

## The Basics of Jury Questionnaires

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Questionnaires save time and promote honesty. The plain fact is that people will say things on paper that they would never say in front of thirty other people under questioning from a judge or an attorney.

### The Value of Questionnaires

I remember a specific questionnaire on a personal-injury suit involving a Latin-American male plaintiff. A questionnaire to the venire asked, "Would you have any problem in awarding damages to an Hispanic?" Surprisingly, one answer we got was, "Yes, they would spend it all on drugs."<sup>1</sup> Now, admittedly that's an extreme example, but because of fear or social pressure to conform, people will tend to give "acceptable" answers in an open court room that they may not have given on a privately-completed questionnaire. There is a large body of research on juror reluctance to frankly confess fixed opinions on sensitive subjects in voir dire, even to the point of perjury.<sup>2</sup>

Answering voir dire questions in an open courtroom in front of thirty or so other people is surprisingly intimidating. I've done it myself, as a potential juror, and I was nervous and found

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<sup>1</sup>See, Robert B. Sykes & Francis J. Carney, *Attorney Voir Dire and Jury Questionnaire: Time for a Change*, UTAH BAR.J., Aug. 1997, at 13, 16–17.

<sup>2</sup>See, Jan Mills Speth, Ph.D., *Speaking With Crossed Fingers- Juror Honesty and Voir Dire*, UTAH TRIAL JOURNAL, Spring 2001, at 23 (discussing research findings that a significant percentage of jurors lie under oath in the voir dire process, and noting that studies invariably find people are willing to be more candid and to reveal more personal information on self-administered written questionnaires than in verbal person-to-person interviews or open-court voir dire). This paper can be downloaded at [www.adjuryresearch.com](http://www.adjuryresearch.com)

myself speaking less than "naturally." And this is someone who has been in courtrooms hundreds of times. How then could we expect someone from outside the profession to react?

Questionnaires can also save the court and the lawyers much on the preliminary questions that the judge usually asks, such as age, education, employment, marital status, and so forth. By eliminating the need for repetitive questioning of each juror on this background information, questionnaires can dramatically shorten the time spent on relatively-unimportant voir dire.

### **Why Are Questionnaires Not Always Used?**

For these reasons, I ask for a questionnaire on nearly every trial, but I don't always get them. Why? Some trial judges are reluctant to use questionnaires. The reasons are several. First, lawyers who have submitted lengthy, elaborate forms that were overly intrusive and time-consuming.

Second, many judges still think questionnaires are unnecessary, especially those who cling to the misconception that jurors will fully and freely answer questions in open court.

Third, some judges are reluctant to give up "control" over what may be their antique method of jury questioning, and fear that counsel will somehow run away with the process by attempting to persuade or shape the jury panel in voir dire.

Fourth, some judges feel that answering a questionnaire may provide a greater opportunity to craft responses that will make it more likely that a panelist will be stricken for cause, even if the response is a contrived one.

Finally, the mechanics of using questionnaires can be troublesome. They may require the jury panel to be brought in to the courthouse in advance of the trial, or they may delay the jury selection process if the questionnaire is given the morning of trial. If the panel is brought into the

courthouse on a day separate from the day of trial, extra juror fees must be paid, and cost nowadays is an issue for the system. Additionally, the panelists are inconvenienced by one more trip to court.

None of these considerations should outweigh the benefits of using questionnaires. Counsel can assuage the trial judge's concerns by using a carefully-constructed and brief questionnaire that is short enough to be filled out quickly the morning of trial, if necessary. This is not ideal— it's much better to have the jury fill out the questionnaire in advance and give counsel a weekend to review it— but it can be done, and I have done it. It only added another half hour to the jury selection process and gave us some valuable information. So you may want to suggest that the judge have the panel report an hour earlier than usual.

### **Mechanics of Questionnaires**

I find questionnaires to nearly always be valuable and I recommend you attempt to get a questionnaire in every case. Keep in mind, though, that you must cover this with the judge at a time early enough to make a difference.

Some judges will give a brief questionnaire to the jury panel to fill out in the jury room the morning of trial. In that event, be very sure that you have nothing more than a one-page questionnaire, as you won't have the time to review it carefully if it is any longer.

Other judges will allow extensive questionnaires to be mailed<sup>3</sup> to the potential jurors, and returned a few days before the trial.<sup>4</sup> Then there are those who will have the jury panel arrive in

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<sup>3</sup>One local trial judge allows questionnaires in the form of on-line surveys.

<sup>4</sup>Although one always has to wonder if filling out the questionnaire at home becomes a “group project.”

court a day or two before the trial, have them fill out the jury questionnaires while they are there and then dismiss them. Obviously, you need to find out how your judge wants to handle the questionnaire.

*Don't leave this until the final pretrial conference*, at least if the final pretrial conference is not scheduled until the week before trial. If the questionnaire is to be mailed to the jury panel, the jury clerk needs several weeks' advance warning. Be sure to ask the clerk or the judge about questionnaires when the scheduling conference is held to set up the final pretrial conference.

There will still be some judges who will not allow questionnaires under any circumstances, despite prodding from their superior courts. Thankfully, these are getting fewer. As to those judges, I wouldn't even bother with a motion for a questionnaire. Others readily permit them. Perhaps the majority is somewhere in between, and as to those, an intelligent motion and memorandum well in advance of the trial on the reason to allow a jury questionnaire is needed.

### **Closed, Open, and Range Questions**

It's helpful to include both open and closed-ended questions in your questionnaire. Those who are less verbal will tend to respond to the closed-ended questions more readily, yet you want those who want to speak to have the opportunity to do so. "Range" questions allow a more subtle approach to the closed-ended question. Here are examples:

•**Closed question:** "Do you have any strong feelings one way or the other about awarding money damages for the death of another? Yes \_\_\_ No \_\_\_\_\_."

•**Open question:** "How do you feel about awarding money damages for the death of another?"

•**Range question:** "I would have problems in awarding money damages for the death of another." (1-Strongly Agree. 2- Agree. 3- Neutral 4- Disagree. 5- Strongly Disagree.)

These three basic types of questions are beneficial in getting people to signal their own "sensitive" areas in a non-judgmental way that will allow follow-up on oral questioning.

Writing the perfect questionnaire is an evolving struggle for trial lawyers. When questionnaires were first being used, we tended to be over-inclusive and annoyingly detailed. More recent experience has taught that the key questions can often be asked in a simple one or two page questionnaire, for later follow-up in oral voir dire.

### **Cases For Your Memorandum Asking for a Questionnaire**

Our appellate courts have repeatedly recommended questionnaires as a good thing for trial courts to use:

•*Miller v. UDOT*, \_\_\_\_\_ P.3d \_\_\_\_\_ 2012 UT 54, ¶38:

“We pause to note that “jury questionnaires provide a reasonable method for ... assisting counsel in ferreting out people with fixed opinions . . . a matter of discretion, we encourage the use of written questionnaires where appropriate; they often elicit useful information at little cost in time and resources to the court. *See* Robert B. Sykes & Francis J. Carney, *Attorney Voir Dire and Jury Questionnaire: Time for a Change*, UTAH BAR J., Aug. 1997, at 13, 16–17; *see also* Thomas J. Hurney, Jr. & Randal H. Sellers, *Picking Juries: Questionnaires and Beyond*, 75 DEF. COUNS. J. 370, 375–77 (2008) (discussing use of questionnaires in civil cases).”

•*State v. Allgier*, 258 P.3d 589, ¶20, 2011 UT 47:

“Finally, “jury questionnaires” provide a reasonable method for “identify[ing] the extent of exposure prospective jurors may have had to news coverage about this case and assist[ing] counsel in ferreting out people with fixed opinions.” (citation omitted).

•*Alcazar v. University of Utah Hosps.*, 188 P.3d 490, 2008 UT App 222, at n. 1:

“We note that a trial court could elect to use a questionnaire to efficiently pose such questions to the jury panel, and judicial involvement would only be needed for any suggested follow-up questions. This form of questioning may help eliminate the potential

for lengthy voir dire.”

•*Claypoole v. Winward Elect.*, 2010 UT App 77, 2010 WL 1394047:

“We agree with Plaintiff that there is much to recommend using a jury questionnaire in appropriate cases. As has been noted, questionnaires may be useful in obtaining a great deal of information about prospective jurors, including sources of possible bias, with only a small investment of the trial court's time.” (citation omitted.)

And I strongly recommend that you also cite the Spaeth article on juror honesty discussed above.

### **Final Tips**

Attach your proposed questionnaire<sup>5</sup> to the memorandum and make it clear that the questionnaire will be a simple matter for the panelists to answer, the "routine" questions can also be answered on the questionnaire,<sup>6</sup> thereby saving time, that useful information may well be learned, and that it will not delay the process of jury selection if the panel can be assembled a little early on the first day of trial.<sup>7</sup>

If the judge refuses to use a questionnaire, there's little you can do about it, as this is something that is entirely discretionary with the trial court and may not be appropriate in every case. It's unlikely you will ever get a reversal for a trial judge's refusal to allow you to use a questionnaire: “[w]hile it may be advisable for a trial court to use a jury questionnaire in certain situations, the trial court has "considerable latitude as to the manner and form of conducting the voir dire examination." *State v. Malmrose*, 649 P.2d 56, 60 (Utah 1982).

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<sup>5</sup>Ideally, this will be a stipulated questionnaire that both side can agree on.

<sup>6</sup>Although by asking the “soft” questions this way, you may lose some of the opportunity to get the panel a bit more relaxed before following up with the harder stuff in court.

<sup>7</sup>And tell the judge that you will provide all the necessary copies at your own expense.

"We cannot say the court abused its discretion in the instant case. Indeed, as the questions asked in voir dire were substantially similar to those requested in the proposed jury questionnaire, even were we to assume the trial court erred in failing to use the proposed jury questionnaire, Mead has demonstrated no harm."

*State v. Mead*, 27 P.3d 1115, 2001 UT 58. *See also, Miller v UDOT, supra* (use of questionnaires still a matter of trial court discretion).

Patient education of the trial bench on the usefulness of questionnaires, with a measure of restraint on the part of lawyers in submitting short questionnaires well in advance of trial, will be the key to convincing a new generation of jurists of the benefits of this tool.

FJC  
October 2012