

THE PHILIP D. REED LECTURE SERIES

INTRODUCTORY REMARKS

*The Honorable Susan R. Bolton**

In April 1993, the Arizona Supreme Court established the Committee on More Effective Use of Juries.¹ Among the mandates to the committee was to recommend specific ways to improve jury trials and the quality of jury verdicts.² In November 1994, the committee published its report entitled *Jurors: The Power of 12*.³ The report made fifty-five recommendations, including that jurors be permitted to ask written questions in both civil and criminal cases.⁴ The committee concluded that juror questions would enhance active participation by jurors in fact-finding and improve their comprehension.⁵ The committee found that, if proper safeguards were followed, no substantial risks would be incurred.⁶ Both the Arizona Rules of Civil Procedure and Rules of Criminal Procedure were amended to provide that jurors be permitted to ask questions.⁷ Arizona Rule of Civil Procedure 40(i)(2) states that jurors may submit written questions directed to witnesses or the court and that counsel must be permitted to object outside the presence of the jury.⁸ Jury questions may be prohibited or limited only for good cause shown.⁹ Arizona Rule of Criminal Procedure 18.6(e) states that jurors *must* be instructed that they can submit written questions directed to a witness or to the court, that objections will be permitted outside their presence, and that

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1. Arizona Judicial Council Committee on More Effective Use of Juries, Administrative Order No. 93-20 (Ariz. 1993).

2. *See id.*

3. THE ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994).

4. *See id.* at 3, 91.

5. *See id.* at 91.

6. *See id.*

7. These rules became effective on December 1, 1995. *See* ARIZ. R. CRIM. P. 18.6(e) (1996) (amended 2017); ARIZ. R. CIV. P. 39(b)(10) (1996) (current version at ARIZ. R. CIV. P. 40(i)(2) (2022)). In a later amendment, Arizona Rule of Civil Procedure 39(b)(10) became the present Arizona Rule of Civil Procedure 40(i)(2). *Compare id.*, with *id.* r. 40(i)(2).

8. ARIZ. R. CIV. P. 40(i)(2).

9. *See id.*

questions may be prohibited or limited for good cause shown.¹⁰ A comment to the criminal rule expands on the instructions that jurors should be given about the submission of written questions and directs how questions that call for admissible evidence should be answered and how questions that call for inadmissible evidence should be handled.¹¹

I was an Arizona Superior Court judge throughout the 1990s, and allowing written juror questions became a regular practice in my jury trials. I continued the practice of allowing juror questions in both civil and criminal cases after moving to the federal district court in 2000. I agree with my Arizona state court colleagues that permitting written juror questions improves the quality of jury trials and have seen none of the risks commonly speculated about when jurors are permitted to submit written questions.

In 2002, the chief judge of the U.S. Court of Appeals for the Ninth Circuit created the Jury Trial Improvement Committee, which was charged with looking at many of the same things that the earlier Arizona Supreme Court Committee had examined.¹² I was appointed chair of the newly created Ninth Circuit committee, based on my recent experience as an Arizona Superior Court judge. Our committee's *Second Report: Recommendations and Suggested Best Practices*, adopted by the Ninth Circuit Judicial Council in October 2006,¹³ recommended that jurors in civil cases be instructed that they may submit written questions because the submission of juror questions can improve both juror attentiveness and comprehension.¹⁴ The committee also suggested procedures to be used for jury questions, including that they be in writing, that objections be permitted outside of the jury's presence, that the court or counsel ask the question, and that the parties should be able to agree that the court could give a stipulated answer to the question.¹⁵ The committee also addressed the concern voiced by judges that jurors will inundate the court with written questions.¹⁶ The data available to the committee showed that the average number of questions submitted by jurors in a trial was only three.¹⁷

The committee did not recommend juror questions in criminal trials.¹⁸ My recollection of the recommendation being limited to civil trials was the oft-voiced concern that the answers to jurors' questions might supply evidence missed by the prosecution, thereby providing an advantage to the government. My experience in criminal trials is that this is not the case, and

10. ARIZ. R. CRIM. P. 18.6(e).

11. *See id.* r. 18.6(e) cmt. (1996).

12. *See Trial Improvement Committee*, U.S. CTS. FOR THE NINTH CIR., <https://www.ca9.uscourts.gov/judicial-council/jury-trial-improvement-committee/> [<https://perma.cc/2BE4-QHT6>] (last visited Apr. 3, 2023).

13. *See NINTH CIR. JURY TRIAL IMPROVEMENT COMM., SECOND REPORT: RECOMMENDATIONS AND SUGGESTED BEST PRACTICES* (2006), <https://cdn.ca9.uscourts.gov/datastore/uploads/jtic/FINALSecondReport.pdf> [<https://perma.cc/CT28-PM79>].

14. *See id.* at 11.

15. *See id.*

16. *See id.* at 11–12.

17. *See id.* at 12.

18. *See generally id.*

the questions posed are most often clarifying questions or questions that are anticipatory of evidence not yet offered. The questions asked in my criminal trials have not advantaged one side or the other and have rarely been the subject of objections by either side.

In my trials, jurors are given preliminary instructions both orally and in writing. They keep their copy of the preliminary instructions in their notebooks during trial. The instruction covering juror questions advises:

[I]f you need to communicate with me or have any questions during the trial of a witness or about the evidence simply give a note to the law clerk or courtroom deputy to give to me. If any juror submits a written question, I will consult with counsel before deciding whether the question can be answered. Do not discuss your question with anyone. Remember that you are not to discuss the case with other jurors until it is submitted for your decision.¹⁹

The juror notebooks include some blank pages with the heading “Juror Question” for writing out the questions.

Jurors most often submit their questions as we take a recess or return from a recess. The lawyers are typically given a copy of the questions, and we discuss them during the recess to decide whether the question can be answered. If the question is to be answered by a witness, the lawyers usually ask me to pose the question to the witness or, in some instances, answer it myself. If the question is not to be answered, the question is not read, and the jury is given a brief explanation, agreed to by counsel, why the question would not be answered. With anticipatory questions, the lawyers and I typically agree that the jury will be told there was a jury question about matters that will be addressed later in the trial, but if the juror’s question is not answered, that they should submit the question again when that subject is addressed with a subsequent witness. Objections to juror questions are rare.

Jurors have traditionally been viewed as a passive audience to a trial,²⁰ yet are asked at the end of the trial to render a verdict based on the evidence, whether they understood it or not. Most juror questions I have seen over the past thirty years have been clarifying questions or anticipatory questions. Often, an individual juror question reveals a point of confusion that neither side perceived. Lawyers and judges sometimes use terminology that they are familiar with but that jurors may not understand. In a recent trial, a juror asked what “lack of foundation” meant. The objection had been made and sustained several times, and the question gave me the opportunity to give a brief explanation to the jury about what a witness needed to be shown to have personal knowledge about the things the witness was asked to testify about.

19. Civil Jury Instructions of U.S. District Court Judge Susan R. Bolton (on file with the *Fordham Law Review*); see also Criminal Jury Instructions of U.S. District Court Judge Susan R. Bolton (on file with the *Fordham Law Review*) (containing similar instructions).

20. See, e.g., Steven I. Friedland, *Legal Institutions: The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. L. REV. 190, 198 (1990).

With proper procedures in place and with the jurors being told what the procedures are for addressing their questions, the trial process is improved by allowing written juror questions.