Permitting Jurors to Ask Questions During Trials

Is it a solution to the problem of curious jurors conducting electronic and social-media research?

By Jeannine Turgeon
A few years ago the Pennsylvania Civil Jury Instructions were updated to address the problem of jurors using the internet and social media to conduct research. The new instructions specifically advised jurors not to access these sources and explained why. Despite the adoption of similar approaches in many jurisdictions, jurors undoubtedly continue to conduct internet and social-media research in violation of specific court instructions.

Recently a trial consultant and clinical psychologist considered the problem from the perspective of individual jurors and the pressures they experience. Roy Futterman, in a Bloomberg Law article last year, observed that “jurors know that they do not know enough” to decide a case and yet “want to do their best to make serious, life-changing decisions.” Jurors “[are] understandably using the internet to assist them in becoming knowledgeable enough to do so.” Thus, “judges’ warnings are only making this internet usage surreptitious rather than stopping it.”
One practice that could address jurors’ burning curiosity for more information is simply to permit them to ask questions during court proceedings. I previously proposed this innovation as one of many that Pennsylvania should adopt in a 2009 law journal article I co-authored with Elizabeth A. Francis. While it does not appear that this innovation has been widely adopted in Pennsylvania, it remains even more relevant today with the increasing problem of jurors conducting electronic research.

The Pennsylvania Supreme Court, in the 1920 case *Boggs v. Jewell Tea Co.*, suggested in dicta that allowing jurors to ask questions is permissible, stating that “[i]n a jury trial the judge has an undoubted right to interrogate witnesses; even jurors may ask questions.” Therefore, the issue technically is not “settled” since this holding technically was “dicta.” There have been no subsequent Supreme Court cases decided differently on this issue.

Civil trial jurors are specifically instructed not to use the internet and social media to conduct research. Jurors are in fact “using the internet to assist them in becoming knowledgeable enough” to “make serious, life-changing decisions.”

The Civil Jury Instructions Subcommittee of the state Supreme Court’s Committee for Proposed Standard Jury Instructions has acknowledged the lack of clarity in the law regarding juror questions, stating that “[There] is no rule of civil procedure or appellate court case law authorizing a judge to permit questions from jurors in a civil case. However, if counsel agree among themselves to allow questions from jurors, the judge may experiment with the concept. The final decision on whether to permit questions from jurors and, if permitted, the procedures adopted to control such questions, should remain to the sound discretion of the trial judge. The committee makes no recommendation on whether jurors should be permitted to question witnesses.”

Outside of Pennsylvania it has been recognized that juror questioning “is [a] practice that is developing in both federal and state court jurisprudence” and that a majority of federal and state courts “permit
juror questioning as a matter of trial court discretion,” while “[i]n contrast, a few courts have held that juror questioning of witnesses amounts to error or an abuse of discretion.”

Most courts that allow juror questioning of witnesses suggest specific procedures a trial court should use in such circumstances. Typical of such procedures is the following from the Kansas Supreme Court: “Trial courts which 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

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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.” State v. Hays, 883 P.2d at 1102.

The subcommittee note in our civil jury instructions suggests the following language for judges to use when allowing juror questions:

1. When attorneys have finished their examination of a witness, you may submit a written question or questions if you have not understood something. I will review each question with the attorneys. You may not receive an answer to your question because I may decide that the question is not proper under the rules of evidence. Even if the question is proper, you may not get an immediate answer to your question. For instance, a later witness or an exhibit you will see later in the trial may answer your question.

2. Most of the testimony will be given in response to questions by the attorneys. Sometimes I may ask questions of a witness. When the attorneys have finished their questioning of a witness and I have finished mine, I will ask you whether you have any questions for that witness. If you do, direct each of your questions to me, and if I decide that it meets the legal rules, I will ask it of the witness. After all your questions for 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.

3. The court will permit jurors to submit written questions during the course of the trial. Such questions must be submitted to the court, but, depending upon the court’s ruling on the
questions, the court may not submit them to the witness. The court will endeavor to permit such questions at the conclusion of a witness’s testimony.

As I noted in a previous article on jury innovation, and worth reiterating here: “This is a sound procedure in our estimation and it is our recommendation that we allow jurors to ask questions at the end of each witness’s testimony. This will encourage and permit them to be ‘active listeners.’ Questions, if any, should be written and passed to the court for review by the lawyers. The court then may ask the witness any questions the attorneys have approved. It requires no new statute or rule of court. It is another innovative idea we should all embrace.”

Under the Boggs dicta and the research in favor of juror questioning, this practice should be utilized to help jurors obtain answers to their questions from the court rather than from their social-media research. There is also evidence that allowing jurors to submit questions makes jurors more engaged in the trial, improves juror comprehension, which results in more accurate and principled verdicts, and provides jurors greater satisfaction from their jury experience.

But there is an acknowledged lack of clarity in the law regarding authorization for juror questioning.

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