WRITTEN JUROR QUESTIONNAIRES IN CIVIL CASES

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Attitudes toward the use of written juror questionnaires are changing rapidly. Long favored by the defense bar, written questionnaires are becoming increasingly popular among plaintiffs' lawyers and among judges in both state and federal court.

To lawyers who regularly administer written questionnaires, resistance to their utilization is puzzling. There are several possible explanations for resistance from the plaintiffs' bar. *First*, successful plaintiffs' lawyers traditionally have taken an intuitive approach to jury selection – *i.e.*, they have relied on their instincts and experience to form a judgment as to whether a particular juror should be seated. The data-driven approach that written questionnaires represent is starkly at odds with the traditional approach. *Second*, the plaintiffs' bar concluded that the use of written questionnaires would confer a competitive advantage on defense lawyers more accustomed to using that technique. *Third*, there were doubtless some plaintiffs' lawyers who concluded that, if the defense bar was *in favor of* juror questionnaires, that was reason enough to *oppose* them.

The principal reason courts have resisted the use of written questionnaires is that they were not familiar with them. Judges tend to be set in their ways, and any suggestion that the court should conduct its proceedings any differently than it has always done so is not likely to be well received. Moreover, it cannot be denied that the use of written questionnaires entails a certain administrative burden. There have to be enough pens and pencils for all of the jurors. Each of them needs to have a writing surface. Once completed, the questionnaires need to be

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copied for all interested counsel. The lawyers need to have time to review the responses before jury selection begins. These can be cumbersome and time-consuming procedures, and some jurors might find the process burdensome. What the courts did not see was that these burdens were more than offset by the efficiencies written questionnaires generate.

But all of that is changing. Working with trial consultants, plaintiffs' lawyers have discovered that written questionnaires can augment their tried and true techniques. Meanwhile, courts are finding written questionnaires far less exotic than they once did. Virtually every court has had some experience with written questionnaires, and the topic has generated considerable discussion in the legal literature.

TERMINOLOGY

Courts in different parts of the country employ different terminology in describing the questionnaire which is the subject of this article. Particularly confusing is the oft-used phrase "supplemental juror questionnaire." This terminology derives from the fact that many courts require jurors, at the time they report for service, to complete a basic questionnaire. Typically, these questionnaires elicit the kind of information that prisoners of war supply in World War II movies – *i.e.*, name, rank, and serial number. In a few jurisdictions, the information requested on the basic questionnaire goes further. It might, for example, capture the juror's marital status, the type of work he does, and/or what his spouse does for a living. The questionnaires discussed in this article are deemed "supplemental" because they seek information *in addition to* the basic information that the court collects as a matter of routine.

DEVISING AN EFFECTIVE WRITTEN QUESTIONNAIRE

A written questionnaire will assist in jury selection only if it poses questions that are known to be correlated with verdict orientation. There is, for example, no reason to inquire

about the juror's military service, television viewing habits, or use of the Internet unless you have some reason to believe that the answers to those questions will be useful in predicting how the juror is likely to vote in your case. Usually, the connection between specific questions and verdict orientation is established through well-conducted jury research. In repetitive litigation (*e.g.*, a succession of suits brought against the manufacturer of an allegedly defective medical device), however, the connections might also be established through post-verdict juror interviews.

Lawyers traditionally have picked juries on the basis of demographic characteristics – age, gender, marital status, occupation, income, education, etc. The conventional wisdom was that plaintiffs' counsel wanted young, single or divorced, low income women of color, while the juror of choice for the defense was an older, married or widowed, higher income white male. There is, however, mounting evidence that demographics are *not* a reliable predictor of verdict-orientation. Far more dependable in determining how a juror will vote are questions about the jurors' *experiences* (*e.g.*, Is the juror exposed to toxic chemicals in the work place? Is he active in his union? What, if any, newspapers does he read on a regular basis?) and *attitudes* (*e.g.*, Does he believe that large corporations put profits over safety? Does he believe that jury verdicts are too large? Does he think that the government is responsible for insuring consumer safety?).

The "trick" in designing an effective questionnaire is not just to pose questions that correlate with verdict orientation, but to propound questions in which the correlation is not obvious. For example, if you represented a pedestrian who was hit while in a crosswalk by a drunken driver, you would probably want to seat jurors who themselves have had bad experiences with drunken drivers. If, however, you asked questions that explicitly identify such

individuals, that information would also become known to defense counsel, who would then seek to excuse those jurors – if possible, for cause, or through the exercise of a peremptory challenge. It would be far better for you if you posed questions based on research showing that, say, a person who regularly reads the *Washington Post* is more sympathetic than the population at large. In that scenario, you would know that there is a connection, but your opponent (unless he had done the same research) would not.

WHY ARE WRITTEN QUESTIONNAIRES VALUABLE?

It is not by happenstance that written questionnaires have become increasingly popular. Lawyers on both sides of the aisle recognize that a written questionnaire, if used properly, can play a major role in jury selection – not as a substitute for counsel's instincts or oral voir dire, but, rather, as a supplement to those tools. Courts increasingly recognize that, at least in complex litigation, written questionnaires can save time. Moreover, in high-profile cases, written questionnaires may be essential to the defendant's ability to get a fair trial.

Many jusifications have been advanced for the use of written questionnaires. The ones that appear to be the most persuasive are as follows:

First, written questionnaires enable the court to efficiently obtain information from prospective jurors. Absent a written questionnaire, the court and counsel have no choice but to go through the box and ask each juror the same questions. While one juror is being questioned, the other jurors must sit and watch. When a written questionnaire is administered, all of the jurors are answering the questions at the same time. This could generate substantial time savings in a case in which a pool of 50, 100, or even more jurors has been summoned.

Second, written questionnaires elicit more candid responses from jurors than can be obtained though oral voir dire. Most people do not engage in a lot of public speaking as part of

their daily lives, and that is essentially what participation in voir dire involves. It is very difficult for most people to stand up in front of a room full of strangers and answer questions – particularly questions that they did not know were coming and that are sometimes highly personal. Add to the mix the apprehension that any outsider feels when forced to participate in the legal system and it is easy to see why jurors would say as little as possible during oral voir dire in order to get through it as quickly as they can. The odds of getting candid, thorough, and carefully considered information increases exponentially when jurors are afforded an opportunity to answer questions privately and without the time pressure that normally attends oral voir dire.

Third, written questionnaires lead to more thorough examinations of the jurors. The information provided on a written questionnaire can become a springboard for follow up questioning during oral voir dire. Of course, examination of the jurors will be more thorough only if counsel have had a fair opportunity to review and synthesize the information obtained through the written questionnaires. In some instances, courts will ask counsel to commence oral voir dire immediately after the questionnaires have been completed. Such an approach completely undermines the utility of the written questionnaire. In order for the process to be effective, counsel should have at least overnight or – depending on the size of the pool – a few nights to digest the information obtained through the questionnaires and prepare appropriate follow-up questions.

Fourth, a written questionnaire greatly reduces the risk that a maverick juror will taint the entire panel. This is particularly important in high-profile cases, where feelings among the jurors might run high. After such a juror has made an inflammatory remark – *e.g.*, announcing that her spouse was injured by the same product in precisely the same way that the plaintiff alleges – excusing that juror and instructing the rest of the panel to disregard the statement is not a

meaningful solution. The alternative – dismissing the entire panel – is one that most judges would be extremely reluctant to embrace. The written questionnaire addresses this problem by giving jurors with strong feelings an opportunity to vent on paper. Ideally, such jurors can be identified on the basis of their questionnaire responses, questioned in chambers, and (if necessary) excused before they poison the entire pool.

SECURING JUDICIAL APPROVAL

Once you become convinced that the written questionnaire is appropriate in your case, how do you persuade the court to allow you to use it? By far the most effective way to obtain judicial approval of a questionnaire is to persuade your adversary to join in requesting one. Courts are much more reluctant to deny use of a questionnaire if both sides want it than if only one party seeks permission. Of course, getting your opponent to join in requesting a questionnaire may necessitate compromises. You may not be able to ask some questions that you would like to pose to the venire or you might have to live with questions that you would rather not ask. In most situations, however, a compromise questionnaire is better than no questionnaire at all.

If your adversary will not join in seeking a questionnaire or if the court is reluctant to approve a questionnaire even though both sides endorse it, you will have to file a motion. What you argue will depend on the source of the resistance that you are getting. If, for example, the court is resisting because it fears that the questionnaire will waste time, your job is to explain how and why a written questionnaire actually saves time. In a high-profile case, you might have to make a Constitutional argument in order to get your way. Your argument would be that your client's right to a fair trial cannot be guaranteed unless you have had a full and fair opportunity to explore whether jurors come into the courtroom with disqualifying biases.

CONCLUSION

Written juror questionnaires have become an accepted part of the legal landscape. Used appropriately, they become a valuable part of the jury selection process. Both plaintiffs and defense counsel can profit from the use of juror questionnaires as part of an overall jury selection strategy, and their odds of persuading the court to allow the questionnaire are greatly enhanced if they join in seeking court approval.