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The Propriety of Jury Questioning: A Remedy for Perceived Harmless Error

In May of 1999, in *United States v. Hernandez*,¹ the Third Circuit ruled on a case of first impression.² Courts commonly rule on issues of first impression; every time a new legal issue is developed or a new rule of law is formed, cases of first impression arise. *Hernandez* is unique because it is a ruling of first impression that is not based upon a new legal issue or a new rule of law.³ *Hernandez* addresses the current practice of allowing jurors to question witnesses in criminal trials,⁴ a practice utilized in the United States since at least 1825,⁵ and in England since the 18th Century.

I. INTRODUCTION: THE HISTORY OF JUROR QUESTIONING WITNESSES

The first time any court in the United States addressed the issue of whether jurors could question witnesses was in a 1895 civil case, *Schaefer v. St. Louis & Suburban Railway Company*.⁶ The court in *Schaefer* explicitly allowed jurors to question the witnesses.⁷ Soon thereafter in 1907, as a result of *State v. Kendall*,⁸ North Carolina became one of the first states to formally permit juror questioning of witnesses, as long as the purpose was to elicit the truth.⁹ It was not until 1954 that the first federal appellate court issued an opinion on the subject.¹⁰ In *United States v. Witt*,¹¹ the Second Circuit ruled that allowing jurors to question witnesses is totally within judicial discretion.¹² The court based its holding on the decision in *United States v. Rosenberg*,¹³ which upheld the practice of judges questioning

1. 176 F.3d 719 (3d Cir. 1999)

2. *Id.* at 723.

3. *Id.*

4. *Id.*

5. Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y & L. 259, 262 (1997).

6. 30 S.W. 331 (Mo. 1895).

7. *Id.* at 333.

8. 57 S.E. 340, 341 (N.C. 1907).

9. Amy Witherite, *Jurors May Indirectly Question Witnesses During Trial: Allen v. State*, 807 S.W.2d 639 (Tex. App.-Houston [14th Dist.] 1991, *pet. granted*), 23 TEX. TECH L. REV. 663, 667-68 (1992).

10. *See id.* at 664 & n.10.

11. 215 F.2d 580, 584 (2d Cir. 1954), *cert. denied*, 348 U.S. 887 (1954).

12. *Id.* at 584.

13. 195 F.2d 583 (2d Cir. 1952).

witnesses.¹⁴ Forty-five years later, notwithstanding a multitude of cases of first impression and further discussions in between, we have yet another case of first impression in the Third Circuit, *United States v. Hernandez*.¹⁵ The *Hernandez* court held that juror questioning of witnesses can occur “so long as it is done in a manner that insures the fairness of the proceedings, the primacy of the court’s stewardship, and the rights of the accused.”¹⁶

The cases decided between *Witt* and *Hernandez* that discuss the propriety of allowing jurors to question witnesses, spawned considerable controversy over the practice.¹⁷ Despite the controversy, allowing jurors to question witnesses became current trial practice in many circuits and states.¹⁸ However, problems inherent in the practice are enumerated in almost every on-point opinion.¹⁹ Every circuit that has addressed the issue has vehemently stressed that the practice is dangerous.²⁰ Additionally, most courts strongly discouraged its use and stated that the practice should be used sparingly²¹ and only in the most complex criminal cases,²² such as antitrust or conspiracy.²³

With few exceptions, every case that discussed the appropriateness of allowing jurors to question witnesses stated that the implementation of the practice is a matter of judicial discretion.²⁴ The courts, however, then backpedaled and ended

14. *Id.* at 593-94.

15. 176 F.3d 719 (3d Cir. 1999).

16. *Id.* at 723.

17. Witherite, *supra* note 10, at 664-69.

18. *See* Wolff, *supra* note 6, at 818.

19. *See, e.g.*, *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992) (explaining that the procedure is “fraught with perils” and that a judge who utilizes the practice should attempt to lessen the “inherent dangers”); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516-17 (4th Cir. 1985) (stating that there are considerable dangers in the practice); *United States v. Feinberg*, 89 F.3d 333, 336 (7th Cir. 1996) (stating that “[w]itness questioning by jurors is fraught with risks.”); *United States v. Johnson*, 914 F.2d 136, 138 (8th Cir. 1990) (concluding that the practice is “fraught with danger and borders on a finding of prejudice per se.”). *See also* *State v. LeMaster*, 669 P.2d 592, 597-98 (Ariz. Ct. App. 1983) (stating that there is the danger that the jury will not remain fair and impartial); *State v. Graves*, 907 P.2d 963, 965 (Mont. 1995) (quoting *DeBenedetto*, 754 F.2d at 516); *State v. Jumpp*, 619 A.2d 602, 610 (N.J. 1993) (listing the dangers inherent in the practice).

20. *See id.*

21. *See* *United States v. Thompson*, 76 F.3d 442, 448 (2d Cir. 1996) (stating that the practice is to be used only in extraordinary or compelling circumstances); *Sutton*, 970 F.2d at 1005 (stating that while the practice is not forbidden, it should be used sparingly).

22. *See* *United States v. Cassiere*, 4 F.3d 1006, 1017 (1st Cir. 1993) (stating that the practice is not prejudicial per se in complex cases); *United States v. Feinberg*, 89 F.3d 333, 337 (7th Cir. 1996) (explaining that there may be criminal cases, such as conspiracy or anti-trust, where the facts are complicated and therefore jurors should be allowed to ask questions).

23. *Id.*

24. *See* *Sutton*, 970 F.2d at 1005 (stating that the matter is “committed to the sound discretion of the trial court.”); *Cassiere*, 4 F.3d at 1018 (explaining that the trial court has broad discretion over procedural trial matters); *Witt*, 215 F.2d at 584 (holding that juror questioning of witnesses is within the judge’s discretion); *DeBenedetto*, 754 F.2d at 516 (finding that although distinguishable, both juror questioning and questioning of jurors by a judge are matters within the trial court’s discretion); *Feinberg*, 89 F.3d at 337 (explaining that the decision to allow jurors to question witnesses is most appropriately left to the trial

with a caveat that they strongly discourage the practice because it is so dangerous.²⁵

In addition to the arguments found in case law, there exists some argument that the Federal Rules of Evidence (FRE) offers guidance on this subject, in the form of FRE 611(a).²⁶ One such argument is that the language of FRE 611(a),²⁷ which gives the court the power to decide the "mode and order" of witnesses, allows the court to invite jurors to question witnesses.²⁸ However, nothing in the Advisory Committee Notes to FRE 611 suggests or even implies that it be used for this purpose.²⁹

In addition to the FRE 611(a) argument, courts and commentators have proposed that Federal Rule of Evidence 614(b)³⁰ embodies the acceptance of the practice.³¹ The Advisory Committee Notes to FRE 614(b) state that the authority of the *judge* to question witnesses is well-established, but the rule never mentions the jury in connection with such authority.³² The Notes to FRE 614(b) do, however, state that judges abuse their roles as questioner when they become advocates,³³ which will be discussed in depth in Part III.

This comment in Part II will identify and discuss the concerns and issues surrounding the current practice of allowing jurors to question witnesses in criminal trials.³⁴ Part III considers what "judicial discretion" means and its

judge's discretion); *United States v. George*, 986 F.2d 1176, 1178 (8th Cir. 1993) (reiterating that the practice is committed to the discretion of the trial court). *See also Graves*, 907 P.2d at 966-67; *Flores v. State*, 965 P.2d 901, 902 (Nev. 1998); *Jumpp*, 619 A.2d at 611; *Cohee v. State*, 942 P.2d 211, 213-14 (Okla. 1997); *Williams v. Commonwealth*, 484 S.E.2d 153, 155 (Va. Ct. App. 1997).

25. *See Feinberg*, 89 F.3d at 337 (stating that the process is not prejudicial *per se*, but that the risks outweigh the benefits); *DeBenedetto*, 754 F.2d at 517 (holding process is not prejudicial, but that the practice is "fraught with peril"); *Sutton*, 970 F.2d at 1005 (finding use not prejudicial *per se*, but that the "game will not be worth the candle."); *United States v. Johnson*, 914 F.2d 136, 138 (8th Cir. 1990).

26. FED. R. EVID. 611(a). *See also DeBenedetto*, 754 F.2d at 515 (stating that the Federal Rules of Evidence neither allow nor disallow the practice, but 611(a) offers some guidance).

27. Rule 611 (a) of the Federal Rules of Evidence states: The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. FED. R. EVID. 611(a).

28. *See DeBenedetto*, 754 F.2d at 515.

29. *See* FED. R. EVID. 611 advisory committee's notes.

30. Rule 614(b) of the Federal Rules of Evidence states: "The court may interrogate witnesses, whether called by itself or by a party." FED. R. EVID. 614(b).

31. *See United States v. Rosenberg*, 195 F.2d 583, 593-94 (2d Cir. 1952) (stating that judges should pose questions to clear up misunderstandings). *See also*, Jeffrey Reynolds Sylvester, *Your Honor, May I Ask a Question? The Inherent Dangers of Allowing Jurors to Question Witnesses* 7 COOLEY L. REV. 213, 216 n.30 (1990) (arguing that juror questioning is supported by Federal Rule of Evidence 614(b)).

32. FED. R. EVID. 614(b) advisory committee's notes.

33. *Id.*

34. *See* discussion *infra* Part II.

relation to the process of juror questioning.³⁵ Part IV will examine the current practice of each of the Federal Circuits and a representative sampling of state courts.³⁶ Part V advocates a blanket rule banning the practice of juror questioning in criminal trials and, as an alternative, encourages the implementation of a new Rule of Federal Evidence or Criminal Procedure to safeguard against the perils inherent in the practice of allowing jurors to question witnesses in criminal trials.³⁷ Finally, Part VI concludes the comment.³⁸

II. INHERENT DANGERS AND ISSUES ENUMERATED

First and foremost, the practice of allowing jurors to ask questions “creates the risk that jurors [untrained in the law and rules of evidence] will ask prejudicial or improper questions.”³⁹ “[T]he potential risk that a juror question will be improper or prejudicial is simply greater than a trial court should take. . . .”⁴⁰ When jurors are not trained in the rules of evidence, courts that allow jurors to question witnesses may encounter situations where a juror wants an improper/prejudicial question asked of a witness and the question is irrelevant or simply cannot be allowed due to prior motion or hearsay exclusion. The court, therefore, may be left with a juror who retains the improper mind-set that generated the unanswered question.⁴¹

A number of courts cite their most troubling concern as the danger that the process of asking questions has the great possibility of turning the jury into advocates for one side or another.⁴² When jurors turn to advocacy, they abandon their primary responsibility to remain neutral fact-finders.⁴³ There is an intrinsic difficulty with being an active participant in a trial while remaining a detached observer.⁴⁴ If jurors become involved in the questioning of witnesses they may feel

35. See discussion *infra* Part III.

36. See discussion *infra* Part IV.

37. See discussion *infra* Part V.

38. See discussion *infra* Part VI.

39. *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995) (discussing the risks inherent in juror questioning of witnesses); *United States v. Douglas*, 81 F.3d 324, 326 (2d Cir. 1996); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985); *United States v. Groene*, 998 F.2d 604, 606 (8th Cir. 1993); *United States v. Brockman*, 183 F.3d 891, 899 (8th Cir. 1999); *State v. LeMaster*, 669 P.2d 592, 597 (Ariz. Ct. App. 1983); *State v. Jeffries*, 644 S.W.2d 432, 434-35 (Tenn. Crim. App. 1982); *Williams v. Commonwealth*, 484 S.E.2d 153, 155 (Va. Ct. App. 1997).

40. *DeBenedetto*, 754 F.2d at 516.

41. See *id.*

42. *Bush*, 47 F.3d at 515; *Douglas*, 81 F.3d at 326; *United States v. Feinberg*, 89 F.3d 333, 336 (7th Cir. 1996); *Groene*, 998 F.2d at 606; *Brockman*, 183 F.3d at 899; *Jeffries*, 644 S.W.2d at 435; *Williams*, 484 S.E.2d at 155.

43. See generally *Bush*, 47 F.3d at 515 (citing *United States v. Johnson*, 892 F.2d 707, 711 (8th Cir. 1989) (observing that the “most troubling concern is that the practice risks turning jurors into advocates, compromising their neutrality.”)); *Feinberg*, 89 F.3d at 336 (“If permitted to go too far, examination by jurors may convert the jurors to adversely compromising their neutrality.”).

44. *Bush*, 47 F.3d at 515.

that they have an investment in the outcome and lose the neutrality and detachment that is required of a neutral fact-finder, in order to preserve the defendant's rights.⁴⁵

Another frequently cited danger is that the practice may cause premature deliberation among the jury.⁴⁶ The questioning of witnesses by jurors reflects the jury's premature consideration of the evidence prior to the commencement of their deliberation.⁴⁷

In addition, when jurors are given the opportunity after every witness to formulate and write out questions they want submitted to the court and asked of the witness, this not only constitutes deliberation, but also unfailingly delays the pace of the trial.⁴⁸ Such actions are diametrically opposed to the sought after goals of judicial economy and efficiency.⁴⁹

The final frequently cited inherent danger is that the practice of jury questioning subjects the objecting party/counsel to the possibility of alienating the jury.⁵⁰ Objecting in the presence of the jury, or with the jury's knowledge of who objected, "[i]mpale[s] attorneys on the horns of a dilemma."⁵¹ If a procedure is not implemented for allowing attorneys to make objections outside of the jury's presence, the attorney must decide whether to alienate a juror by objecting to his question or to prejudice his own client by failing to object. This dilemma creates an awkwardness for the lawyer who wants to object to the juror's question, but who cannot afford to alienate any member of the jury.⁵²

45. *Id.*

46. *Id.* See also *United States v. Ajmal*, 67 F.3d 12, 14 (2d Cir. 1995) (arguing that "if allowed to formulate questions throughout the trial, jurors may prematurely evaluate the evidence and adopt a position as to the weight of that evidence before considering all the facts . . . [and such] premature deliberation . . . can be highly prejudicial."); *United States v. Thompson*, 76 F.3d 442, 448 (2d Cir. 1996) (noting that "[s]uch questioning tends to . . . encourage premature deliberations . . ."); *DeBenedetto*, 754 F.2d at 517 ("To the extent that such juror questions reflect consideration of the evidence—and such questions inevitably must do so—that, at the least, the questioning juror has begun the deliberating process with his fellow jurors."); *Feinberg*, 89 F.3d at 336 (citing *Bush*, the *Feinberg* court states that "Jurors may [also] begin premature deliberations."); *Groene*, 998 F.2d at 606 ("[T]he process of formulating questions may precipitate prematurely the deliberation phase of the trial . . ."); *Brockman*, 183 F.3d at 899, quoting *Groene*, 998 F.2d at 606; *Williams*, 484 S.E.2d at 155 (citing *DeBenedetto*, the *Williams* court observed that "juror questioning may encourage premature deliberation.").

47. See *DeBenedetto*, 754 F.2d at 517; *Brockman*, 183 F.3d at 899; *Thompson*, 76 F.3d at 448.

48. *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992); *Ajmal*, 67 F.3d at 14; *Thompson*, 76 F.3d at 448; *State v. LeMaster*, 669 P.2d 592, 606 (Ariz. Ct. App. 1983).

49. See *Sutton*, 970 F.2d at 1005; *Ajmal*, 67 F.3d at 14; *Thompson*, 76 F.3d at 448; *LeMaster*, 669 P.2d at 597.

50. *Bush*, 47 F.3d at 515; *Ajmal*, 67 F.3d at 14; *Feinberg*, 89 F.3d at 336-37.

51. See *Feinberg*, 89 F.3d at 336 (quoting *Bush*, 47 F.3d at 515).

52. See generally *Sutton*, 970 F.2d at 1005.

III. JUDICIAL DISCRETION

Judicial discretion is “equated with ‘sound judgment of the court to be exercised according to the rules of law.’”⁵³ It is described as “the option the trial judge has in doing or not doing a thing that cannot be demanded by a litigant as an absolute right”⁵⁴

Unlike the criminal defendant who has an absolute right to a fair and impartial fact-finder,⁵⁵ jurors have no absolute right to question witnesses.⁵⁶ As a result of leaving the issue to a trial court’s discretion, a judge can decide whether or not he thinks, in his “sound judgment,” the questioning of witnesses by the jurors is proper. An important question is what constitutes the complexity required by many jurisdictions before the procedure should be implemented. Equally important a question is whether the judge is best suited to determine if a jury of lay persons will or will not understand the case.

A point often overlooked by many commentators is that most of these cases are reviewed for abuse of discretion. Although most courts find an inherent error in the practice of juror questioning, they inevitably, with few exceptions, conclude that the error was harmless to the defendant. Error, even though harmless, is still error, and a constant stream of cases illustrating such an error in the system should signal that a remedy is needed.

Abuse of discretion is aptly defined as “a clearly erroneous conclusion and judgment—one that is clearly against the logic and effect of such facts as are presented”⁵⁷ It is also considered an unreasonable departure from considered precedents and settled judicial custom, and it constitutes an error of law.⁵⁸ Under this definition, allowing jurors to question witnesses will very rarely be an abuse of discretion because of existing precedent and judicial custom on the subject. Unfortunately, if reasonable men can differ about the propriety of the action taken by the trial court, then the trial court did not abuse its discretion.⁵⁹

“Men” differ on the question of allowing juror questioning,⁶⁰ but only two circuits have held that the practice constitutes an abuse of discretion.⁶¹ Where so many differ on the propriety of the subject, is the correct standard abuse of

53. *People v. Russel*, 70 Cal. Rptr. 210, 215 (Cal. 1968) (quoting *Lent v. Tillson*, 14 P. 71, 78 (Cal. 1887)).

54. *Kasper v. Helfrich*, 421 S.W.2d 66, 69 (Mo. Ct. App. 1967).

55. See U.S. CONST. amend. VI.

56. *State v. Graves*, 907 P.2d 963, 966-67 (Mont. 1995).

57. *State v. Draper*, 27 P.2d 39, 50 (Utah 1933) (quoting *Starr v. State*, 115 P. 356, 363 (Okla. Crim. App. 1911)).

58. *Beck v. Wings Field, Inc.*, 122 F.2d 114, 116-17 (3^d Cir. 1941).

59. *Kasper*, 421 S.W.2d at 69.

60. See discussion *infra* Part III.

61. *United States v. Ajmal*, 67 F.3d 12, 15 (2d Cir. 1995); *United States v. Thompson*, 76 F.3d 442, 449 (2d Cir. 1996).

discretion? Are we to stand by while the courts abuse their discretion, hiding behind the argument that such abuse is not prejudicial to the defendant?

IV. THE CURRENT PRACTICE: EXAMINATION OF FEDERAL CIRCUITS AND STATE COURTS

A. Federal Review

The United States Supreme Court has consistently denied certiorari to cases arguing whether the practice of allowing jurors to question witnesses is prejudicial *per se* or a violation of a defendant's Sixth Amendment rights.⁶² In addition, the federal circuit courts that have addressed the issue of juror questioning of witnesses have failed to establish a bright line rule against the practice. Instead, they strongly discourage its use, after noting each and every danger involved in the process.⁶³

1. First Circuit

The First Circuit, on three occasions during the 1990's, discussed whether jurors are allowed to question witnesses.⁶⁴ The court consistently stated that the trial court may utilize the practice as it is not prejudicial *per se*⁶⁵ and is allowable within a trial court's discretion.⁶⁶ However, both *United States v. Sutton* and *United States v. Cassiere* state that judges should employ the practice sparingly, only in complex cases, and the practice should be the exception, not the rule.⁶⁷

62. Wolff, *supra* note 6, at 820; Leonard Pertnoy, *The Juror's Need to Know vs. The Constitutional Right to a Fair Trial*, 97 DICK. L. REV. 627, 635 (1993) ("The Supreme Court has yet to pass on the constitutionality of juror questioning."); Sylvester, *supra* note 32, at 216 (1990); Judge Anthony Valen, *Jurors Asking Questions: Revolutionary or Evolutionary?*, 20 N. KY. L. REV. 423, 430 (1993) (stating that "[t]he United States Supreme Court has passed up many opportunities to rule on [juror questioning].").

63. *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992); *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995); *United States v. Amjal*, 67 F.3d 12, 14 (2d Cir. 1995); *United States v. DeBenedetto*, 754 F.2d 512, 516-17 (4th Cir. 1985); *United States v. Feinberg*, 89 F.3d 333, 336-37 (7th Cir. 1996); *United States v. Groene*, 998 F. 2d 604, 606 (8th Cir. 1993); *United States v. Brockman*, 183 F.3d 891, 899 (8th Cir. 1999).

64. *Sutton*, 970 F.2d at 1001; *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993); *United States v. Rivera-Santiago*, 107 F.3d 960 (1st Cir. 1997).

65. *Sutton*, 970 F.2d at 1005; *Cassiere*, 4 F.3d at 1018.

66. *Sutton*, 970 F.2d at 1005.

67. *Id.* (holding that the practice "should be the long-odds exception, not the rule."); *Cassiere*, 4 F.3d at 1018 (reiterating *Sutton* and stating that "the practice should be reserved for exceptional situations, and should not become the routine, even in complex cases").

In *Sutton*, the trial judge gave the jury preliminary instructions to inform them that they could ask questions of witnesses and to outline a simple procedure for what each juror should do if he or she had a question.⁶⁸ During the trial, the judge received a question from the jury asking if they were able to submit questions to a witness while the witness was testifying on the stand.⁶⁹ The judge answered in the affirmative, stating that this “is the essence of your right to ask questions.”⁷⁰ Throughout the trial, juror-inspired questions were asked of witnesses, with defense counsel usually objecting to the question being asked.⁷¹ The defendant was convicted, and he appealed, asserting that the practice was inherently prejudicial.⁷² On appeal, the court held that, in this case, the practice was not prejudicial *per se*, but stated that the practice was to be the “long odds-exception.”⁷³ The court also outlined the dangers inherent in allowing jurors to question witnesses.⁷⁴

The following year in *Cassiere*, the court took this enumeration a step further and outlined the prophylactic procedures that the trial court should use in the exceptional cases where the questioning of witnesses by jurors was appropriate.⁷⁵ During the *Cassiere* trial,⁷⁶ the court told the jury that they could ask questions of the witnesses and explained that they had to be in written form.⁷⁷ By the end of the trial, the court asked eleven juror-inspired questions to various witnesses.⁷⁸ Defendants did not object to the practice, nor did they object to any specific questions.⁷⁹ The court held that due to the factual complexity of the case, there was no plain error when the court implemented procedural safeguards and the

68. *Sutton*, 970 F.2d at 1003.

69. *Id.* at 1003.

70. *Id.*

71. *Id.* at 1004.

72. *Id.*

73. *Id.* at 1005. The *Sutton* court identified the following dangers of this practice: (1) it will transform jurors from passive to active participants; (2) it will delay the trial; (3) create awkwardness for attorneys; and (4) may undermine litigation strategies. *See id.*

74. *Id.*

75. *See United States v. Cassiere*, 4 F.3d 1006, 1018 (1st Cir. 1993). The court in *Cassiere* articulated the following procedural protections for use of this practice:

The district court should inform counsel at the earliest possible time of its intention to use this technique and allow counsel the opportunity to object. The court should instruct the jurors that they should limit their questions to important points, that at times the rules of evidence will dictate that the court not ask a question, and that the jurors should draw no implication from the court’s failure to pose a juror-proposed question to the [witness]. The jurors should reduce their questions to writing and pass them to the court. Before asking a question, the court should offer a sidebar conference to give counsel the opportunity to object.

Id.

76. *United States v. Cassiere* involved the trial of two criminal defendants, Joseph N. Cassiere and Janet M. Pezzullo, who were convicted of federal wire fraud and conspiracy, stemming from a scheme designed to defraud mortgage lenders. *Cassiere*, 4 F.3d at 1006.

77. *Id.* at 1016.

78. *Id.* at 1017.

79. *Id.*

defense failed to object to the questions when they were asked.⁸⁰ The *Cassiere* court concluded by re-enumerating the procedural safeguards identified in *Sutton*.⁸¹

2. Second Circuit

The Second Circuit first addressed the issue of jurors questioning witnesses in 1954 in *United States v. Witt*⁸² and found it to be valid under Federal Rule of Evidence 614(b).⁸³ In *Witt*, the defendants were tried and convicted for conspiring to defraud the United States.⁸⁴ Jurors asked questions of the witnesses, and the defendants included this issue in their appeal.⁸⁵ The court found that jurors asking questions is allowable because it is "like witness-questioning by the judge himself."⁸⁶

In 1995, the circuit again addressed the issue in *United States v. Bush*.⁸⁷ In *Bush*, the trial court did not give pre-trial instructions regarding juror questioning, but nevertheless allowed the jurors to question the defendant to clarify his testimony.⁸⁸ The circuit court held that while the practice is within the discretion of the trial judge, its use is strongly discouraged.⁸⁹ The court stated that the "most troubling concern" with the practice of juror questioning is that it will turn jurors into advocates, cause them to ask inappropriate or improper questions, and at the very least, encourage premature deliberation.⁹⁰

Ironically, later the same year, the Second Circuit decided *United States v. Ajmal*,⁹¹ and overturned the defendant's conviction after determining that the trial court abused its discretion by allowing jurors to question witnesses.⁹² In *Ajmal*, the

80. *Id.* at 1017-18.

81. *Id.* at 1018; *see also supra* note 76 (outlining the procedural protections used when allowing juror questioning).

82. 215 F.2d 580 (2d Cir. 1954).

83. *Id.* at 584 (relying on *United States v. Rosenberg*, 195 F.2d 583, 593-94 (2d Cir. 1952)). *See also* FED. RULE EVID. 614(b), *supra* note 28.

84. *Witt*, 215 F.2d at 581.

85. *Id.* at 584.

86. *Id.*

87. 47 F.3d 511 (2d Cir. 1995). Defendant Bush was tried and convicted of armed bank robbery and other related charges. *Id.* at 512.

88. *Id.* at 512-14.

89. *Id.* at 515.

90. *Id.*

91. 67 F.3d 12 (2d Cir. 1995).

92. *Id.* at 15 ("such questioning tainted the trial process Accordingly, the district court's solicitation of juror questioning absent a showing of extraordinary circumstances was an abuse of discretion.").

Second Circuit determined that the factual circumstances of the case did not warrant the court inviting jurors to question witnesses.⁹³ The court held that an abuse of discretion occurred because: 1) the decision to invite the questioning was not caused by a complex fact pattern; 2) the decision was made as a matter of routine; 3) the jurors took extensive use of the invitation, even to the extent of questioning the criminal defendant; 4) this promoted premature deliberation because the jurors were allowed to pose “non-fact-clarifying questions;” and 5) this caused the jurors to turn from “neutral fact-finder to inquisitor and advocate.”⁹⁴

Interestingly enough, the court quickly reiterated that even though they still found that juror questioning was within a trial court’s discretion, in order to properly exercise this discretion, the trial courts must balance the benefits and disadvantages of allowing such questioning.⁹⁵

Most recently, in *United States v. Douglas*,⁹⁶ the Second Circuit held that encouraging juror questioning was not a basis for disturbing a conviction.⁹⁷ Restating the inherent dangers in the practice,⁹⁸ the court reminded the district courts that the risks of adverse consequences render juror questioning of witnesses “inappropriate for [the courts] to invite or encourage.”⁹⁹

It appears that the only factor distinguishable between *Ajmal* and *Douglas* is that where the court in *Douglas* did invite juror questioning, it did not abuse the practice to the same extent that the *Ajmal* court did.¹⁰⁰ The court appeared to base its holding on the fact that the jury only posed a few questions to the witnesses in *Douglas*, and those questions were of slight significance.¹⁰¹ This rationale begs the question of whether the Second Circuit’s future decisions regarding juror questioning will rest on the number of questions asked and their significance to the case, rather than the balancing of advantages and disadvantages that the circuit court previously discussed.¹⁰² However, counting the number of questions asked by jurors requires an exhaustive case-by-case analysis because such an approach commands an in-depth examination of the transcript, to determine the quantity of questions asked and their significance to the case.

93. *Id.* at 14-15. Defendant was tried and convicted for possession of heroin with the intent to distribute. *Id.* at 13.

94. *Id.* at 14-15.

95. *Id.* at 14.

96. 81 F.3d 324 (2d Cir. 1996).

97. *Id.* at 326. The court determined that because the questions asked of witnesses were “few in number and of slight significance” the error of the judge in inviting the questioning was harmless. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*; see also *United States v. Ajmal*, 67 F.3d 12, 14-15 (2d Cir. 1995) (observing that “the jurors took extensive advantage of [the] opportunity to question witnesses . . . [and] tainted the trial process . . .”).

101. *Douglas*, 81 F.3d at 326.

102. See *Ajmal*, 67 F.3d at 14.

3. Third Circuit

The 1999 case of *United States v. Hernandez*¹⁰³ that inspired this comment was a case of first impression in the Third Circuit.¹⁰⁴ In *Hernandez*, the defendant was convicted of conspiracy and receiving or possessing stolen goods.¹⁰⁵ The district court allowed the jurors to write out their questions for the witnesses, but the court reviewed the questions before they were asked of any witness.¹⁰⁶ The court allowed the attorneys to look at the questions and make objections outside of the presence of the jury.¹⁰⁷ During the trial, a question was submitted through this process, and the court declined to ask the question of the witness.¹⁰⁸ Instead, the court allowed the attorneys to respond to the question.¹⁰⁹ Defense counsel objected, arguing that the question and its timeliness suggested premature deliberations on behalf of the juror.¹¹⁰ The court overruled the objection.¹¹¹ On appeal, the defense insisted that "permitting the jurors to act as inquisitors"¹¹² denied the defendant his Sixth Amendment Rights.¹¹³ The circuit court, as a matter of first impression, affirmed the lower court's holding and approved the practice "so long as it is done in a manner that insures the fairness of the proceedings, the primacy of the court's stewardship, and the rights of the accused."¹¹⁴ The Third Circuit agreed that a judge wanting to allow juror questions should adopt a procedure ensuring fairness, but failed to outline or advocate any type of guidelines for implementation of the procedure.¹¹⁵

4. Fourth Circuit

The Fourth Circuit decided in 1985 what many believe to be the seminal case in this controversy, *DeBenedetto v. Goodyear Tire & Rubber Company*.¹¹⁶ In

103. 176 F.3d 719 (3d Cir. 1999).

104. *Id.* at 723.

105. *Id.* at 721.

106. *Id.* at 722.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 723.

111. *Id.* The court found nothing in the wording of the question indicating "notions of guilt" on behalf of the inquiring juror. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 726.

116. 754 F.2d 512 (4th Cir. 1985).

DeBenedetto, a products liability case, the judge in his opening remarks to the jury explained that he would allow the jurors to submit questions for the witnesses, and if appropriate, the court would ask them.¹¹⁷ During the course of the trial, the jurors submitted approximately ninety-five questions, half of which were submitted by the jury foreman.¹¹⁸ The defense did not object to the process at any time during the trial.¹¹⁹ However, on appeal, the defense argued that because “the Federal Rules of Evidence do not explicitly permit this practice, it is error for a trial court to permit it.”¹²⁰

The Fourth Circuit held that allowing juror questioning is well within a trial court’s discretion,¹²¹ but the court refuted the reliance on Federal Rule of Evidence 611(a) as the underlying rationale for allowing the practice.¹²² The court refused to adopt a bright-line rule condemning the practice but stated in very strong language that the practice is “fraught with dangers” because jurors are not trained in the law.¹²³ The court held that the potential risks inherent in juror questioning are “simply greater than a trial court should take,” absent compelling circumstances.¹²⁴

The year following *DeBenedetto*, in *United States v. Polowichak*,¹²⁵ the Fourth Circuit disapproved of the practice of a court inviting or encouraging jurors to question witnesses.¹²⁶ The Fourth Circuit stressed that if the district courts

117. *Id.* at 515 n.1.

118. *Id.* at 517.

119. *Id.* at 515.

120. *Id.*

121. *Id.* at 516.

122. *Id.* at 515. The court examined the argument that the Federal Rules of Evidence applied but held that the Rules neither allow or disallow the practice. *Id.* The court rejected the argument that Federal Rule of Evidence 611(a) governs by finding that juror inspired questions are “clearly and properly distinguishable” from questioning by the trial judge. *Id.* at 515-16

123. *Id.* at 516-17. The *DeBenedetto* court outlined the inherent dangers as follows:

Our judicial system is founded upon the presence of a body constituted as a neutral factfinder to discern the truth from the positions presented by the adverse parties. . . . Individuals not trained in the law cannot be expected to know and understand what is legally relevant . . . [and] what is legally admissible.

Id. at 516. The court further stated that “since jurors are not trained in the law, the potential risk that a juror question will be improper or prejudicial is simply greater than a trial court should take . . .” *Id.* Questions made within hearing of other jurors could evoke “mental reactions” among the other jurors. *Id.* If a question is rejected, the jurors are “likely to retain whatever mind-set has been generated by the question, leaving the court and counsel to ponder, under the stress of trial, how much influence a *juror* question, answered or unanswered, may have had on the perceptions of the jury as a whole.” *Id.* (emphasis in original). In addition, “it is questionable how effective remedial steps are after the jury has heard the question. . . .” *Id.* “[R]emedial steps may well make the questioning juror feel abashed and uncomfortable, and perhaps even angry if he feels his pursuit of truth has been thwarted by rules he does not understand.” *Id.* Stronger jurors may dominate the inquiries, and there exists a “possibility that the jury will attach more significance to the answers to these jury questions . . .” *Id.* at 516-17. Furthermore, jurors who ask questions have prematurely begun the deliberation process. *Id.* at 517.

124. *Id.*

125. 783 F.2d 410 (4th Cir. 1986).

126. *Id.* at 413.

continue the practice, they are to “require jurors to submit questions in writing, without disclosing the question to other jurors, whereupon the court may pose the question in its original or restated form upon ruling the question or the substance of the question proper.”¹²⁷

5. Fifth Circuit

The Fifth Circuit, in *United States v. Callahan*,¹²⁸ upheld the practice of allowing jurors to question witnesses.¹²⁹ In *Callahan*, the defendant was convicted of tax evasion and appealed his conviction, based partly on the argument that the trial court encouraged jurors to question the witnesses.¹³⁰ While the trial judge informed the jurors that they should not hesitate to ask questions, he “explained that he did not want to encourage jurors to ask large number of questions,” and only one question was actually submitted during the trial.¹³¹

The court held that there was nothing improper in allowing jurors to ask questions.¹³² The court rationalized that allowing jurors to question witnesses ultimately causes a more complete development of the issues and facts of a case.¹³³ The Fifth Circuit took the position that while the development of the case is most important, the district courts need to balance the positives of questioning against the possible abuses that are likely to occur.¹³⁴

6. Sixth Circuit

As of date, the Sixth Circuit has not addressed the question of whether jurors may question witnesses.

7. Seventh Circuit

Another recent case of first impression lies in the Seventh Circuit. In 1996, the Seventh Circuit ruled on *United States v. Feinber*,¹³⁵ and found that the use of

127. *Id.*

128. 588 F.2d 1078 (5th Cir. 1979).

129. *Id.*

130. *Id.* at 1081.

131. *Id.* at 1086.

132. *Id.*

133. *Id.* at 1086. “[Q]uestion[s] should alert trial counsel that a particular factual issue may need more extensive development.” *Id.*

134. *Id.* at 1086-87 n.2.

135. 89 F.3d 333 (7th Cir. 1996).

the practice is a matter of judicial discretion.¹³⁶ In *Feinberg*, the judge, in his pretrial instructions to the jury, stated:

Most of the testimony will be given in response to questions by the attorneys When the attorneys have finished their questioning of a witness . . . I shall ask you whether you have any questions of that witness. If you do, address each of your questions to me, and if I decide that it meets the legal rules, I shall ask it of the witness. After all of your questions of a witness have been dealt with, the attorneys will have an opportunity to ask the witness further about the subjects raised by your questions. When you direct questions to me to be asked of the witness, you may state them either orally or in writing.¹³⁷

During the trial, the jury asked ten questions.¹³⁸ The defense did not object to either the judge's instructions nor any of the jurors' questions.¹³⁹ The defendant appealed his conviction partially on the basis that permitting the jurors to ask questions amounted to prejudice.¹⁴⁰

The Seventh Circuit stated that the practice is acceptable in some cases¹⁴¹ but is generally not condoned.¹⁴² The court stated that implicit in the practice is the obligation of the district court to weigh the benefits against the potential harm.¹⁴³ Ultimately, the court concluded that "[i]n the vast majority of cases the risks outweigh the benefits."¹⁴⁴

8. Eighth Circuit

The Eighth Circuit is the only circuit that has exhaustively examined, criticized, and ultimately approved the practice. In *United States v. Land*,¹⁴⁵ the Eighth Circuit first held that the practice of juror questioning of witnesses could only be reviewed for plain error.¹⁴⁶ In *Land*, defense counsel failed to make contemporaneous objections to juror questions.¹⁴⁷ The court found that although the trial court had no prior consideration of the questions that the jurors orally

136. *Id.* at 336.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 337. "There may be cases, such as conspiracy or antitrust cases, in which the facts are so complicated that jurors should be allowed to ask questions in order to perform their duties." *Id.*

142. *See id.* at 336.

143. *Id.* at 337.

144. *Id.*

145. 877 F.2d 17 (8th Cir. 1989).

146. *Id.* at 19.

147. *Id.*

articulated to the witnesses, the only review on appeal could be for plain error, absent objection by counsel.¹⁴⁸

Later that same year, the same court in *United States v. Johnson* (hereinafter *Johnson I*)¹⁴⁹ followed the holding in *Land*, and due to a lack of objections to the procedure during trial, found no grounds to overturn the conviction based upon juror questioning.¹⁵⁰ However, the *Johnson I* court issued a warning to express the risks of juror questioning and stressing the importance of having the jury maintain their duty as neutral fact-finders.¹⁵¹

Relying on *Land*, *Johnson I*, and *United States v. Lewin*,¹⁵² in 1990 this circuit decided *United States v. Johnson* (hereinafter *Johnson II*).¹⁵³ In *Johnson II*, the defense counsel made objections to juror questions during trial, and the Eighth Circuit held that review on appeal would be abuse of discretion, not plain error.¹⁵⁴ However, the court ultimately found that the questioning in this case was neither an abuse of discretion nor plain error.¹⁵⁵

While in the past this circuit has held that “the use of the procedure itself is not plain error,”¹⁵⁶ it consistently advocates the use of protection procedures in its implementation.¹⁵⁷ The Eighth Circuit regularly enumerates the dangers inherent in the practice as follows: 1) the practice turns jurors into advocates; 2) the act of formulating questions leads to premature deliberation; 3) jurors are likely to give more weight to answers to questions posed amongst themselves than those posed by counsel; 4) inappropriate questions, not in conformity with the rules of evidence, will be asked; and 5) the objecting party risks estranging the jury.¹⁵⁸

In a 1999 case, *United States v. Brockman*,¹⁵⁹ the Eighth Circuit adopted strong language and stated that it will continue to uphold the practice of allowing jurors to question witnesses, but only where the enumerated procedures are used

148. *Id.*

149. 892 F.2d 707 (8th Cir. 1989).

150. *Id.* at 710.

151. *Id.* at 713-15.

152. 900 F.2d 145 (8th Cir. 1990). This case follows the holding of *United States v. Land*, 877 F.2d 17 (8th Cir. 1989).

153. 914 F.2d 136 (8th Cir. 1990).

154. *Id.* at 138. The Eighth Circuit found that where no objections are made to the practice during the trial, the only review on appeal can be for plain error. *Id.* However, where there have been objections made by counsel during the trial, the review rises to abuse of discretion. *Id.*

155. *Id.* at 138-9.

156. *United States v. Groene*, 998 F.2d 604, 606 (8th Cir. 1993).

157. *Id.*

158. See *United States v. Brockman*, 183 F.3d 891, 899 (8th Cir. 1999); *Groene*, 998 F.2d at 606; *United States v. Bascope-Zurita*, 68 F.3d 1057, 1064 (8th Cir. 1995).

159. 183 F.3d 891 (8th Cir. 1999).

to reduce the dangers.¹⁶⁰

9. Ninth Circuit

In a one-page, no-nonsense opinion, the Ninth Circuit declared juror questioning appropriate, but did not discuss why.¹⁶¹

10. Tenth Circuit

The Tenth Circuit is unique; one state within the circuit outright allows the practice of juror questioning,¹⁶² and another state altogether banned the practice.¹⁶³ However, when the Tenth Circuit took an appeal of a habeas corpus petition that raised an issue with the practice, the court decided the case under Oklahoma state law that allowed for jurors to ask questions of witnesses.¹⁶⁴ Thus, this Circuit has not yet addressed the issue under federal law.

11. Eleventh Circuit

This issue has not yet been addressed in the Eleventh Circuit.

In summary, a review of current federal case law demonstrates that the inevitable finding among the circuits is that the practice of allowing jurors to question witnesses is not prejudicial *per se*. Rather, it is a matter that is firmly within a trial court's discretion, only to be reviewed on appeal for abuse of discretion. Most circuits enumerate the dangers, caution against the practice because of these dangers, and then allow the practice of allowing jurors to question witnesses, as long as the district court employs procedural protections. With the practice entrenched in judicial custom and case law, why then do the circuits continue to waiver on the issue, and why are the courts reluctant to take a firm stand on the matter? After fifty years why does so much controversy over the practice continue, and why has a rule not been adopted to address the issue, that either standardizes the practice under federal law or adopts an outright ban on its use?

160. See Brockman, 183 F.3d at 899. Brockman itself does not list enumerated protection procedures, but specifically followed the Eighth Circuit's earlier decision in *Groene*. *Id.* at 899 (citing *Groene*, 998 F.2d at 606) ("[I]f juror questions are allowed, this trial court should carefully weigh using a procedure that requires those questions to be submitted in writing or out of the hearing of [and with discussion with] other jurors.").

161. See *United States v. Gonzalez*, 424 F.2d 1055 (9th Cir. 1970).

162. *Shackelford v. Champion*, 156 F.3d 1244, 1998 WL 544363 (10th Cir. 1998), *cert. denied*, 525 U.S. 1150 (1999).

163. *Allen v. State*, 845 S.W.2d 907, 907 (Tex. Crim. App. 1993).

164. *Shackelford*, 1998 WL 544363, at *2.

B. State Review

Most state courts have addressed the issue.¹⁶⁵ The following is a representative sampling of the state courts that have discussed the practice of jurors questioning witnesses. Unlike the federal circuits, there are a few states that have placed absolute bans on the practice and prohibit the state courts from allowing jurors to participate in witness questioning.¹⁶⁶ Conversely, there are two states that specifically allow jurors to question witnesses and have codified the procedure.¹⁶⁷

1. Arizona

Arizona addressed the issue in 1983 in *State v. LeMaster*.¹⁶⁸ In *LeMaster*, the trial judge instructed the jurors prior to trial that they would be allowed to question witnesses after each witness finished their testimony.¹⁶⁹ The judge instructed the jurors to write out their questions and submit them to the court.¹⁷⁰ Depending on whether the question was appropriate, the judge would ask the witness the juror-derived question.¹⁷¹

After being convicted, the defendant appealed, contending that the entire process "was improper and constituted reversible error."¹⁷² The court held that when a trial court permits juror questioning, certain procedures must be followed.¹⁷³ The court enumerated the procedures to be implemented, adding that

165. See generally Wolff, *supra* note 6, at 818-19 & n.12.

166. See Wharton v. State, 734 So. 2d 985, 990 (Miss. 1998); State v. Zima, 468 N.W.2d 377, 380 (Neb. 1991); Allen, 845 S.W.2d at 907.

167. See Lawson v. State, 664 N.E.2d 773, 780 (Ind. 1996); State v. Darcy N.K., 581 N.W.2d 567, 580 (Wis. Ct. App. 1998).

168. 669 P.2d 592 (Ariz. Ct. App. 1983).

169. *Id.* at 596.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 597. The court outlined the procedures as follows: 1) The court should pre-instruct the jury that they will be able to ask questions to clarify the testimony of any witness. 2) The court may declare a recess or arrange a time for questions after each witness has testified. 3) The court should advise the jurors that they are not to discuss their questions among themselves, and they should submit their written questions to the bailiff. 4) The court should advise the jury that the court will decide whether or not to ask the question and if the court does decide the question is appropriate, the court itself will ask the question. 5) Each question will be reviewed by counsel and counsel should be given the opportunity to object to each proposed question, both on the record and outside of the jury's presence. 6) If the question is irrelevant or improper and prejudicial, the question shall not be asked. 7) After a jury question has been asked, counsel will be given time to further question the witness regarding the issues brought up by the question and

the court does not condone the practice due to the inherent risks.¹⁷⁴

2. California

In 1979, a California court dealt with the issue of allowing jurors to question witnesses. The practice was approved so long as the juror wrote out the question and submitted it for the court and counsel's consideration, prior to the court asking the question of the witness.¹⁷⁵

In a 1985 case, *People v. McAlister*,¹⁷⁶ the issue was revisited. *McAlister* involved a juror verbalizing a question to the witness, in the presence of other jurors.¹⁷⁷ The court found that the practice constituted error, but that such error was not prejudicial.¹⁷⁸ Interestingly enough, the court declared that when a trial court allows a juror to propose questions to witnesses, that juror is acting as a representative of the court,¹⁷⁹ and it is then the duty of the court to ensure that improper questions are not propounded.¹⁸⁰ Ultimately, the court articulated that the practice is inherently dangerous and is discouraged.¹⁸¹ In this case, however, the court was limited to determining whether prejudice resulted from the questioning that had occurred, and concluded that it had not.¹⁸²

3. Georgia

Georgia's original stance on juror questioning started with a demand that, "juror[s] should not be permitted to examine a witness under any circumstances."¹⁸³ However, over the years there has been a slow progression to a point where the practice is now allowed, so long as procedure is followed.¹⁸⁴ In *State v. Story*,¹⁸⁵ the defendant was convicted of child molestation.¹⁸⁶ During the proceedings, over defense counsel's objections, the trial judge allowed two jury members to ask questions of the victim.¹⁸⁷ On appeal, the Court of Appeals of Georgia stated that although questions of witnesses are not to be solicited among a jury, if a juror upon his own initiative formulates a question regarding the

answer. *Id.*

174. *Id.* at 597-98.

175. *People v. Gates*, 158 Cal. Rptr. 759, 762 (Cal. 1979).

176. 213 Cal. Rptr. 271 (Cal. Ct. App. 1985).

177. *Id.* at 275-76.

178. *Id.* at 276.

179. *Id.*

180. *Id.*

181. *Id.* at 277.

182. *Id.*

183. *Stinson v. State*, 260 S.E.2d 407 (Ga. Ct. App. 1979).

184. *Story v. State*, 278 S.E.2d 97, 98 (Ga. Ct. App. 1981).

185. 278 S.E.2d 97 (Ga. Ct. App. 1981).

186. *Id.* at 98.

187. *Id.*

testimony of a witness, he should inform the judge that there is a juror question, and procedures should then be implemented to facilitate the asking of the question.¹⁸⁸

Georgia differs from most states in its allowance of the procedure, because an admonition contained within the listed procedures requires that a question asked of the witness must relate to a juror's understanding of a material issue in the case.¹⁸⁹

4. Idaho

In 1992, the Supreme Court of Idaho decided *State v. Tolman*.¹⁹⁰ The defendant, after being convicted of various types of sexual misconduct, appealed alleging that the trial court should not have allowed jurors to ask questions of the witnesses.¹⁹¹ During the trial, a juror asked to question a witness and the judge informed him that he could do so by writing down his question and submitting it to the court.¹⁹² Only one question was submitted to which the state promptly objected, outside of the jury's presence.¹⁹³ The trial judge informed the jury that the question was not going to be answered.¹⁹⁴ However, the defendant argued on appeal that the question which was submitted to the judge but not asked of the witness was prejudicial to his defense, because the court did not inform the jury which party's counsel made the objection.¹⁹⁵ The court did not rule on whether the practice was proper or improper, and only determined that where a question is not even asked, the practice is not prejudicial.¹⁹⁶

5. Indiana

Indiana courts began discussing this issue in the late 1960's, beginning with *Carter v. State*.¹⁹⁷ At the time of *Carter*, Indiana had no case law that dealt with the practice of allowing or not allowing jurors to question witnesses.¹⁹⁸ The appellant in *Carter* argued that it was reversible error for the trial court, at the

188. *Id.*

189. *Id.*

190. 828 P.2d 1304 (Idaho 1992).

191. *Id.* at 1305, 1311.

192. *Id.* at 1306.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1311.

197. 234 N.E.2d 650 (Ind. 1968).

198. *Id.* at 651.

beginning of trial, to give an instruction prohibiting jurors from asking questions.¹⁹⁹ The court agreed with the appellant, finding that although Indiana had no case law on the matter, the majority of jurisdictions at that time permitted jurors to raise relevant questions, and therefore, an instruction prohibiting jurors from asking questions deprived them of their right to do so.²⁰⁰ The court ended the opinion with a proclamation that the practice is neither to be encouraged nor forbidden by trial courts.²⁰¹

In a 1992 opinion, *Stancombe v. State*,²⁰² the Indiana Court of Appeals refused to rule on whether or not the questioning was an abuse of discretion *per se*, and held that the Supreme Court of Indiana needed to outline a procedure if questioning was allowed.²⁰³ The Indiana legislature subsequently codified the procedure within Indiana Evidence Rule 614(d).²⁰⁴

In a subsequent case, *Lawson v. State*,²⁰⁵ the court recognized the uniqueness of the codification of the procedure²⁰⁶ and held that this issue was so important that the inclusion of this provision into Indiana's Rules of Evidence was intended and purposeful.²⁰⁷ The court viewed this inclusion into Indiana's Rules of Evidence as giving Indiana trial courts the discretion to allow jurors to question witnesses during trial.²⁰⁸

6. Kansas

In 1994, the Kansas Supreme Court addressed the issue as one of first impression in *State v. Hays*.²⁰⁹ In *Hays*, after a recess following the examination of two witnesses, the jury, as a group, submitted two questions for one of the witnesses.²¹⁰ The judge instructed the prosecutor to return the witness to the stand

199. *Id.*

200. *Id.* at 652. *But cf.* *State v. Graves*, 907 P.2d 963, 967 (Mont. 1995) (holding that jurors "have no inherent right to question witnesses").

201. *Graves*, 907 P.2d at 652.

202. 605 N.E.2d 251 (Ind. Ct. App. 1992).

203. *See id.* at 256.

204. Indiana Evidence Rule 614(d) provides:

(d) Interrogation by Juror. A juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.

IND. R. EVID. 614(d).

205. 664 N.E.2d 773 (Ind. 1996).

206. "Neither the federal nor uniform rules contain an equivalent of Indiana's Rule 614(d)." *Id.* at 780.

207. *Id.*

208. *Id.*

209. 883 P.2d 1093, 1098 (Kan. 1994).

210. *Id.* at 1097-98.

and to ask her the questions put forth by the jury.²¹¹

The defendant, on appeal, argued that allowing jurors to submit questions for witnesses is contrary to Kansas state law because: 1) judges are required to admonish the jury to abstain from communicating with anyone regarding the trial,²¹² and 2) questioning explicitly “permits a jury to request information during deliberations,” thus “implicitly prohibits a jury from requesting information before it begins deliberating.”²¹³

As a result of addressing the question for the first time in the 1990's, the Kansas Supreme Court reviewed the holdings and rationale of many other jurisdictions on the subject.²¹⁴ It ultimately elected to follow the majority of jurisdictions and allow the practice.²¹⁵

The court found that no prejudice arose from the court having the prosecutor ask the witness the jury's questions, but added that the trial judge should be the one to do so.²¹⁶ The court, however, was troubled by the submission of the questions by the jury as a whole, rather than by individual jurors.²¹⁷ The court found that the questions presented by the jury revealed that they had been discussing the case to such an extent as to bring about questions.²¹⁸ The court found that this discussion amounted to jury deliberation. However, they held that such deliberations failed to prejudice the defendant.²¹⁹

In its opinion, the court ultimately discouraged the practice, and articulated the many risks associated with the implementation of the practice. However, the court also outlined a procedure to be followed in the event a trial court, in its

211. *Id.* at 1098.

212. *Id.*; KAN. STAT. ANN. § 22-3420(2) (1999). Section 22-3420(2) provides:

If the jury is permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or allow themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them, and that such admonition shall apply to every subsequent separation of the jury.

KAN. STAT. ANN. § 22-3420(2).

213. *Hays*, 883 P.2d at 1098; KAN. STAT. ANN. § 22-3420(3). Section 22-3420 (3) provides: After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney. KAN. STAT. ANN. § 22-3420(3).

214. *Hays*, 883 P.2d at 1099-1100.

215. *Id.* at 1102.

216. *Id.* at 1101-02.

217. *Id.* at 1102.

218. *Id.*

219. *Id.*

discretion, deems the practice appropriate.²²⁰

7. Michigan

Michigan courts first examined the issue in the 1972 case of *People v. Heard*.²²¹ In *Heard*, the Supreme Court of Michigan held that under certain circumstances, a trial court, in its discretion, may allow jurors to question a witness.²²² The *Heard* court appeared to limit the lower court's discretion to those occasions where the questions presented would "help unravel otherwise confusing testimony."²²³

In 1982, the court revisited the issue in *People v. Stout*.²²⁴ In *Stout*, the defendant was tried and convicted of possession of marijuana and cocaine.²²⁵ During trial, the court allowed a juror to orally articulate a question to an expert witness, and the defense objected.²²⁶ On appeal, the defendant argued that the holding in *Heard* was narrow in scope and the court should allow only questions used to clarify a witness' testimony, not to gather additional information.²²⁷ The *Stout* court held that *Heard* was not intended to limit juror questions to situations that "unravel confusing testimony" but was intended to allow questioning by jurors, as long as the questions aided in the fact-finding process.²²⁸

8. Mississippi

Mississippi is the newest member of the very small minority of states that banned the practice of juror questioning. Over the years, Mississippi common law has entertained various interpretations of this issue. In 1980, in *Lucas v. State*,²²⁹ the Supreme Court of Mississippi first considered a case involving the propriety

220. *Id.* The court reasoned:

Trial courts that permit jurors to submit questions to witnesses should maintain strict control and should adhere to certain safeguards to minimize the risks associated with the practice. The trial court should not solicit questions and should only permit them for purposes of clarification. The testimony of a witness should not be interrupted by questions from jurors. Jurors should submit questions in writing and without any discussion with other jurors. Counsel should be afforded the opportunity to object outside the presence of the jury. The trial court must determine the relevancy of the questions. The trial court should instruct the jury not to draw any inference if a question submitted is not asked. The trial judge, rather than counsel or jurors, should question the witness. Finally, counsel should be given the right to further examine the witness following the jury's questions.

Id.

221. 200 N.W.2d 73 (Mich. 1972).

222. *Id.* at 76.

223. *Id.*

224. 323 N.W.2d 532 (Mich. Ct. App. 1982).

225. *Id.* at 534.

226. *Id.* at 535.

227. *Id.* at 536.

228. *Id.*

229. 381 So. 2d 140 (Miss. 1980).

of allowing juror questioning.²³⁰ In *Lucas*, the court held:

[t]his court does not approve the practice of a trial court inviting jurors to ask questions of witnesses. This privilege should only be granted when, in the sound discretion of the trial judge, it appears that it will aid a juror in understanding some material issue involved in the case and then, ordinarily, when some juror has indicated that he wishes such a point clarified.²³¹

In a 1988 case, *Myers v. State*,²³² the court went further on this issue than the *Lucas* court, and while not forbidding the practice of juror questioning, the *Lucas* court stated "this is a practice that should be discouraged."²³³ However, in a 1998 case, *Wharton v. State*,²³⁴ the Supreme Court of Mississippi overruled its previous holdings and conclusively stated that "juror interrogation is no longer to be left to the discretion of the trial court, but rather is a practice that is condemned and outright forbidden by this court."²³⁵ After enumerating the inherent problems,²³⁶ the court explained its change of heart in simple terms, "[o]ur prior warnings concerning juror questioning have apparently gone unheeded on occasion."²³⁷

9. Montana

Montana also addressed the issue as one of first impression in the 1990's in *State v. Graves*.²³⁸ In *Graves*, the defense objected to the trial court's standing

230. *Id.* at 144.

231. *Id.*

232. 522 So. 2d 760 (Miss. 1988).

233. *Id.* at 762.

234. 734 So. 2d 985, 990 (Miss. 1998)

235. *Id.* at 990 (emphasis added).

236. *Id.* The court reasoned:

The most obvious problem with allowing jurors to question witnesses is the unfamiliarity of jurors with the rules of evidence. ... Other potential problems include (1) Counsel may be forced to either make an objection to a question in front of the juror who asks the question, at the risk of offending the juror, or withhold the objection and permit prejudicial testimony to come in without objection; (2) juror objectivity and impartiality may be lessened or lost; (3) if a juror submits a question in open court, the other jurors are informed as to what the questioning juror is thinking, which may begin the deliberation process before the evidence is concluded and before final instructions from the court; (4) if the juror is permitted to question the witness directly, the interaction may create tension or antagonism in the juror; and (5) the procedure may disrupt courtroom decorum.

Id. (quoting *State v. Hays*, 883 P.2d 1093, 1099 (Kan. 1994)).

237. *Id.*

238. 907 P.2d 963 (Mont. 1995).

policy of allowing jurors to submit written questions of witnesses.²³⁹ During the trial, the jury asked thirteen questions of witnesses.²⁴⁰ Defendant Graves, upon conviction, appealed on the ground that allowing the jurors to ask questions caused them to become advocates, and thus he was denied his right to a fair trial by an impartial jury.²⁴¹

Because this was a case of first impression in Montana, the Montana Supreme Court looked to federal circuit court holdings for guidance.²⁴² After reviewing various holdings and Montana's Rules of Evidence,²⁴³ the court concluded that "juror questioning of witnesses is a matter within the sound discretion of the trial judge."²⁴⁴ However, the court held that jurors have no inherent right to question witnesses and that it is not an appropriate practice for all cases or all witnesses.²⁴⁵

Although the Montana Supreme Court found that the practice lies within a trial judge's discretion and neither encouraged nor discouraged its use, the court stated that it found the practice to be dangerous and outlined certain minimum safeguards for its implementation.²⁴⁶

10. Nebraska

Nebraska is another state that expressly forbids the practice of juror questioning. In a 1991 case of first impression, *State v. Zima*,²⁴⁷ the Supreme Court of Nebraska prohibited juror questioning of witnesses.²⁴⁸ In *Zima*, the defendant was charged and convicted of driving under the influence and failing to signal a turn.²⁴⁹ Upon the conclusion of the questioning of each witness, the trial judge invited jurors to ask questions of the witness.²⁵⁰ Based upon a series of

239. *Id.* at 963-64.

240. *Id.* at 964.

241. *Id.*

242. *Id.* at 964-66.

243. MONT. R. EVID. 611(a)(1). The justices appear to have partially based their allowance of the procedure on Montana Rule of Evidence 611(a)(1). *Graves*, 907 P.2d at 967. Note that Montana Rule of Evidence 611(a)(1) contains exactly the same wording as Federal Rule of Evidence 611(a)(1). See discussion *supra* note 27-30 and accompanying text.

244. *Graves*, 907 P.2d at 966-67.

245. *Id.*

246. *Id.* at 967. The court stated:

[W]e conclude that if a judge, in his or her discretion, decides to allow this practice, certain minimum safeguards must be implemented. These safeguards include: (1) the questions should be factual, not adversarial or argumentative, and should only be allowed to clarify information already presented; (2) the questions should be submitted to the court in writing; (3) counsel should be given the opportunity to object to the questions outside the presence of the jury; (4) the trial judge should read the questions to the witness; and (5) counsel should be allowed to ask follow-up questions.

Id.

247. 468 N.W.2d 377 (Neb. 1991).

248. *Id.* at 380.

249. *Id.* at 378.

250. *Id.*

direct oral questions and answers between a juror and an expert witness, the State moved for a mistrial, which the defendant resisted.²⁵¹ On appeal, the defendant argued that the colloquy between the juror and the witness “deprived him of a fair and impartial jury and trial.”²⁵²

In holding that they forbid juror questioning in Nebraska State Courts, the justices stated that they felt the techniques used to mitigate the risks, so often enumerated by other jurisdictions, do not deal with the issue of the effect of the questioning on the impartiality of the jury.²⁵³ The justices based their holding upon the fundamental premise that the judicial system “is an adversary one which depends upon counsel to put before a lay fact finder that which should be admitted in accordance with the rules of evidence and to keep from them that which should not be received in evidence.”²⁵⁴ The court argued that allowing jurors to participate in the adversarial system risks turning these neutral-fact finders into advocates and does not “suggest a fairer or more reliable truth-seeking procedure.”²⁵⁵

Interestingly, Justice Shanahan, in a concurring opinion, objected to a rule flatly prohibiting jurors from ever asking questions, based upon a reading of the Nebraska Rules of Evidence and the holdings of other jurisdictions.²⁵⁶ In his concurrence, Shanahan made an interesting point not seen in any other opinion, “[i]nherent in a categorical condemnation of the practice which allows a juror’s question to a witness is a skepticism concerning every trial judge’s capability to manage interrogation and a suspicion about a jury’s analytical and deductive capacities.”²⁵⁷

11. New Jersey

In another case of first impression in the 1990’s, *State v. Jumps*,²⁵⁸ the defendant appealed his conviction partially based upon one question that was submitted by the jury.²⁵⁹ Defendant argued that allowing this question, which admittedly caused a duplication of the witness’ previous testimony, was prejudicial

251. *Id.* at 378-79.

252. *Id.* at 378.

253. *Id.* at 379.

254. *Id.* at 380.

255. *Id.*

256. *State v. Zima*, 468 N.W.2d 377, 380-81 (Neb. 1991) (Shanahan, J. concurring). Justice Shanahan relied upon Nebraska Rules of Evidence 611(1) and 614(2), which are comparable to Federal Rules of Evidence 611(a) and 614(b), respectively. See *supra* notes 27-34 and accompanying text.

257. *Id.* at 382.

258. 619 A.2d 602 (N.J. Super. Ct. App. Div. 1993).

259. *Id.* at 609.

to him because it allowed the jury to hear the same information twice.²⁶⁰

After looking to decisions of other jurisdictions, the Superior Court of New Jersey, Appellate Division, ultimately agreed with the majority of jurisdictions that allow juror questioning and held that the practice is within the discretion of the trial court.²⁶¹ As with most other jurisdictions, the court in *Jumpp* did not endorse the practice, instead they enumerated the many inherent dangers and recommended a procedure for implementation.²⁶² However, unlike any other jurisdiction, the court in *Jumpp* directed the lower courts not to implement the practice until the New Jersey Supreme Court had ruled on the issue and, if appropriate, established guidelines and procedures for its implementation.²⁶³

12. Nevada

Nevada courts condone the practice of allowing jurors to question witnesses. Specifically, the Supreme Court of Nevada sanctioned the procedure in a 1998 case of first impression, *Flores v. State*.²⁶⁴ In *Flores*, the defendant was found guilty of robbery with a deadly weapon and attempted murder with a deadly weapon.²⁶⁵ He appealed, contending that allowing jurors to submit written questions for the witnesses violated his right to a fair trial by impartial jury pursuant to the Constitution and Nevada law.²⁶⁶

The Supreme Court of Nevada held that in light of the inherent dangers, and

260. *Id.* The testimony on direct examination included:

THE COURT: The question is, "When he [defendant] stated his name to you did he give you a reason why he was turning himself in?" Did he just say, "I come to turn myself in?" what happened?

THE WITNESS: He just stated, "I am turning myself in." At that point—

THE COURT: That's all. Is that all he said?

THE WITNESS: That's all.

THE COURT: Other than giving you his name and address?

THE WITNESS: Yes.

Id. The question propounded by the jury and the witness' answer:

Q. How was it that you first saw [defendant]?

A. He had come in the front door of headquarters, I had come out of the communications section and asked him if I could help him at which point he stated, "I came to turn myself in," and I asked him what his name was. He stated Rupert Jumpp. At that time I placed him in custody and brought him to the detention area in the rear of headquarters.

Id.

261. *Id.* at 610.

262. *Id.* at 610-11.

263. *Id.* at 613.

264. 965 P.2d 901 (Nev. 1998).

265. *Id.* at 901.

266. *Id.* at 902. The Nevada law, which defendant refers to is NRS 175.401(3), states in pertinent part: At each adjournment of the court, whether the jurors are permitted to separate or depart for home overnight, or are kept in charge of officers, they must be admonished by the judge or another officer of the court that it is their duty not to...form or express any opinion on any subject connected with the trial until the cause is finally submitted to them.

Nev. Rev. Stat. § 175.401(3) (1997).

where the practice is firmly-rooted in “common law and American Jurisprudence”, the practice should be implemented in Nevada because it “can significantly enhance the truth-seeking function of the trial process.”²⁶⁷

Instead of enumerating the inherent risks in the practice, the court in *Flores* listed the potential benefits of the practice, including: “(1) increased juror attentiveness; (2) the potential for jurors to more completely comprehend the evidence; (3) the opportunity for trial attorneys to better understand the juror thought processes and their perception of the case weaknesses; and (4) greater juror satisfaction regarding their role at trial.”²⁶⁸ The *Flores* court also recommended that the usually mentioned safeguards²⁶⁹ be implemented to protect against the risk of prejudice.²⁷⁰

13. Oklahoma

In 1942, in one of the earliest cases on the issue, the Oklahoma Court of Criminal Appeals considered the propriety of juror questioning in *Krause v. State*.²⁷¹ In *Krause*, the court held that it was proper for jurors to ask occasional questions in order to clarify a statement of a witness, and that the exercise of the procedure is ultimately left to the discretion of the trial court.²⁷²

Forty-five years later in *Cohee v. State*,²⁷³ the same court reiterated its 1942 position. In *Cohee*, the defendant was convicted of unlawful delivery of a controlled substance.²⁷⁴ Defendant’s appeal was based upon the propriety of allowing jurors to take notes during trial.²⁷⁵ However, in ruling on that issue, the court likened it to juror questioning and proceeded to reaffirm the *Krause* holding by outlining procedures, similarly implemented elsewhere, to be used if juror

267. *Flores*, 965 P.2d at 902.

268. *Id.*

269. These safeguards include:

(1) initial jury instructions explaining that questions must be factual in nature and designed to clarify information already presented; (2) the requirement that jurors submit their questions in writing; (3) determinations regarding the admissibility of the questions must be conducted outside the presence of the jury; (4) counsel must have the opportunity to object to each question outside the presence of the jury; (5) an admonition that only questions permissible under the rules of evidence will be asked; (6) counsel is permitted to ask follow-up questions; and (7) an admonition that jurors must not place undue weight on the responses to their questions.

Id. at 902-03.

270. *Id.*

271. 132 P.2d 179 (Okla. Crim. App. 1942).

272. *Id.* at 182.

273. 942 P.2d 211 (Okla. Crim. App. 1997).

274. *Id.* at 211.

275. *Id.* at 212.

questioning is allowed in a trial.²⁷⁶ Consequently, in Oklahoma, the practice continues to remain firmly within the discretion of the trial court.²⁷⁷

14. Tennessee

In a 1982 decision, *State v. Jeffries*,²⁷⁸ the defendant was convicted of selling a controlled substance.²⁷⁹ During the trial the trial court “allowed extensive questioning covering forty-two pages of the transcript . . . directed to the defense witnesses”²⁸⁰ to be orally propounded by the jurors.²⁸¹ The Tennessee Court of Criminal Appeals found that the jury had assumed the role of advocate and this was therefore prejudicial to the defendant.²⁸² The court further held that the trial court abused its discretion by permitting this extensive examination of witnesses by the jury and reversed Jeffries’ conviction.²⁸³

15. Texas

In 1991, the Texas Court of Appeals heard *Allen v. State*²⁸⁴ as a matter of first impression. In *Allen*, where the defendant was charged with possession of controlled substances, the court informed the jury that they could submit written questions to the court for the witnesses following the completion of examination.²⁸⁵ Defendant Allen objected to the practice in its entirety and raised the issue on appeal.²⁸⁶ The court looked to other jurisdictions for guidance and held that the trial court was properly within its discretion to allow jurors to present questions to the witnesses.²⁸⁷ Allen then applied for discretionary review to the Court of Criminal Appeals of Texas.²⁸⁸

Between Allen’s appellate hearing and his request for review, the Court of Criminal Appeals had ruled on another case addressing the same issue, *Morrison v. State*.²⁸⁹ In *Morrison*, the court held that “[a]llowing juror questioning of witnesses in the criminal setting, is . . . impermissible, and any excursion into this

276. *Id.* at 214-15.

277. *Id.* at 214.

278. 644 S.W.2d 432 (Tenn. Crim. App. 1982).

279. *Id.* at 433.

280. *Id.* at 434.

281. *Id.*

282. *Id.* at 435.

283. *Id.* at 435. A great deal of the finding that the court had abused its discretion related to the fact that the trial transcript contained 42 pages of questioning by the jury mainly directed to the defense witnesses. *Id.* at 434-35.

284. 807 S.W.2d 639 (Tex. Crim. App. 1991).

285. *Id.* at 639.

286. *Id.* at 642.

287. *Id.*

288. *Allen v. State*, 845 S.W.2d 907 (Tex. Crim. App. 1993).

289. 845 S.W.2d 882 (Tex. Crim. App. 1992).

area is error not subject to a harm analysis.”²⁹⁰ The rationale behind this holding was that “a change in our [trial] system involving intrusion of one component into the function of another may only be established through the limited rule making authority of this court, subject to disapproval by the legislature or by the legislature in accordance with due process.”²⁹¹ Accordingly, the court reversed Allen’s conviction²⁹² and thereby effectively banned jurors from questioning witnesses in state criminal courts in Texas.²⁹³

16. Virginia

In another case of first impression, *Williams v. Commonwealth*,²⁹⁴ a Virginia trial court received one question in writing from a juror, proceeded to read the question aloud, and without allowing the witness to answer, allowed the prosecution to further pursue the subject.²⁹⁵ The defendant appealed, and the Virginia Court of Appeals held that the practice of allowing jurors to ask questions of witnesses is within the trial court’s discretion, and will only be reviewed if there is prejudice or a problem with the procedure adopted by that court.²⁹⁶ Furthermore, even after citing the problems inherent in the practice, the *Williams* court chose not to discourage the practice, provided that the lower courts implemented procedural protections.²⁹⁷

In summary, all of the federal circuits and a majority of the states that have addressed the issue of whether the court should permit jurors to question witnesses have allowed the practice to continue under the guise of judicial discretion, provided that procedural protections were followed.²⁹⁸ Only three states have been bold enough to place an outright ban on the practice: Texas, Mississippi and Nebraska.²⁹⁹ One state, Indiana, saw fit to codify the practice and incorporate it into its rules of evidence.³⁰⁰ Another state, New Jersey, still awaits a state Supreme Court ruling before its lower courts can espouse the practice.³⁰¹ There is still, however, a question that needs to be addressed by those states that allow the

290. *Allen*, 845 S.W.2d at 907.

291. *Morrison*, 845 S.W.2d at 889.

292. *Allen*, 845 S.W.2d at 907.

293. *Id.*

294. 484 S.E.2d 153 (Va. Ct. App. 1997).

295. *Id.* at 153-154.

296. *Id.* at 155.

297. *Id.*

298. See discussion *supra* Part IV.

299. See *supra* notes 230, 248 & 285 and accompanying text.

300. See *supra* note 198 and accompanying text.

301. See *supra* note 259 and accompanying text.

practice: Do the benefits, such as making the juror feel more positive about his experience and being more involved in trial, really outweigh the inherent dangers of prejudice, premature deliberation, and loss of neutral fact-finding?

V. CRITICAL ANALYSIS OF FEDERAL AND STATE CASE LAW

The current trend of appellate courts to quietly sidestep the issue of juror questioning by promulgating the use of trial court discretion, and by adding the caveat that the practice should only be used in very rare instances because of its inherent dangers, needs to be remedied. Courts and legislatures should realistically examine the inherent dangers and realize that the benefits of the practice are substantially outweighed by the loss of neutrality among the fact-finders and the resulting prejudice to the criminal defendant.

One court listed the benefits derived from jurors questioning witnesses as “(1) increased juror attentiveness; (2) the potential for jurors to more completely comprehend the evidence; (3) the opportunity for trial attorneys to better understand the jurors’ thought processes and their perception of the case weaknesses; and (4) greater juror satisfaction regarding their role at trial.”³⁰² However, these “possible” benefits are swamped by the frequently stated and subsequently ignored inherent dangers.³⁰³ The fact remains that courts weighing these benefits are pandering to juries who lack an attention span exceeding six minutes.³⁰⁴

Despite our changing times, our judicial system still ultimately depends upon the existence of highly trained attorneys representing each side, with a neutral fact-finder in the middle.³⁰⁵ The attorney’s role has always been to elicit relevant, pertinent information to persuade the neutral fact-finder.³⁰⁶ The neutral fact-finder is supposed to remain uninvolved in the unfolding of the case and to independently evaluate the information that has been presented to them, not what they have discovered on their own.³⁰⁷ Perhaps this argument is best articulated by the Nebraska Supreme Court, which stated that the judicial system “is an adversary one which depends upon counsel to put before lay fact finders that which should be admitted in accordance with the rules of evidence and to keep from them that which should not be received in evidence.”³⁰⁸

The purported benefits of allowing attorneys to better understand the jurors’ thought processes and their perception of the weaknesses in the case is inapposite

302. *Flores v. State*, 965 P.2d 901, 902 (Nev. 1998).

303. *See supra* Part II.

304. *See* Linda S. Crawford, *A Clear Look at Jury Confusion*, 14 No. 12 MED. MALPRACTICE L. & STRATEGY 4 (1997).

305. *Wolff, supra* note 6, at 828.

306. *Id.*

307. *Id.*

308. *State v. Zima*, 468 N.W.2d 377, 380 (Neb. 1991).

to our adversarial system. Additionally, these benefits could be viewed, as a corollary, to a violation of Federal Rule of Evidence 606.³⁰⁹ The Advisory Committee Notes to this rule state that the “central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and *any other feature of the process.*”³¹⁰ If juror questioning leads to premature deliberations as so many authorities suggest,³¹¹ then the questions jurors ask in the courtroom during these “premature deliberations” should fall under Rule 606; and either the attorneys or the court should be viewed as violating Rule 606 when he or she derives any information from these internal processes.

Because the inherent dangers so greatly outweigh the benefits and possibly violate existing rules, a blanket ban should be placed upon the practice of jurors questioning witnesses. However, making such a change would involve a serious departure from precedent and judicial custom, and many courts and legislatures would be unwilling to invoke such severe action. Therefore, at bare minimum, there should be a movement to enact a new rule of Federal Evidence or Criminal Procedure.

Many jurisdictions addressing the issue of juror questioning of witnesses have already promulgated procedure to define when a trial judge may determine that juror questioning is required.³¹² With very few exceptions,³¹³ there are no statutory rules that outline the procedure. The two relevant Federal Rules of Evidence, 611 and 614,³¹⁴ do not sufficiently address the issue. In order to fill the void, prevent future error, and circumvent the inherent problems within the meshing of judicial discretion and prejudice to the criminal defendant, Federal Rule of Evidence 611

309. Fed. R. Evid. 606(b). Rule 606(b) states:

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id.

310. FED. R. EVID. 606(b) advisory committee's notes (emphasis added).

311. *United States v. Douglas*, 81 F.3d 324, 326 (2d Cir. 1996); *United States v. Feinberg*, 89 F.3d 333, 336 (7th Cir. 1996); *United States v. Groene*, 998 F.2d 604, 606 (8th Cir. 1993).

312. *See* discussion generally *supra* Part IV.

313. *See supra* note 205.

314. *See supra* notes 27 - 31.

or 614 should be amended, or a new Rule of Evidence or Criminal Procedure should be enacted, to include the oft-mentioned procedural protections necessary in juror questioning of witnesses.

VI. PROPOSAL

The new rule should contain the following parts in some way, shape, or form:

- 1.) Trial courts should not routinely encourage juror questioning in criminal trials, and its use should be strictly limited.
- 2.) If a trial is determined, through pre-determined means (e.g., a list of predetermined criteria or list of appropriate types of cases, i.e., antitrust, conspiracy) to be sufficiently complex as to warrant the use of juror questioning, the jurors should be given preliminary instructions, prior to the start of the trial, advising them that this procedure will be allowed and explaining to them the procedure to be used.
- 3.) The jurors should be informed that upon the conclusion of the examination of each witness both parties will ask them if they have any questions for that witness. The jury should be advised that *only* questions that are relevant, allowable within the Federal Rules of Evidence, and aimed at clarifying information about which witnesses have previously testified will be entertained. If the jurors do have question(s), they are to raise their hand(s) to inform the court, and then they are to write down the question, without disclosing or discussing the question/issue to any other juror, and give it to the bailiff, who will give it to the court. Jurors under *no* instances are to verbalize a question in open court. If a juror verbalizes a question in open court, that juror should be dismissed.
- 4.) After receiving a question from a juror, the judge should call a recess, remove the jury from the jury box, and then, out of the presence of the jury and on the record, read the question(s), allow counsel to read the question(s), and entertain any objections of counsel.
- 5.) If the judge determines that the question is inappropriate, the jury as a whole should be informed that the question may not be asked, and the judge should explain the reason—violates Federal Rules of Evidence, not relevant, not at issue in this case, etc.—and inform the jury that they are not to draw any inference from the fact that the question(s) may not be asked.
- 6.) If the judge rules that the question(s) may be asked, the jury should be returned to the jury box, and the judge should ask the question(s) to the witness after rephrasing the question(s) in correct legal format, conforming with the Federal Rules of Evidence or Criminal Procedure.
- 7.) After the witness has answered the question(s), the court should permit counsel for both parties, if so desired, to redirect or re-cross-examine the witness

on *only* the facts or issues brought out by the juror-inspired question.³¹⁵

VII. CONCLUSION

“The blindfold on Justice is not a gag.”³¹⁶

While a bright-line rule banning juror questioning is ultimately preferred, a jury in exceptional times may have a pertinent, relevant question that needs to be answered before they can reach a fair and well-reasoned verdict. However, juror questioning of witnesses is neither a right nor a traditional role of the jury. Therefore, because its dangers significantly outweigh the “possible” benefits, it should not be allowed. In those phenomenal instances where it cannot be avoided, it should then be subject to review as *error apparent of record*.³¹⁷

The proposed Rule of Evidence or Criminal Procedure is a good remedy for this problem because it will lessen the prejudicial effect of juror questioning on a criminal defendant. Additionally, a sweeping adoption of the proposed rule will lessen the controversy over the use of the practice, eliminate needless use of juror questioning, bring validity to the practice, and protect the integrity of our legal system.

Some measure needs to be taken to prevent future instances of juror questioning from interfering with the rights of criminal defendants. Even though most uses of juror questioning are found to be harmless error, they are nonetheless still error, and error should be remedied.

LAURIE FORBES NEFF³¹⁸

315. The above recommended prophylactic measures were inspired by the procedures enumerated in several cases and those codified in Indiana’s Rule of Evidence 614(d). *See generally* *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993); *State v. LeMaster*, 669 P.2d 592 (Ariz. Ct. App. 1983); *State v. Hays*, 883 P.2d 1093 (Kan. 1994); *State v. Graves*, 907 P.2d 963 (Mont. 1995); *Flores v. State*, 965 P.2d 901 (Nev. 1998); IND. R. EVID. 614(d).

316. *State v. Zima*, 468 N.W.2d 377, 382 (Neb. 1991) (Shanahan, J., concurring).

317. BLACK’S LAW DICTIONARY 543 (6th ed. 1990). Error apparent of record is defined as “[p]lain, fundamental error that goes to the foundation of the action irrespective of the evidence; an obvious misapprehension of the applicable law.” *Id.* (citing *Parks v. Parks*, 98 F.2d 235, 236 (D.C. Cir. 1938)).

318. J.D., Pepperdine University School of Law, 2001.

