

FLORIDA Let Jurors Ask Questions

The medical malpractice trial involved a claim that an oncologist had delayed diagnosing the cancer in the plaintiff's arm. As a result, his arm had to be amputated at the shoulder. After the plaintiff testified, the jurors asked only one question: "Is the plaintiff right or left-handed?" Lawyers seeking millions of dollars in damages forgot to ask.¹



edge or competence, or those which the lawyers agree are better answered by a following witness. The judge then poses the permissible questions to the witness, and counsel may follow up as appropriate. The written questions, asked or rejected, are made part of the court record. The court will typically remind jurors that if a question is not asked, that simply means it falls outside the rules of permissible evidence or that it will be addressed later. The entire process is on the record.¹⁰

Studies report that judges have observed a clear improvement in the level of juror engagement and attention.¹¹ In my experience, jurors who know they have an opportunity to ask questions are transformed from passive captive bystanders into active critical thinkers who are engaged with the evidence as it is presented. Rarely do jurors raise issues that demand clearly inadmissible responses, and when such questions are submitted, the court can take control by simply rejecting the question or by redirecting the focus of the jury. There are few juror-lawyer-wannabees, and the process put in place under our rules allows the court to curtail unnecessary and irrelevant questions.¹² The speculative fears of loss of juror neutrality, distortion of the juror's role into advocacy, loss of witness control, and delay in trial proceedings¹³ have simply not been born out in studies¹⁴ or in the experience of Florida trial judges.

The benefits we have experienced have significantly outweighed the anticipated detriments, which have not materialized. However, our deeply engrained preference for the status quo limits use of juror questions in criminal cases. In criminal cases in Florida, jury questioning remains optional and is almost never used. A survey by Professor Mitchell Frank of

THIS CAUTIONARY TALE ILLUSTRATES the benefit of jury questions, which have been permitted in Florida's civil jury trials since 2008. Given the state's rule, a juror was able to submit this very question to the judge, who then asked the witness on the stand.

A question such as this one tells us that the juror was listening to the evidence and actively engaged in critical thinking. It tells us that if the question had not been asked, the juror would have been wondering and possibly distracted during the balance of the trial. It clarifies the damage testimony. It allows the question to be answered by the witness with direct knowledge of the subject. And it ensures that the juror had not simply missed the answer during the testimony. These are the benefits of juror questioning, evidenced in thousands of civil trials without incident.

Based on a decade of experience, Florida judges and lawyers have settled into jury questioning as a routine civil practice.² Florida's experience mirrors one documented across the country: Those who use jury questioning endorse the process enthusiastically. From Arizona³, Colorado,⁴ the U.S. Court of Appeals for the Seventh Circuit,⁵ state and federal judges in Iowa, and the U.S. Court of Appeals for the Eighth Circuit,⁶ empirical evidence supports the conclusion that jury questioning improves jury trials.⁷ Florida's simple procedure

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— which requires the court to allow jury questions⁸ — is representative of those in use across the country.⁹

Under our statute, the jury is advised that they will be *permitted* to ask questions but reminded that they are not *required* to ask questions. And there is opportunity for juror questions after each witness: Once the examination of a witness by the parties is completed, the judge asks whether the jury has questions of the witness. The juror must write the question on a piece of notepaper, without signing a name and without showing their question to anyone else. The judge reviews the questions in a sidebar with counsel, handling objections outside the presence of the jury, and eliminates questions that fall afoul of the evidence rules, those outside the witness' knowl-

judges, prosecutors, and public defenders in the 9th Circuit of Florida, the trial court serving the Orlando metropolitan area, found an abiding refusal to consider the practice in criminal cases despite it never being tested, and, by contrast, complete acceptance of juror questioning in civil cases.¹⁵ Frank’s survey reflects the national consensus: that those who use jury questioning find it beneficial to the jury and to justice. Those who oppose it rely on imagined disaster rather than experience or empirical evidence. Recently, U.S. District Court Judge Marina Garcia Marmolejo analyzed a five-week criminal trial in which she utilized jury questioning and followed up with surveys and interviews with the jury. Judge Garcia Marmolejo found that the same benefits identified in civil cases applied to her criminal case.¹⁶

There are systemic benefits as well: Marmolejo’s findings document jurors’ increased comprehension of the evidence, greater juror attentiveness and participation, greater satisfaction with the process, and more confidence in the result; all of this benefits juror trust and confidence in the system, and by extension, public trust and confidence.¹⁷ Juror questions are an important and easily deployed tool to give juries the ability to do their job: deliver on the truth.



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¹ For background on this case, see *Rodriguez v. Livingstone*, 2016-032781-CA-01, 2018 Fla. Cir. LEXIS 11351, at *1 (Fla. Cir. Ct. June 14, 2018).

² Fla. R. Civ. P. 1.452; Fla. R.Crim. P. 3.371; Fla. Std. Jury Inst. (Civ) 202.4, Fla. Std. Jury Inst. (Crim.) 2.1(c).

³ See generally ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994); ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 – PART 2 (1998).

⁴ See generally COLORADO SUPREME COURT COMMITTEE ON THE EFFECTIVE AND EFFICIENT USE OF JURIES, WITH RESPECT TO THE JURY: A PROPOSAL FOR JURY REFORM (1997), https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Jury_System_Standing_Committee/juryref_1.pdf.

⁵ See generally SEVENTH CIR. BAR ASS’N AM. JURY PROJECT COMM’N, SEVENTH CIRCUIT AMERICAN JURY PROJECT: FINAL REPORT (2008), https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report.pdf.

⁶ See generally Thomas D. Waterman et al., *A Fresh Look at Jurors Questioning Witnesses: A Review of Eight Circuit and Iowa Appellate Precedents and an Empirical Analysis of Federal and State Trial Judges and Trial Lawyers*, 64 DRAKE L. REV. 485 (2016).

⁷ See generally GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007). The State-of-the-States Survey of Jury Improvement Efforts also included a local court survey that documented practices employed by state courts in jury operations and a statewide survey that documented state-level policies governing jury system management and jury trial procedure. See Mitchell J. Frank, *The Jury Wants to Take the Podium — But Even with the Authority to Do So, Can It: An Interdisciplinary Examination of Jurors’ Questioning of Witnesses at Trial*, 38 AM. J. TRIAL ADVOC. 1, app. 1 (2014) (summarizing jury questioning across jurisdictions as of 2015).

⁸ See Fla. R. Civ. P. 1.452; Fla. R.Crim. P. 3.371; Fla. Std. Jury Inst. (Civ) 202.4, Fla. Std. Jury Inst. (Crim.) 2.1(c).

⁹ See Frank, *supra* note 7, at 6 (“Save only a small minority of jurisdictions, juror questioning is today authorized by case law, Rules of Procedure (civil and criminal), Jury Instructions, Rules of Evidence or Rules of Court, throughout the United States, in both federal and state courts, either on a mandatory or discretionary bases [sic] in both civil and criminal cases.”).

¹⁰ Fla. R. Civ. P. 1.452; Fla. R.Crim. P. 3.371; Fla. Std. Jury Inst. (Civ) 202.4, Fla. Std. Jury Inst. (Crim.) 2.1(c).

¹¹ Marina Garcia Marmolejo, *Jack of All Trades, Masters of None: Giving Jurors the Tools They Need to Reach the Right Verdict*, 28 GEO. MASON L. REV. 149, 177 (2020).

¹² What the court cannot do however, is discharge an active questioner. There are virtually no appellate cases reversing trial courts in connection with juror questions. The two most prominent involve a judge who discharged a sitting juror because he did not like the questions. See *Hinton v. United States*, 979 A.2d 663 (D.C. 2009); *Washington v. State*, 955 So.2d 1165 (Fla. Dist. Ct. App. 2007) (showing a rare instance when Florida’s criminal court allowed questions).

¹³ Judge Garcia Marmolejo’s study showed that the jury question process, including sidebars, took 1 hour 41 minutes out of a trial lasting 152 hours 23 minutes. Marmolejo, *supra* note 11, at 173.

¹⁴ See, e.g., *id.*

¹⁵ Frank, *supra* note 7, at 26–27.

¹⁶ Marmolejo, *supra* note 11, at 173.

¹⁷ *Id.* at 164.