

July 2016 Jury Tip: “How and when to best use questionnaires in jury selection”

If you’ve tried enough jury trials, you know by now that the more information you have about each juror during jury selection, the better. The more time and latitude you’re given during voir dire, the better. And if you’ve voir dired enough jurors, you probably know that the most challenging part of voir dire is getting jurors to be brutally honest and transparent, especially when you’re asking them to express beliefs and attitudes that seem controversial or uncomfortable or private. Have you ever tried asking a jury “who has negative feelings about” a particular demographic, like African-Americans or illegal immigrants or homosexuals? If you were to ask your jurors “who has had an abortion?” or even “who here sometimes drives drunk,” do you feel confident that you would get 100% honest answers in open court? Sometimes asking a voir dire question about a sensitive bias—as crucial as it is to your case—seems like a complete waste of effort.

This month’s tip, unfortunately, doesn’t give you a magical formula for making jurors honest and candid in open court. There are ways to ask questions that maximize your chances of encouraging honest answers, but none that are fully effective. In reality, your best solution is to ask the court to use a written questionnaire in jury selection. For those of you who aren’t familiar with a jury questionnaire, I’m talking about a form filled with written voir dire questions that potential jurors fill out before voir dire begins, to supplement the voir dire process. Some questionnaires are a page or two, many can be 5 to 10 pages, and I’ve heard of questionnaires in high-profile cases that have been a hundred pages. But just to clarify, I’m talking about questionnaires filled with non-general questions that each side has proposed for the unique case; I’m not talking about standard, form questionnaires that come from the court and that ask only generic questions that apply to every trial.

Now I understand that the use of jury questionnaires during jury selection is a fairly limited practice in court trials across the country. Many states may never permit the use of a questionnaire to supplement voir dire. And in my experience, many judges refuse to permit the use of questionnaires in those jurisdictions that do permit them in theory. But even if you don’t think it’s likely your judge will agree, don’t forget that every lawyer has the opportunity to at least advocate for the use of a questionnaire in the right case, so it’s important for lawyers to understand when to ask for one, why to ask for one, and how to properly use one when allowed. Because the truth is that sometimes it’s a disadvantage to use a questionnaire, and sometimes you need help convincing the court to allow one, and many times questionnaires are badly mis-utilized.

So let’s circle back to the beginning: if you are worried about a bias on your jury that is particularly sensitive, controversial, embarrassing, or want to ask a question in voir dire that you think will be hard to get honest answers from your jury, you’ll benefit from a questionnaire. There is never a guarantee of getting an honest answer, but jurors are much, much more likely to admit something that requires brutal honesty in writing than

publicly, in open court. Writing feels anonymous... and the truth is that jurors are most worried about offending other jurors, not so much the lawyers or the judge. On the other hand, if the other side in a trial has the sensitive, controversial biases to worry about, you're better off without a questionnaire.

Now that's the obvious reason to use a questionnaire, but not the only one, and not necessarily the most important one. Here's the main reason I use questionnaires: when I want a voir dire question asked that I don't want the other jurors to hear. There are certain answers in voir dire that do taint the rest of the jury pool that I'll discuss in a second—if I have enough of those questions, I want a written questionnaire.

But as many lawyers know, wanting a questionnaire usually doesn't get you a questionnaire; you have to get your judge to agree. Very briefly, I'll summarize the ways to maximize your chances at getting one. Get opposing counsel to agree to one... and more importantly, do whatever you need to do so that you have a draft without objections to present to the judge. Admit to your judge that most trials don't require a questionnaire, but argue that this unique trial does, because of some sensitive issues. Specifically, tell your judge that using a questionnaire will save hours of inefficient sidebars in chambers with your jurors. It's much more efficient—and painless—to have jurors spend an hour writing about a private issue than bringing them into sidebar one-by-one. And lastly, argue to your judge that questionnaires will save, not waste, time. Have the jurors fill the questionnaires out in the morning, then dismiss them for the day while motions in limine are argued. Does it always work? No—but these are the best ways of trying.

So let's say that you've decided that a questionnaire would benefit your side and convinced your judge to agree to use one: what should you ask in a questionnaire and what do you save for voir dire? Here's what I do: I put any voir dire question that asks jurors about specific, biasing experiences they've had (or things they've seen that are bad for my case) in the questionnaire, so that the other jurors don't hear about it. When it comes to "tainting" the jury pool or "poisoning the well," jurors aren't influenced by the opinions fellow jurors express, but they can be influenced by facts and experiences they hear. I don't mind the jury pool hearing a fellow juror complaining about lawsuits, but I don't want other jurors hearing juror #8 talking about a co-worker who faked a disability, or a company they worked for that stole ideas from competitors. And I certainly don't want other jurors to hear a juror with expert knowledge share a bad fact. So my questionnaires focus on experiences, not opinions.

The only opinions I include in questionnaires are highly sensitive prejudices that I would expect jurors to be reluctant to admit in open voir dire. But for the most part, I never ask questions about attitudes, feelings, or beliefs about the key issues in the case in a written questionnaire. The reason is that when it comes to attitudes, I want to see HOW the juror answers the question. HOW a juror explains how they feel is just as important as the words they say. Experiences are cut and dry, but attitudes are so nuanced that they require the lawyer to explain and interact with the juror. For me, it's a mistake to think you can accurately capture how a juror truly feels about a subject in writing, because so much gets lost in translation.