

Drafting and using jury questionnaires effectively

A guide to writing your questionnaire, getting it admitted and using it effectively

By Sonia Chopra

Whether you use a jury questionnaire in every case or have never even thought about submitting one, a carefully crafted questionnaire serves to make the information gathering process during jury selection more systematic and thorough. This article's in-depth look at jury questionnaires includes why you might want to use one, what to ask and how to ask it, how to get the judge to allow you to have one, and the optimal ways to utilize the information you get from a questionnaire during oral voir dire.

Why should you use a jury questionnaire? Because public speaking is scary for almost everyone. And some of what we have to ask jurors is personal and potentially embarrassing for them to reveal. Jurors are more likely to reveal their true beliefs and disclose more information in a questionnaire as opposed to in open court, where they may censor their responses because of social desirability effects, pressure from the judge to "be fair" and a desire to keep out of the spotlight. Another benefit is that you get the same information from everyone.

You've probably noticed that in jury selection you get a lot of information from the first 12 or 18, but after that, questioning fatigue sets in and you tend to ask less and less. While different people disclose at different levels, even in writing, a questionnaire ensures that at least the concepts you are most interested in are in front of everyone.

A questionnaire also gives you early information about who is going to be a potential cause challenge from one or both sides. Depending on your relationship with opposing counsel you may be able to create a list of stipulated cause/hardship challenges without having to waste time questioning these potential jurors. Jurors' answers to the questionnaire are under penalty of perjury. If they express bias in the questionnaire, you can cite their responses to support your challenge for cause, even if they are "rehabilitated" in court.

Certainly, a good questionnaire is one that gives you valuable information about who is likely to be favorable or problematic for your case, but be sure to make it user friendly for both the jurors who are filling it out and for you to evaluate in court.

The way you lay out the questionnaire makes a difference. It's best to start with easy questions like demographics and work experience, because these are things people are used to disclosing on forms and are easy to answer and are unthreatening. Group similar topics together so the juror doesn't have to mentally jump around. More importantly, it makes it easier for you to evaluate the questionnaires come crunch time.

Along the same lines, ask the questions in an order that makes sense. Start with the easy questions, which are demographics, and experiences, before moving into attitudes and biases. It's a good idea to put questions about lawsuits and damages towards the end, because usually their views on liability and damages *in the case at hand* are what you will care most about, so you want the jurors to know as much as possible about the case and the issues before they answer these questions. End up with "concluding questions" which are those asking about the jurors' ability to serve.

Be sure to leave enough space for jurors to answer the questions. When you ask a question and ask "please explain" but don't allow any space for explanations it makes people less likely to expand on their answers and is irritating to those trying to complete the form. In a recent case a juror wrote, "You've Got to Be Kidding Me" next to a tiny box that said "please explain." In this particular questionnaire the juror didn't even have enough space to write her juror number or name. This may seem minor but it frustrates jurors who already don't want to be there and ultimately reduces the information you get. Also, if you ask something but do not allow enough space for the juror to explain, you are going to have to spend more time getting the information from them in oral voir dire.

You can, of course, go too far in the other direction and make poor use of space, with margins too big and spaces between questions. This is problematic because it makes the questionnaire appear longer. Longer questionnaires are less likely to get approved, and more likely to seem cumbersome to jurors.

There is also such a thing as too much information. In 99 percent of the cases, you are not going to have more than overnight to go over the questionnaires. In the end, you will almost always be focusing on 5 to 6 questions to make your decision about how to rate the juror. While the person's favorite book or magazine might be interesting, is it really what you need to know to decide whether or not to keep them?

Another point that may seem obvious but which experience suggests still bears repeating is that you should carefully proofread the questionnaire before it is finalized. Look for consistency in wording,

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and in response options. Make sure you aren't asking the same question more than once. This, as well as the inconsistency in formatting, often happens when you are merging questionnaires with the defense. Look out for typos. There are always jurors who point them out. It is unprofessional and sends the wrong message. If we can't take the time to make sure the questionnaire is accurate, why should the juror take care in filling it out? Have someone who doesn't know the case and isn't a lawyer read the questionnaire to see if the questions make sense and are understandable to the layperson. Don't ask questions that sound like interrogatories; ask things in plain, simple English.

The following examples, from a case where the plaintiff was injured while riding a motorcycle, serve to illustrate the content and order of topics.

Demographics

Demographic topics include the basics like age, gender, address, education, employment status, marital status, information about children and so on. You can also ask about roommates, parents, work history, management or supervisory experiences, workplace duties, small business ownership and the juror's (or family member's) experiences with case-relevant occupations.

Case-specific experiences

In this particular example, the experiences we are looking at are accidents, motorcycle use, and injuries consistent with what the client had. In an employment case you would be looking to see who had been terminated, discriminated against, harassed or retaliated against or accused of the same; in a product case you'd want to know who had used this product or something similar.

Have you or anyone close to you ever owned or driven a motorcycle?
❑ Yes ❑ No If Yes, please explain:

Have you or anyone close to you ever been in or witnessed any type of accident involving a motorcycle?
❑ Yes ❑ No If Yes, please explain:

Have you or anyone close to you ever had what you would consider a "near miss" or "close call" with regard to an accident involving a motorcycle?
❑ Yes ❑ No If Yes, please explain.

Have you or anyone close to you ever had any experiences with any of the following injuries or medical conditions? ❑ Neck injury ❑ Spinal injury ❑ Hip replacement ❑ Erectile dysfunction
If Yes, please explain.

Case-specific attitudes

After you get the experience, you ask about negative case-specific attitudes. In a motorcycle case you would try to find out who doesn't like motorcycles or the people who ride them. In an employment case this is where you would ask if the juror thinks people who claim discrimination are making excuses for their own poor performance, that there are too many regulations on what employers can and can't do, and so on. For a products case this is where you ask if the government says something is safe, it means that it is, or if they believe warnings do little good because nobody reads them.

Do you or anyone close to you have negative feelings about motorcycles or the people who choose to ride them?
❑ Yes ❑ No If Yes, please explain.

Do you believe that people who drive motorcycles are less cautious or greater risk takers than people who do not? ❑ Yes ❑ No If Yes, please explain.

Do you believe that people who choose to drive motorcycles assume the risk for their own injuries if they are in an accident? ❑ Yes ❑ No If Yes, please explain.

Case-specific areas of potential bias

While some attorneys express concerns about "introducing" biases by asking certain questions, my strong belief is that if you have something you are worried about, just put it right on the questionnaire and ask people if that's going to impact their ability to be a juror in the case. This could be the plaintiff's pre-existing medical conditions, race/ethnicity/immigration issues, lack of a seatbelt, using a cell phone while driving, or whatever it is that may evoke strong reactions. Jurors harbor negative attitudes about issues in our cases and you need to find that out. Merely asking questions in a questionnaire is not going to all of a sudden change someone's lifetime of experiences or opinions. Better to find out before jury selection, as opposed to when the verdict is returned.

The plaintiff Mr. Hernandez had a pre-existing back condition. He is seeking compensation in part for the extent to which his back condition was worsened by this collision. Do you have any concerns or hesitations about awarding money damages for this type of injury? ❑ Yes ❑ No If Yes, please explain.

Some of the witnesses, including the plaintiff, will testify in Spanish through an interpreter. Some people believe that if you are going to bring a lawsuit in the U.S. you should be able to speak English. Do you agree? ❑ Yes ❑ No If Yes, please explain.

Would you tend to give more weight or credibility to testimony that is in English compared to testimony that comes through an interpreter?
❑ Yes ❑ No If Yes, please explain.

Litigation experiences

This section is pretty self-explanatory. You want to know what experiences the juror has had with the legal system: Have they ever sued or been sued, served as a juror, been a witness or given a deposition.

Damages

Negative attitudes about civil litigation and skepticism of plaintiffs should follow the questions on experiences. Questions about damages flow nicely right after. This is often the largest section in my questionnaires, because attitudes about damages tell you a lot about the person's general orientation being

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plaintiff or defense, and this is usually where you are going to find the basis for some cause challenges.

If you or a loved one were seriously injured because of the fault of someone else, would you consider bringing a lawsuit? ❑ Yes ❑ No If No, please explain.

Do you believe that most people who file lawsuits exaggerate their injuries in court? ❑ Yes ❑ No If Yes, please explain.

What do you think about people who file personal injury lawsuits?

Do you support caps or limits on the amounts of money juries can award in civil cases? ❑ Yes ❑ No If Yes, please explain.

How do you feel about awarding money damages to compensate them for physical pain and suffering and emotional distress?

Hardship and cause

Wrap it up with questions about the juror's ability to serve, beliefs about their impartiality, relationships with the defendant company if applicable, and the witness list.

Question formation

Besides figuring out what to ask, you need to think about how to best ask it. A primary goal of your questions should be to gather as much information as you can so you don't have to solicit it in oral voir dire. To do that most effectively you need to ask for details. Is it enough to ask if someone has ever been involved in an auto accident? No, you need to know what happened, who was at fault, whether or not there were injuries, if there was litigation, etc. Get the details in the questionnaire and you don't have to waste time getting it in voir dire. However, don't ask too much in one sentence; you'll lose information. Instead, break a question into subheadings to make sure that each aspect of the questions is answered. For example:

Version A

Have you or anyone close to you ever been in a motor vehicle accident while driving on the job? ❑ Yes ❑ No If Yes, please explain, including what happened, any injuries suffered, who or what was at fault and whether or not there was a lawsuit or claim filed.

Version B

Have you or anyone close to you ever been in a motor vehicle accident while driving on the job? ❑ Yes ❑ No
If Yes, please explain.

Were there any injuries suffered?

Who or what was at fault?

Was there a lawsuit or claim filed? ❑ Yes ❑ No Please explain.

Jurors read the questions quickly and don't pay close attention to long questions with many subparts. As a result, you are going to get more information from Version B because it asks for specific information and the question is broken down into sections.

Part of the challenge in developing good questions is to ask them in a manner that reveals your problem jurors while at the same time protecting those who are favorable. One tactic is to use what we at NJP call the 90 to 10 percent rule. When you start formulating questions, ask yourself, how would most people answer this question? If you ask a question that 50 percent of people answer one way and 50 percent answer the other way, it is not a distinguishing question that will be of value in deciding who to challenge and who to keep. What you want to do is come up with questions that will result in a 90 to 10 percent (or 80/20) split of responses – but importantly, asked in a direction where the minority 10 to 20 percent response is the one that is *unhelpful* to your case. Otherwise you may end up highlighting people the other side will want to challenge. For example:

Version A

Do you believe that some people who file lawsuits exaggerate their injuries in court? ❑ Yes ❑ No If Yes, please explain.

WRONG GROUP: With the "some" wording, even pro-plaintiff jurors could say yes. The minority who don't believe that even some people do this are probably the most pro-plaintiff.

Version B

Do you believe that most people who file lawsuits exaggerate their injuries in court? ❑ Yes ❑ No If Yes, please explain:

RIGHT GROUP: Changing "some" to "most" makes the response more extreme, which changes the response pattern so that the minority who says "yes" are more likely to be pro-defense.

Getting judicial approval

Now, I know some of you are thinking, "my judge will never let me have a questionnaire, so what's the point?" There *are* things you can do that increase your chances of the judge using a questionnaire.

First, if you and the defense can agree about using a questionnaire, and even better, agree on a final version, then take it to the bench for a blessing.

Second, make the questionnaire short and to the point. Ask questions that are relevant to the case, look for bias, and assist in the intelligent exercise of peremptory challenges. You almost never need a questionnaire that is longer than five pages.

Third, you want to present the idea to the judge in a way that makes it clear you will not be putting any extra burden on the court staff. Tell the judge that you will handle all the logistics, you will bring copies and pens, and be responsible for taking the completed questionnaires to be copied and return the originals back to the court. Let the Court know there will not be wasted court time, because counsel can argue motions or deal with other pretrial motions while the jurors are filling out the forms, and oral voir dire can begin the next day.

You can also submit a declaration in support of using a questionnaire in which you a) explain the benefits of using a questionnaire and b) specify why a questionnaire is warranted in this particular

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case. When pleading your case for having a questionnaire, focus on the benefits to the jurors such as increased privacy, and less embarrassment in answering questions in public. Stress that oral voir dire will be more efficient because counsel will not have to spend as much time getting information from jurors, it will be focused on following up on questionnaire responses. (Note, if you make this promise, and then you break it by asking things that are already in the questionnaire making voir dire take longer than the judge is used to, you will ruin it for the rest of us and the judge is unlikely to agree to a questionnaire again in the future!) You can also suggest that there is a greater potential for stipulations to remove jurors without questioning, which also makes the process more efficient.

In explaining why a questionnaire is a good idea in your case, if there are aspects of your case that are sensitive in nature, list them. For example, race/ethnicity, immigration, sexual orientation, drugs or alcohol, mental health issues, sexual behavior, medical conditions, etc.

Cite the Code of Civil Procedure § 222.5 which was updated January 1, 2012 to read:

> A court shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel. If a questionnaire is utilized, the parties should be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences. To help facilitate the jury selection process, the judge in civil trials should provide the parties with both the alphabetical list and the list of prospective jurors in the order in which they will be called.

The code now states that questionnaires SHALL NOT (was previously "should not") be arbitrarily refused, and it also says you should be given reasonable time to evaluate responses, and get the random list so you can look at them in order and know who is coming up.

Additionally, judges love precedent. If you know of other cases in your jurisdiction where questionnaires have been used, list them in your declaration. For California, NJP's book *Jurywork: Systematic Techniques*[1] has an annually updated appendix which lists venues where questionnaires have been used by county. You can access it on Westlaw.

Social Science evidence

There is shockingly little research on the benefits of questionnaires compared to oral voir dire. There are, however, a few studies you can include in a declaration. The two I think are most persuasive were done by or with judges, as opposed to academics. The Seventh Circuit American Jury Project was a study done with judges, attorneys and jurors on their perceptions of jury questionnaires.[2]

Judges who used a questionnaire reported that they found it to be helpful in informing the court about who should remain eligible to be seated and in deciding what follow-up questions should be asked to potential jurors. They also said it reduced the time needed for asking such follow-up questions. A majority of judges and attorneys believed that using a questionnaire had increased the efficiency of the trial process and improved their own satisfaction with the trial process.

Nearly half of the attorneys responded that use of the jury selection questionnaire had also decreased the amount of time spent to select the jury. Perhaps even more persuasively, 77 percent of jurors said they would prefer to answer questions on a written questionnaire as opposed to answering all questions out loud. The most commonly cited reasons were "privacy," "saves time and speeds up the process," and "I don't feel comfortable speaking in public."

In another series of studies, Federal Judge Gregory Mize conducted an experiment in his courtroom where he would privately question in chambers all of the jurors who did not respond to any of the questions in open court. In the first article published, he reports on findings from criminal trials where potential jurors revealed relevant information that led to the removal for cause of at least one of the "silent" jurors in 90 percent of the cases in which he enacted this procedure.[3] Judge Mize continued this procedure in civil cases and found that there was one significant piece of information disclosed for every two trials he presided over.[4] Examples of information revealed in chambers but not in open court include a juror who had been treated by the same doctors who were defendants in a malpractice case, a juror who said they could not be fair because the plaintiff's attorney had represented them in a personal injury case previously, a juror who reported overhearing other potential jurors talk about frivolous lawsuits and personal responsibility (which resulted in the panel being quashed), a potential juror who reported being an alcoholic who had already been drinking that day, and venire persons who could not read or speak English. The most common excuses jurors gave for not answering questions in group voir dire were shyness, embarrassment, and a belief that their answers weren't very important.

Last, there are studies in the field of survey research that you can cite which shows that people are less candid and give more socially desirable responses to questions when they are asked face to face as opposed to when the questions are asked in self-administered questionnaires.[5]

Using the information

Once you have all of this valuable information about your jurors, what is the best way to use it? If you have the time, I think the very best practice is to create a one-page summary sheet for each juror that provides a thumbnail sketch at the top, which includes your thoughts about how they are going to view the case, a section where you list questions that may lead to cause challenges, and a section where you list the questions you need to

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follow up on to better evaluate the juror. Include your initial rating at the top so you know at a glance what your goal is going to be with this juror before you start talking to them.

In court, don't ask questions that get at the same information you already have. This frustrates both the jurors and the judge. It makes it appear that you haven't bothered to read their responses and that you are wasting everyone's valuable time. Focus your follow-up on the areas of bias that you are most concerned about. The goal in oral voir dire should be to finalize your assessment of the juror to determine if it is someone you want to try and challenge for cause or use a peremptory on, someone you like and want to protect, or someone you need to continue to question to make a determination.

When trying to establish a challenge for cause with a juror who indicated bias on the questionnaire, it is a good idea to read them their response and then confirm it was their honest and truthful answer. This makes it more difficult for them to be "rehabilitated" by opposing counsel or the judge. When arguing cause to the judge, cite the research that suggests written, private answers are more truthful than what a juror says under social pressure in open court. You should also always request that the questionnaires be made part of the record. Last, when making your final decisions about who to strike, don't forget the questionnaire responses. Sometimes we can be seduced by a juror's personality or appearance in court and forget the content of their answers. Unless it is a question of misunderstanding the law or concepts being asked about, most of the time the juror's initial response is the true one.

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Endnotes

[1] Krauss & Chopra, eds. (2014).
[2] Seventh Circuit American Jury Project *Final Report* (Sept. 2008) Available at: http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf
[3] Hon. Gregory Mize, *On Better Jury Selection: Spotting UFO Jurors Before they Enter the Jury Room*, Court Review 10 (Spring 1999).
[4] Hon. Gregory Mize, *Be Cautious of the Quiet Ones,* 10 Voir Dire 1 (Summer 2003)
[5] See, e.g., L. Chang & J. Krosnick, *Comparing Oral Interviewing with Self-Administered Computerized Questionnaires,* 74 (1) Public Opinion Quarterly (Spring 2010) 154-167

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