurors to question witnesses.<sup>37</sup>

In his own words, he changed his mind "simply because [he] saw what it did to the decision-making process."<sup>38</sup> Specifically, he points to two reasons above all others: first, juror questions allow the jury instant feedback, giving them a better-informed comprehension of the facts on which to rule; and second, the questioning allows the lawyers a "window into the juror's mind" before it is too late to give jurors the information they desire.<sup>39</sup>

And as for any reluctance on the part of judges, Holderman counsels that "if the judges try [allowing juror questioning of witnesses], they'll become believers like me." Other jurists join him in that belief.<sup>40</sup>

Chief Judge David R. Herndon and Magistrate Judge Clifford J. Proud of the United States District Court for the Southern District of Illinois are equally enthusiastic about the process. Judge Herndon said in an interview that the process caused jurors to "become personally invested in the trial" and that the jurors "always asked insightful questions, which helped trial counsel understand jurors' thought processes during trial and actually helped them in one case to decide strategy with regard to what witnesses to call."<sup>41</sup> Judge Proud was initially skeptical, but described himself as a "huge proponent" of the process.<sup>42</sup>

Christian County Circuit Judge Ronald D. Spears is another proponent of juror questions, provided controls are imposed, because it will permit jurors to do their job better.<sup>43</sup> Spears, a past president of the Illinois Judges Association, contends that "most judges don't think they can simply impose juror questions without the parties' consent."<sup>44</sup> He has tried unsuccessfully to get both sides in civil cases to consent to juror questioning.

"It seems that the younger generation of lawyers are more open to the idea. Jurors are very receptive to it," Spears said in an interview for this article.<sup>45</sup> His favorable view of juror questions stems in part from his experience in the Judge Advocate General's Corps. He noted that military courts allow the members or fact finders to ask questions of witnesses.<sup>46</sup>

As for practitioners, many who have

tried cases using juror questions during trial, including one of the authors of this article, are proponents.<sup>47</sup> Bruce Pfaff, who has co-authored an article with Professor Marder and John Stalmack encouraging the practice, believes that jurors get to the heart of the issues and ask intelligent questions. They do so without derailing the trial strategy of counsel, particularly since counsel are given the opportunity to object before juror questions are asked.<sup>48</sup>

He says that as long as the practice is "[p]roperly administered in the way that certain circuit court judges do and in the way that the seventh circuit procedure recommends, no party should feel prejudiced by the ability of jurors to pose written questions to be read to the witness after the lawyers and the court review them out of the presence of the jury. The benefits substantially outweigh any perceived disadvantage counsel may feel in not exercising complete control over the examination."<sup>49</sup> Moreover, Pfaff asks, "[o]nce the jurors are given the case to decide, the lawyers lose all control over

28. Id.

29. Interview with Chief Judge James F. Holderman (July 15, 2010) (notes on file with author).

30. Chief Judge James F. Holderman, *Trying the ABA's Principles for Juries and Jury Trials*, Litig, Spring 2007, at 8-9 (describing the start of the American Jury Project's testing phase in the seventh circuit).

31. See Seventh Circuit Bar Assn, *American Jury Project Commission Manual* (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/jury/pdf/7th\\_Circuit\\_American\\_Jury\\_Project\\_Manual.auth-checkdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/jury/pdf/7th_Circuit_American_Jury_Project_Manual.auth-checkdam.pdf).

32. Interview with Judge Holderman (cited in note 29).

33. Wolfson, *Experiment in Juror Interrogation* (cited in note 7).

34. Interview with Judge Holderman (cited in note 29); see also Seventh Circuit American Jury Project Final Report 60-62 (cited in note 20).

35. See Seventh Circuit American Jury Project Final Report (cited in note 20).

36. Interview with Judge Holderman (cited in note 29).

37. Id.

38. Id.

39. Id.

40. Id.

41. Interview with Chief Judge David R. Herndon (July 29, 2010) (notes on file with author).

42. Interview with Magistrate Judge Clifford J. Proud (July 29, 2010) (notes on file with author).

43. Interview with Judge Ronald D. Spears (July 30, 2010) (notes on file with author).

44. Id.

45. Id.

46. Id.

47. See note 18.

48. Interview with Bruce Pfaff (July 29, 2010) (notes on file with author). See also Bruce Pfaff, John L. Stalmack, & Nancy S. Marder, *The Right to Submit Questions to Witnesses*, CBA Rec, May 2009, at 36, for further discussion of, and support for, implementation of juror questions in trials.

49. Email from Bruce Pfaff (July 30, 2010) (copy on file with author).

it anyway, so why not make the trial process more interactive and satisfying for the jurors?”<sup>50</sup>

Marion attorney Joseph A. Bleyer tried a case recently in federal court in East St. Louis in which juror questions were allowed in an employment case. Bleyer, who won a defense verdict in the case, thought the juror questions helped the attorneys focus on what was important in the case and provided great insight to the attorneys.<sup>51</sup> His initial reluctance proved unfounded and the juror questions kept the jury involved in the trial.<sup>52</sup>

### **The time has come**

We propose that the Illinois Supreme Court adopt a new Rule, which provides a uniform, considered procedure for juror questions at trial. A recent public

hearing gave trial lawyers and judges an opportunity to weigh in on a proposed rule. (See sidebar for the proposal the authors submitted to the Illinois Supreme Court Rules Committee. The committee held a public hearing in Chicago on May 20.)

The interests of justice drive our proposal. As members of the bar, our goal in every case should be equity and fairness. Increasing jurors’ understanding of the facts at trial goes right to the heart of that mission and is worth the effort required. The practice is relatively simple to implement and its benefits far outweigh any risks.

Nearly a century and a half ago, that same Illinois lawyer who exonerated his client in *People v Harrison* delivered one of the most powerful speeches in Ameri-

can history. In his Gettysburg Address, President Lincoln articulated the fundamental principle of our nation: “government of the people, by the people, and for the people.”<sup>53</sup> The American legal system is one of the greatest examples of that democratic system – perhaps nowhere better than in our incorporation of the citizenry in the trial process as the ultimate arbiters of justice. Now is the time to recognize that jurors undertake that responsibility seriously and will help by their questions to achieve the just result. ■

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50. Id.

51. Interview with Joseph A. Bleyer (July 30, 2010) (notes on file with author).

52. Id.

53. *Gettysburg Address*, (The Columbia Encyclopedia 6th ed 2008), online at <http://www.encyclopedia.com/doc/1E1-GettysbuAd.html>.

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