

REPORT OF THE
CONFERENCE OF CIVIL PRESIDING JUDGES
ON ITS
EVALUATION OF JUROR QUESTION-ASKING
PROCEDURES

January 2006

The N.J. Supreme Court authorized juror questions in civil trials, as may be determined by the judge prior to the commencement of *voir dire*, approving a recommendation for such action from the Civil Practice Committee following completion of a pilot program conducted by its Jury Subcommittee. The Court-approved revision of R. 1:8-8(c), effective September 3, 2002, as follows:

(c) Juror Questions. Prior to the commencement of the *voir dire* of prospective jurors in a civil action, the court shall determine whether to allow jurors to propose questions to be asked of the witnesses. The court shall make its determination after the parties have been given an opportunity to address the issue, but they need not consent. If the court determines to permit jurors to submit proposed questions, it shall explain to the jury in its opening remarks that subject to the rules of evidence and the court's discretion, questions by the jurors will be allowed for the purpose of clarifying the testimony of a witness. The jurors' questions shall be submitted to the court in writing at the conclusion of the testimony of each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination to respond to the jurors' questions and the witness's answers.

In response to procedural questions raised by trial judges in the first year after authorization of juror questions, the Conference of Civil Presiding Judges initiated this evaluation, with the assistance of Michael Garrahan, chief of the AOC's Jury Management Unit. Survey instruments were developed for use by the Conference and provided to trial judges and attorneys to complete for trials taking place during September 2003 through February 2004 and involving juror questions for witnesses. Those survey instruments focused on three specific issues identified by judges and about which there were differing opinions on what would constitute the most appropriate procedures. These issues are listed below:

1. Where one party's witness testifies by videotape or deposition, should juror questions be asked of the other party's witness(es)?

2. If a witness remains available after completing his or her testimony, including responding to any juror questions, should that witness be subject to recall in order to respond to later juror questions?
3. Should the jurors be identified by seat number on questions that they submit for witnesses?

In addition to those issues, the surveys additionally sought background information (such as the number of questions asked by jurors) and information about how trial judges conducted the review of juror questions with counsel. The surveys also asked judges and attorneys their opinions on whether authorizing jurors to submit questions significantly affected the following areas:

- jurors' attentiveness
- jurors' understanding of testimony
- jurors' satisfaction with the process
- the fairness of the trial

Another question sought judges' and attorneys' reactions to jurors being permitted to submit questions in the particular trial in which they were involved. Those participating were also asked to provide additional comment on questions so that they had a full opportunity to provide their input. Over the six-month period in which the surveys were conducted, 232 completed surveys were submitted by 65 trial judges and 479 completed surveys were submitted by attorneys – 219 by plaintiffs' counsel and 260 by defense counsel. With regard to trial type, a combined 72% of the survey cases involved automobile negligence (45%), non-auto personal injury (18%), or medical malpractice (9%).

Number of Survey Responses from Judges and Attorneys	
Judges	232
Defense Attorneys	260
Plaintiff Attorneys	219

Note: The 232 judge responses were from 65 individual judges. There were 479 responses from attorneys -- 54% from defense attorneys. The number of individual attorneys was not counted. Attorneys may have been involved in more than one trial and there were multiple attorneys in some trials.

This evaluation first addresses the responses to the three primary questions identified above, including possible next steps for the Conference based on those

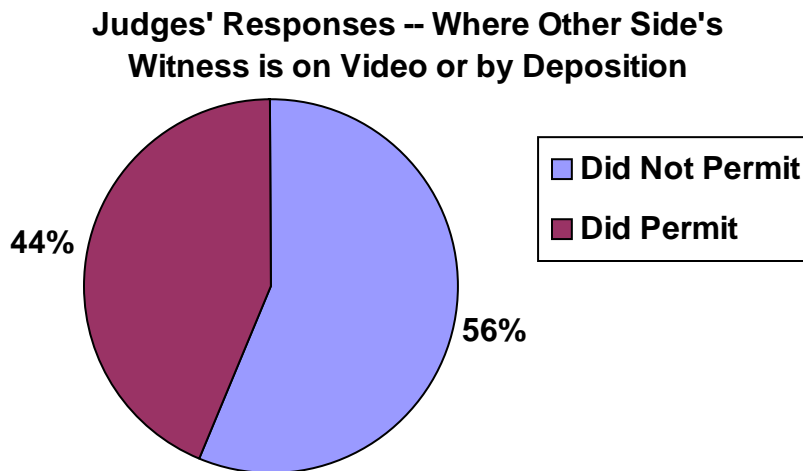
results, and also reviews the responses of judges and attorneys to the other areas covered by the survey.

1. When A Witness Testifies On Videotape Or By Deposition

Question 9 on the Trial Judge Questionnaire sought a Yes / No response to whether any witness had testified on videotape or by deposition, and if answered “Yes” asked for the number of such witnesses, and then asked the following:

9a. If any witness testified by way of videotape or by deposition, and was therefore unavailable to respond to jurors’ questions, did you permit questions to be asked of the other party’s (parties’) expert witness(es)?

Where a witness testified by videotape or deposition, 56% of the responding judges did not permit juror questions to be asked of the other party’s corresponding witness. Questions were permitted by 44% of the judges who responded to that question.



Responses from participating judges disclosed that a witness testified by videotape or deposition in 34% of the cases that involved juror questions. Judges’ responses also noted that there was only one such witness in 61% of those cases and two witnesses in another 28%. Therefore, in only 11% of these trials were there more than two witnesses testifying in this way.

A question on the Attorney Questionnaire asked the attorneys if the trial judge allowed the questions in the trial in which they participated. The question did not ask the attorneys' opinions of whether questions should have been permitted. Its inclusion was as a back-up to the question asked of judges and it's unnecessary to report on the responses since there were sufficient judges' responses and no related issues that require additional review.

Written comments from judges show support both for allowing juror questions to the other party's witnesses and for not allowing such questions – reinforcing the 56% to 44% response in favor of not allowing questions.

The primary reason expressed for not allowing questions of one party's witness when the other party's witness did not testify in person was the need to ensure an equal playing field. A compromise position was taken by a judge who indicated that the lawyers had consented before trial to have both expert witnesses respond to juror questions by way of the speakerphone since one was unavailable to testify in person. The apparent intent was to treat each witness in the same way with respect to his or her responses to juror questions.

A number of attorneys provided responses to the general question, and their comments were similar to these of the judges.

Possible Next Steps – Re: Videotaped or Deposition Witness

Since the judges' responses were only 56% to 44% in favor of not permitting juror questions where the other side's witness testified by videotape or deposition, it is recommended that no action be taken at this time. Rather, trial judges should continue to make these determinations on a case-by-case basis. The court rule allows the trial judge to determine whether to authorize juror questions at trial, so allowing the trial judge to exercise his or her discretion with regard to this trial situation is consistent. This situation was reported to have occurred in 34% of the trials for which judges submitted completed surveys, so it is a significant issue that will be monitored and perhaps revisited at a later time.

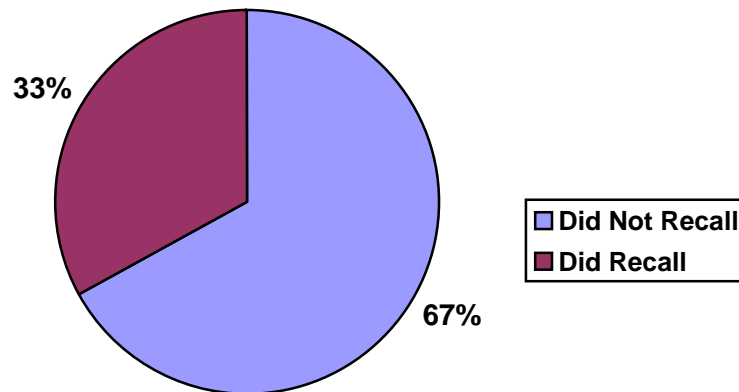
2. Should a Witness be Recalled to Respond to Juror Questions?

Question 10 on the Trial Judge Questionnaire asked judges the following:

10. If witnesses remained available in court after completing their testimony, did you allow them to be recalled, if requested, in order to respond to later juror questions?

In those surveys on which judges responded Yes or No to whether a witness was requested to be recalled, 67% stated that they did not recall the witness in order to respond to a later juror question. Judges stated that they did recall a witness in 33% of those instances. Judges' responses indicated that this issue was encountered in 25% of the trials in the evaluation. Therefore, when this situation occurred, judges decided not to recall those witnesses in two-thirds (67%) of those trials.

**Did Judges Recall Witnesses for Later
Juror Questions?**



Attorneys were asked to provide their opinion about this issue in Question 5 on the Attorney Questionnaire, as follows:

5. If a witness remains available in court after completing his or her testimony (including responding to any juror questions) and being dismissed, do you believe that such a witness should be subject to recall in order to respond to later juror questions?

Overall, 72% of the responding attorneys answered “No” – that witnesses should not be subject to recall in order to respond to later questions from jurors. Another 25% stated that witnesses should be subject to recall and 3% did not respond to that question. Within that overall response from attorneys, the percentage of “No” responses was 67% among attorneys representing plaintiffs and 77% among attorneys representing defendants. The 25% overall “Yes” response included 30% among plaintiffs’ attorneys and 20% among defense counsel.

Possible Next Steps – Re: Whether to Recall Witnesses

By a significant majority, responding judges and attorneys favored not recalling witnesses (who were otherwise available) in order to respond to juror questions that were submitted after the witness was excused. Those majorities were 67% of judges and 72% of attorneys, including 67% from plaintiffs counsel and 77% from defense counsel. In light of that level of response, the Conference has recommended a proposed revision to R. 1:8-8(c) to the Civil Practice Committee. The proposed revision would add the following language to the end of the current rule section:

Once a witness is excused by the court after completion of his or her testimony, including responding to any questions from jurors and follow-up questions from counsel, the witness shall not be recalled to respond to juror questions that are proposed at a later time unless all counsel and the court agree.

Judges’ responses revealed that this circumstance occurred in 25% of the 232 trials involved in this study, which indicates that addressing this issue will assist a large number of judges, attorneys, litigants, and witnesses. Any change to the rules would also need to be reflected in the instructions to jurors.

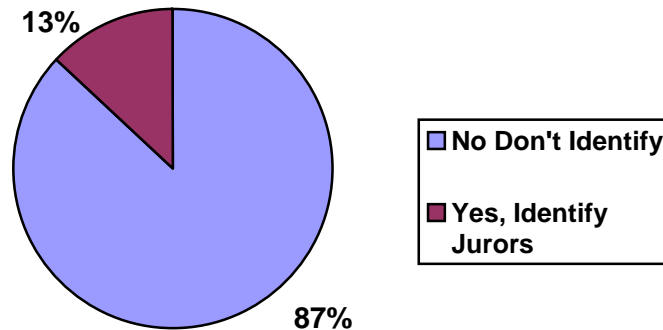
3. Should each juror be required to identify himself or herself on the written questions that they propose to ask of witnesses?

Question 11 on the Trial Judge Questionnaire asked judges the following:

11. Did you require each juror to place his or her juror number (seat position) on each question that they submitted for a witness?

Of the 226 responses to this question, 87% of the judges responded that they did not require jurors to write their juror number (seat position) on their questions. The remaining 13% stated that they did require jurors to include their seat number on any written questions.

**Judges' Responses to Whether Jurors
Should be Identified on their Questions?**

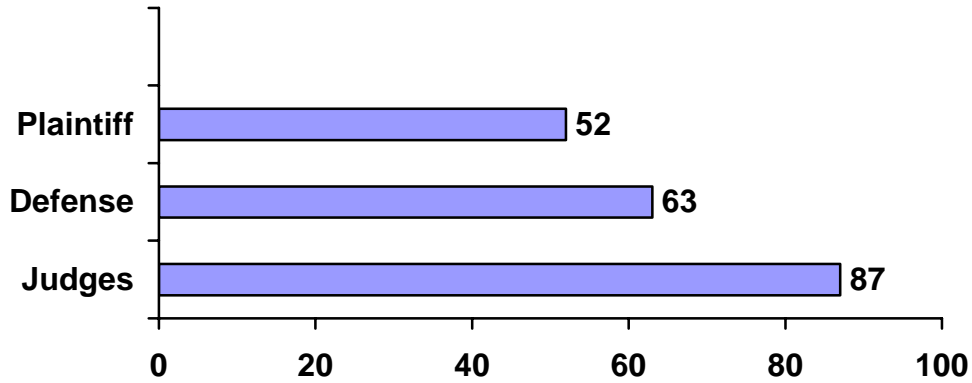


Question 6 on the Attorney Questionnaire asked attorneys the following question:

6. In your opinion, should each juror be required to write his or her number (seat position) on each question that they submit for a witness?

Overall, 58% of attorneys stated “No” – believing that jurors should not be required to place their juror number (seat position) on the questions they submit for witnesses. The “Yes” response was 42% overall (one survey did not contain a response to this question). Within the overall response, the “No” response was 52% from plaintiffs’ attorneys and 63% among defendants’ attorneys.

Percentage of Responses Saying Don't Identify Jurors on Their Questions



It should be noted that the question to judges was whether they actually required juror identification when confronting this issue at trial, whereas the question to attorneys asked their opinion of whether identification should be required. One difference between judges and attorneys on this issue that is demonstrated in their respective comments is that some attorneys are interested in identifying jurors as individuals in order to direct argument, including summation, to those particular jurors, whereas judges tend to consider jurors as part of the whole, i.e. the jury, rather than as individuals.

Possible Next Steps – Re: Whether to Identify Jurors on Questions

Although these responses show a significant difference in the rate of “No” responses from judges (87%) and attorneys (58% = No, including 52% of plaintiffs’ attorneys and 63% of defense attorneys), each group favored jurors not being identified with their questions for witnesses. Additionally, it must be pointed out that the judges’ rate of “No” responses — at 87% — was substantial. The Conference considered whether to recommend that the current court rule be revised to state that jurors, where authorized to submit questions in civil trials, not identify themselves, by name or identifying number, on their questions, but determined not to recommend such a rule change.

Several judges indicated that they disguise, or mask, a juror’s connection with particular questions by requiring that each juror submit a piece of paper, even if blank, or write something like “I have no question”. This procedure was considered and rejected during the development of both the pilot project and the procedures that are in place today, and the Conference does not recommend its statewide implementation.

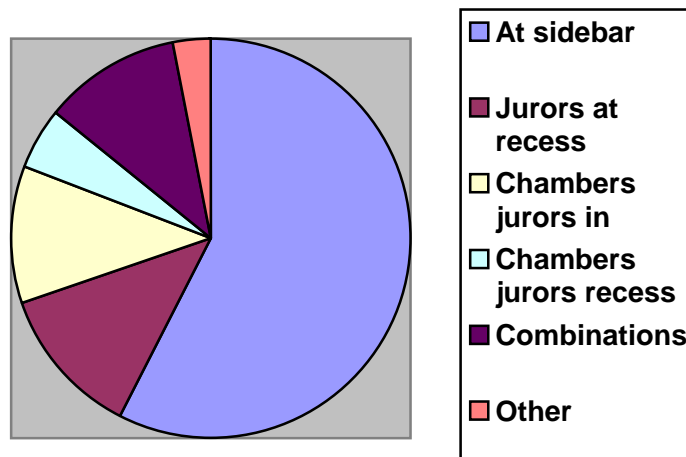
General Questions

Courtroom procedures – judge question #8

With regard to the issue of the positioning of counsel and jurors when the judge reviews jurors’ questions with counsel, question 8 asked: “What procedure did you use when reviewing jurors’ questions with counsel?” Judges indicated that in 57% of the trials they conduct the review “At sidebar, with jurors in the courtroom”. The next greatest response was at 12% (“In courtroom, with jurors removed or at recess”) and there were two responses at 11% (“In chambers, with jurors in the courtroom” and “Combination of above”. Judges’ clear preference is to review the questions at sidebar with the jurors in the courtroom. The breakdown of the responses is the following:

a.	At sidebar, with jurors in the courtroom	57%
b.	In courtroom, with jurors removed or at recess	12%
c.	In chambers, with jurors in the courtroom	11%
d.	In chambers, with jurors removed or at recess	5%
e.	Combination of above	11%
f.	Other	3%

Where Judges Review Juror Questions



The judges clearly prefer the courtroom over chambers for conducting the review of jurors' questions -- 69% favoring the courtroom versus 16% favoring chambers (even without considering the 14% who offered combined or other responses). There are no further steps recommended in this area.

Attorney follow-up questions – judge questions 7 and 7a

Question 7 on the Trial Judge Questionnaire inquired about follow-up questions, asking how often attorneys asked follow-up questions after witnesses responded to juror questions. Judges' responses were that attorneys asked follow-up questions in 71% of such instances and no follow-up questions in the remaining 29%. Judges' revealed, in their replies to question 7a, that the median number of follow-up questions was just one. Sixteen responses (12%) stated that there were five or more follow-up questions. The responses, particularly given that the median number of follow-up questions is just one, indicates that there is no need to recommend any next steps in this area.

Opinion on the impact of juror questions — judge question 13 and attorney question 7

Both judges and attorneys, in responses to question 13 and question 7, respectively, were asked to provide a "Yes" or "No" response to whether allowing juror questions affected the following items.

- Juror attentiveness during the trial
- Juror understanding of the testimony
- Juror satisfaction with the process
- The fairness of the trial

The percentage of "Yes" responses from judges and attorneys are shown in the table below, which shows the tabulated responses of plaintiff and defense counsel, as well as of attorneys as an undifferentiated group. There was a majority response of "Yes" in each category for each group, with judges responding "Yes" in a greater percentage than attorneys. The impact on juror satisfaction obtained the highest percentage of "Yes" responses and the impact on the fairness of the trial received the lowest percentage of "Yes" responses.

Issue Inquired About	% of Yes Responses			
	Judges	Plaintiff	Defense	All Attorneys
Jurors' attentiveness	83%	64%	57%	60%
Understanding of testimony	84%	68%	61%	64%
Juror Satisfaction	95%	81%	77%	79%
The fairness of the trial	76%	66%	51%	58%

Time Required by Juror Questions -- Judge Question #12

Question 12 asked for the amount of time that resulted from "...allowing the opportunity for juror questions (including time for attorney objections, follow-up questions, and any other extra time required...)." Judges provided that time estimate in 154 completed surveys - a 66% response rate. It can be difficult to track that kind of information during a trial and that number of responses provides a meaningful measure.

The responses indicated that the median amount of time required for the juror questioning process was 30 minutes. The average amount of time was 59 minutes. The reason why the average time is nearly twice the median can be traced to 16 trials in which the estimated time to conduct the procedures was 3 hours or more. Those 16 trials were 10% of the total number of trials but their combined times were represented more than 48% of the total time for the 154 trials. Those trials reported that the procedures averaged 276 minutes, or more than 4.5 hours each. The average time without those trials included would be 34 minutes, meaning that those 16 trials added 25 minutes to each of the other 138 trials. For these reasons, it appears that the median is a more reliable predictor of the time that will be required for a typical trial.

It is worth noting that the 30-minute median is the same as that reported in the original pilot study of juror questions (see Report on Pilot Project Allowing Juror Questions, report of Civil Practice Subcommittee, 2001). In addition, although two of the questions being evaluated in this report (i.e., allowing questions when the other side testifies by way of videotape or deposition and recalling witnesses for later juror questions) may have been said to add time to these procedures, neither procedure was supported by the responses of judges and attorneys. Accordingly, although the information on time added by the procedure does not result in any recommendations for

additional procedures or rule revisions, this information is, nonetheless, helpful to the evaluation.

Information was obtained from court clerks on, inter alia, the numbers of questions submitted and the number actually asked. The average number of questions submitted, the number of questions asked, and the corresponding “approval” rate, are shown below — categorized by the type of witness to whom the questions were directed.

Plaintiff Witnesses			
Witness Type	Total Questions Submitted	Total Questions Allowed	Percentage Allowed of Total Questions
Expert	457	222	49%
Fact	900	368	41%
Totals	1357	590	43%
Defense Witnesses			
Witness Type	Total Questions Submitted	Total Questions Allowed	Percentage Allowed of Total Questions
Expert	308	232	75%
Fact	343	288	84%
Totals	651	520	80%

As can be seen, the approval rate for questions to defense witnesses is much greater than that for plaintiffs’ witnesses. Based on the numbers shown above, there were an average of 1.4 juror questions actually asked of each plaintiffs’ witness — 1.6 for expert witnesses and 1.4 for fact witnesses. There were an average of 2.1 questions asked of each defense witness — that is, an average of 2.1 questions overall as well as for expert and fact witnesses individually.

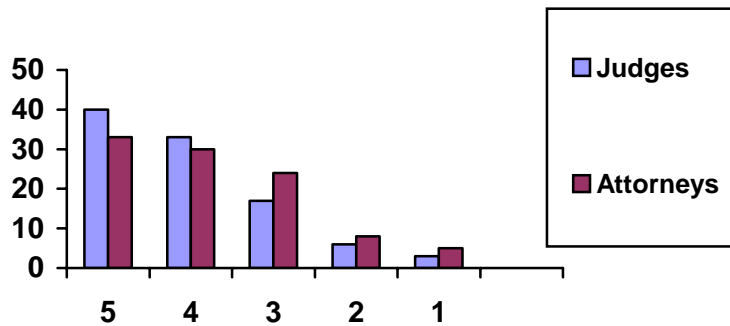
Ranking of Reaction to Juror Questions – Judge question 14, attorney question 8

Judges and attorneys were asked, in the questions noted above, to rank their reactions to jurors being permitted to propose questions to witnesses -- on a scale of 1 (very negative) to 5 (very positive). Of the judges’ responses, 88% were in the 4 or 5 range. The responses of plaintiffs’ attorneys were in the 4 or 5 category for 73% of their

responses and defendants’ attorneys’ responses were in the 4 or 5 category for 54% of responses. Overall, attorney responses were in the 4 or 5 range for 63% of responses. The percentage responses for each category are shown in the table and the graph below.

Ranking	Judges	Percentage of Responses		
		Plaintiffs	Defendants	All Attorneys
1	0.6%	3%	7%	5%
2	0.6%	6%	10%	8%
3	12%	17%	30%	24%
4	22%	33%	27%	30%
5	66%	40%	27%	33%

Judges' and Attorneys' Rankings of Reaction to Juror Questions -- by %



Note: 5 is “very positive” / 1 is “very negative”

The responses from both judges and attorneys indicate overall satisfaction with the impact of the procedures on jurors’ attentiveness, jurors’ understanding of testimony, jurors’ satisfaction with the process, and the fairness of the trial, and their assessments in that area should encourage increased use of the question-asking process at trial.