The Use of Juror Questionnaires in Civil Cases in California

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Introduction

The *O.J. Simpson* case[1] has raised awareness of jury questionnaires. In that high profile case involving issues of domestic violence, race, and celebrity, prospective jurors were asked to complete a 294-question form delving into subjects ranging from education and military service to interest in sports, science and math courses taken, and experience as a victim or witness to crime. Some examples of inquiries on the *O.J. Simpson* questionnaire include:

144. Have you ever written to a celebrity?

170. When is violence an appropriate response to domestic trouble?

186. Have you ever dated a person of a different race?

211. Have you ever provided a urine sample to be analyzed for any purpose?

212. Do you believe it is immoral or wrong to do an amniocentesis to determine whether a fetus has a genetic defect?

252. Do you ever watch TV programs that show real life police activities such as "Cops," "America's Most Wanted," or "Unsolved Mysteries"?[2]

But while the *O.J. Simpson* case has raised awareness of jury questionnaires, it has furthered certain misconceptions about their use, including that administration of a questionnaire is laborious and that a questionnaire must be long to be useful.

Juror questionnaires are an effective tool in civil cases in learning more about prospective jurors, and thereby increasing the efficacy of voir dire. Due in part to revisions of the Code of Civil Procedure favoring their use and the Judicial Council's promulgation of a form questionnaire with an optional personal injury supplement, the use of juror questionnaires is increasing. This article will attempt to provide information about the use of jury questionnaires in civil cases in California state courts, including suggestions about their design and how to get a court to adopt them.

What Is a Jury Questionnaire?

A jury questionnaire is a written list of questions answered in writing by prospective jurors. The questions are answered under oath. Jury questionnaires are of two types. First, under CCP §205, the jury commissioner may require potential jurors to complete a questionnaire. Such a questionnaire, however, shall ask only questions related to juror identification, qualification, and ability to serve. CCP §205(a). Except as ordered by the court, a jury questionnaire propounded by the jury commissioner may be used only for qualifying prospective jurors and management of the jury system, and not to assist in the voir dire process of selecting trial jurors for a specific case. CCP §205(b).

The second type of jury questionnaire is that used by the trial judge and counsel to assist in the voir dire process. This second category, authorized by CCP §§205(d) and 222.5, is the subject of this article.

Why Use a Jury Questionnaire?

A jury questionnaire can be a very effective adjunct to oral voir dire of prospective jurors. Use of a jury questionnaire offers the following benefits:

- ***Shortens voir dire.*** Jury selection is typically one of the most time-consuming parts of a trial. Courts, and therefore litigants, are under increasing pressure because of calendar congestion and the need to comply with Trial Court Delay Reduction Act (Govt C §§68600–68620) goals to speed up all aspects of trial. Use of a jury questionnaire may dramatically expedite jury selection. The entire panel of prospective jurors can answer a modest length questionnaire in perhaps 30 minutes, less time than it may take to obtain that information orally from just one or two jurors. A jury questionnaire may also speed up voir dire because it allows counsel to be better prepared and thus ask fewer follow-up questions and exercise peremptory challenges more rapidly.
- ***Elicits more honest responses.*** Many trial counsel have had the experience of facing a seemingly diverse jury panel, only to have one juror after another repeat the same, seemingly "correct" response given by preceding jurors to voir dire questions. A jury questionnaire may result in more honest answers because each juror responds *individually*. Furthermore, there is less subconscious pressure to conform to social norms, which may be an enormously important issue when voir dire will legitimately involve personal or sensitive subjects such as racial bias, sexual abuse, business failure, or history of being fired from jobs. Sue,

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[1] *People v Simpson,* LA Super Ct, BA097211.

[2] The *O.J. Simpson* jury questionnaire is reprinted in C. Bennett, R. Hirschhorn & J. Dimitrius, Bennett's Guide to Jury Selection and Trial Dynamics Appendix, Form 8.25 (West 1994).

Smith, & Pedroza, *Authoritarianism, Pre-Trial Publicity, and Awareness of Bias in Simulated Jurors,* 37 Psychological Reports 1299 (1975); Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis,* 56 Ind L J 245 (1981); Jones, *Judge-versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor,* 11 Law & Human Behavior 131 (1987). Few people would be willing to confess, for example, that they are biased against certain ethnic groups in front of a judge and a large group of strangers. But a sensitively worded question on a written questionnaire may elicit such information, which may be of crucial importance to your case.

- ***Elicits more independent responses.*** Another common phenomenon in oral voir dire is for the first prospective juror to answer a question somewhat completely and subsequent jurors to simply respond, "I agree with Juror Number One" or "My answer is the same." A jury questionnaire will result in more *complete* information because each juror will give his or her own answer and will respond to every question.
- ***Elicits more complete information.*** Another difficulty with oral voir dire involves asking all the important questions of each and *every* juror. To do so would require the attorney not only to be tediously mechanical with his or her questions, but also to use more time than is usually made available in most courts. Thus, it is nearly inevitable that some of the jurors who serve will not have been asked one or more key questions. This is not so with a juror questionnaire. By using a questionnaire, an attorney can elicit answers to *every* question from *every* juror without testing the patience of the jurors or the court.
- ***Protects juror privacy.*** Use of a written questionnaire spares jurors the potential embarrassment of answering certain necessary but intrusive questions in front of a large group of people. For example, in a wrongful termination case, it may be entirely proper to ask jurors if they have ever been fired from a job; in an automobile accident case involving the use of alcohol, jurors may be asked if they have ever been arrested for driving under the influence. Jurors prefer to answer such questions in writing.
- ***Reduces risk of contaminating the jury panel.*** On occasion, a prospective juror may so vividly retell an experience, express an opinion, or state a prejudicial fact that it taints the entire panel. This, of course, is a serious risk, given that the only remedy is to declare a mistrial and thus waste an enormous amount of the court's time. Use of a jury questionnaire prevents this situation because it is answered in writing. Potentially inflammatory written responses may be followed up in an in camera proceeding.

Because of these benefits, the use of jury questionnaires is increasing.

Getting a Juror Questionnaire Adopted by the Court

Several provisions of the Code of Civil Procedure authorize the use of jury questionnaires. Code of Civil Procedure §205(c) and (d) specifically permit jury questionnaires to assist the voir dire process. Even more importantly, CCP §222.5 provides that "[a] court should 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."

Despite this broad mandate in favor of questionnaires, many attorneys report that judges are reluctant to allow their use. See, *e.g.,* San Francisco Daily Journal, Apr. 3, 1995, p 3. Therefore, counsel wishing to have the court use a jury questionnaire should submit a memorandum in support that addresses the following points:

- Describe the benefits of jury questionnaires, including those listed above.
- Cite and summarize the social science research that supports the use of jury questionnaires. See the recommended reading list at the end of this article.
- Describe the aspects of your case that make use of a questionnaire particularly appropriate, *e.g.,* bring to the court's attention any potentially embarrassing topics that must necessarily be explored on voir dire.
- Refer the court to CCP §222.5, which forbids a court from arbitrarily or unreasonably refusing to allow reasonable written questionnaires, when requested by counsel.
- Indicate that the subjects on the questionnaire would be proper oral voir dire questions, so that the practical effect of giving the questionnaire will be to expedite the jury selection process.
- Anticipate that the court may have concerns of a practical nature regarding the administration of a jury questionnaire. Assure the court that counsel will do everything possible to ensure that the questionnaire is not an unreasonable burden on the court and its staff. (Administration of a questionnaire is addressed in the next section.)
- Attach a copy of the proposed questionnaire so that the court may be satisfied that the questions are proper and reasonable.
- If possible, provide a list of cases in that jurisdiction in which juror questionnaires have been used.

Counsel should consider asking opposing counsel to stipulate to the use of a jury questionnaire. Quite often, use of a questionnaire is in the best interest of all parties. It will probably be easier to get the court's approval if

all parties agree that a questionnaire should be administered and that its content is acceptable.

The Administration of a Juror Questionnaire

Use of a jury questionnaire presents certain management issues.

The parties should do everything possible to relieve the burdens on the court's staff presented by the use of a questionnaire. Once the questionnaire's content has been approved by the court, counsel should offer to provide a sufficient number of blank forms and pens for the entire panel of prospective jurors. Pens are preferred over pencils because ink photocopies much better. Similarly, counsel should offer to make copies of the completed questionnaires after they have been answered by the prospective jurors. Typically, the court retains the original set of questionnaires and each party receives at least one set of copies.

Furthermore, counsel should give consideration to the time involved in filling out and evaluating the questionnaire. It will take the jury some amount of time to answer the questionnaire. That time must be incorporated into the court schedule. If feasible, the jury may fill out the questionnaire while the judge and counsel are arguing motions in limine or conducting other business. That will save the court's time. For this to happen, the motion for use of a questionnaire needs to be the first motion presented.

Counsel will also need time to evaluate the jurors' responses to the questionnaire. Try to arrange the schedule so that counsel will have at least the lunch break or preferably the evening recess to do that.

The Judicial Council Form: the De Facto Standard

In 1993, the Judicial Council published a form that it recommended for use in California courts as a pretrial juror questionnaire. This questionnaire is six pages long, and includes a page of introductory comments and instructions to prospective jurors.

There is no doubt that the publication of this questionnaire by the Judicial Council was a watershed development in the progress of jury selection in California. With this publication, the Judicial Council used its considerable authority to affirm that juror questionnaires are a valuable aid to jury selection rather than a social science gimmick. And with this publication, the Judicial Council has greatly increased the chances that a questionnaire will be allowed by trial judges in California.

Unfortunately, there are two basic problems with the Judicial Council form—the authoritarian tone of its questions and the absence of case-specific experiential and attitudinal questions.

The authoritarian tone of the Judicial Council questionnaire is unmistakable. Take, for example, question 1.6: "If you plan to attend or are currently attending school, describe:" Imagine asking this question of a juror in oral voir dire. Given that no attorney, or judge, would use this tone while questioning a prospective juror, there is no reason for the use of this tone in a juror questionnaire. This is not an isolated example from the Judicial Council questionnaire—all of the first 12 questions on the questionnaire are phrased in this manner.

These questions are not questions; they are directives and rather terse ones at that. This questioning style is *not* an effective means for eliciting information from prospective jurors. Terse directives tend to elicit terse responses. The patronizing tone set by these directives also tends to establish an adversarial relationship between the court and the jurors. And such a tone is particularly detrimental at the beginning of the questionnaire, where it can affect all that follows.

The tone of the questionnaire, however, could easily be fixed. The question cited earlier (1.6), for example, could have been rewritten as follows: "If you plan to attend or are currently attending school, *could you please* describe *your plans*." As simplistic as it sounds, the use of the word "please" would dramatically change the tone and effectiveness of the Judicial Council questionnaire. With this simple word, the questionnaire would give the jurors their proper respect and acknowledge the significance of their participation in the system. Judges and trial attorneys are well aware of this fact and do everything they can to show jurors this respect. Why the Judicial Council form does not communicate the court's respect for the jurors' role in the process is unknown.

The other inadequacy of the Judicial Council questionnaire is its failure to take into account case-specific attitudes and experiences. This failure, however, is excusable if the Judicial Council intended the questionnaire to be a generic foundation on which to add a more useful, case-specific questionnaire. In fact, on the first page of questions, the questionnaire labels its questions "General Questions." And to its credit, the Judicial Council questionnaire does include a personal injury supplement. Nevertheless, whether intentional or not, the Judicial Council questionnaire has been used without supplement and as a result has caused case-specific attitudes and experiences to be ignored rather than probed.

The Judicial Council questionnaire, in fact, is treated by some judges and attorneys as a complete questionnaire that can stand on its own and should not be altered. This is an unfortunate misuse of the questionnaire. The Judicial Council questionnaire should be regarded as only a first step that enables counsel to focus effort on the more critical case-specific attitudinal and experiential questions that need to be added. As such, it provides

the legal community with a valuable piece of infrastructure by which all attorneys and parties will benefit.

When misused, however, as a complete and inalterable questionnaire, the Judicial Council form becomes a hindrance. By limiting attorneys to just the most general information on prospective jurors, the "unaltered" Judicial Council questionnaire ignores the attitudinal and experiential information that is most predictive of jurors' predispositions. And, in so doing, the "unaltered" Judicial Council form encourages the use of gross generalizations and stereotypes in jury selection.

The solution to this misuse of the Judicial Council questionnaire is to issue a simple set of recommended guidelines for the design and administration of a juror questionnaire based on some of the principles discussed in this article.

Designing a Better Questionnaire

In the design of a better questionnaire, there are some basic rules one should follow.

Remember Its Role

The role of a juror questionnaire is to supplement oral voir dire. This is the most basic and fundamental constraint on the questionnaire. As such, the juror questionnaire cannot delve into areas of inquiry that would not otherwise be allowed in oral voir dire. Although it may allow you to ask questions that would be difficult, if not impossible, to ask in oral voir dire (*i.e.,* questions on sensitive topics like crime victimization or sexual history), the juror questionnaire does not give counsel license to explore every aspect of a prospective juror's life regardless of its relevance to the case.

The Shorter, the Better

There are inclinations and motivations for attorneys to write longer rather than shorter questionnaires. By its very nature, legal training inclines practitioners to leave no stone unturned—an inclination that is reinforced by the discovery process. Unlike a long set of interrogatories submitted to the opposing party, a long set of questions submitted to prospective jurors is likely to elicit *less* rather than *more* information. There are several reasons for this.

- ***The intimidation factor.*** Some jurors, especially those with weak verbal skills, are intimidated by what seems to be the daunting task of completing a lengthy questionnaire. To relieve their own anxiety and make the task seem less daunting, jurors may "pace themselves" by giving shorter answers, more neutral answers (that require little thought), or no answers at all.
- ***The boredom factor.*** Even prospective jurors with strong verbal skills who are not intimidated by a long questionnaire may lose interest in the questionnaire at some point. Like intimidated jurors, bored jurors also may begin "pacing themselves," that is, giving (as referred to above) shorter answers, more neutral answers, or no answers at all.
- ***The error factor.*** Prospective jurors who are either intimidated or bored by a questionnaire are far more likely to make mistakes when answering a question. It may be as simple as saying, "No, I've had no such experience," when, in fact, they have had such an experience. Potentially even more dangerous is if, in their haste to finish the questionnaire, jurors misread a question and indicate an opinion on a key issue that is quite different than what they actually believe. In theory, a single mistake should not be too damaging. In practice, however, when one is evaluating many questionnaires in a limited amount of time and with a limited amount of follow-up oral voir dire allowed, a single mistake on a key question could, in fact, be the difference between whether a juror sits on, or is struck from, a jury.

Make It Functional

Good designers of anything—from bridges to bathrooms—know that you have to consider the product's end use to make it functional. Good juror questionnaire designers need to do the same. And you must remember that the end use of a questionnaire includes not only the potential jurors filling it out, but also the trial team evaluating it. Thus, the "greatest" questionnaire in the world is of little use if you do not have the time to evaluate it.

To design a functional questionnaire, counsel must consider how much time and how many people will be available to evaluate the completed questionnaires. A rule of thumb is that one person can generally evaluate two pages per minute. Based on this rule, one person should be able to evaluate 12 ten-page questionnaires in an hour or 18 questionnaires in 90 minutes (a typical court lunch break) or 60 questionnaires in five hours. While actual results can vary greatly from this rule of thumb, it provides a handy benchmark by which to design the questionnaire.

A questionnaire's functionality also can be enhanced if it is based on a jury selection profile. A jury selection profile is a finite, well-defined set of juror characteristics on which you plan to base your peremptory challenges. Ideally, such profiles are based on pretrial jury research. However, even anecdotal profiles—that is, profiles based on deductive reasoning and anecdotal experience—are useful in that they, like research-based profiles, enable you to focus better on the questions thought to be most predictive. Without such focus, even a short questionnaire can be difficult to evaluate.

The layout of a questionnaire can make it easier not only for jurors to fill out, but also for the trial teams to evaluate. Using a consistent question and answer format, for example, can reduce both juror confusion and the time needed to evaluate the questionnaires. A well laid out and easy to read questionnaire also can help jurors and the trial teams alike.

Another aid to making your questionnaire functional is asking the court before recessing to number the jurors so that both sides will know in what order the jurors will be called. Most courts will number the first 12 or 18. Some will even number the entire panel. With the jurors numbered, you can manage your time more wisely by evaluating the questionnaires in order.

Areas of Inquiry

There are five general areas of inquiry that should be included in every questionnaire. They are as follows:

- ***Demographic:*** These questions are meant to explore a juror's most fundamental characteristics—age, place of birth, place of residence, education, occupation, marital status, job status, occupation of the juror's significant other, occupation of the juror's parents, age and occupation of the juror's children, etc. A person's demographics are generally defined as those characteristics that people cannot easily change. Ethnicity, religion, income, and political party are also considered demographic characteristics, but are seldom allowed on a juror questionnaire. Ironically, while demographic questions are the most common and least controversial components of a jury questionnaire, social science research consistently shows them to be among the *least* valuable in predicting a juror's biases or predispositions. Penrod & Linz, The Impact of Social Psychology on Procedural Justice, "Voir Dire: Uses and Abuses" (1986).
- ***Experiential:*** These questions are meant to explore a juror's past experiences. Most courts will allow a broad range of questions in this area, from the seemingly irrelevant (*i.e.,* military experience in a contract dispute case) to the painfully relevant (*i.e.,* sexual harassment experiences in a sexual harassment case). Jury research has found these types of questions moderately predictive. It should be noted, however, that while some experiences can be quite predictive of a juror's biases or predispositions, others can be weak or even counterintuitive. It is occasionally discovered, for example, that crime victims can be surprisingly unsympathetic to fellow crime victims.
- ***Attitudinal:*** These questions are meant to explore jurors' attitudes, values, and beliefs. Such questions elicit jurors' opinions on case relevant issues. Jury research unequivocally shows that these types of questions are consistently the best predictors of a juror's biases or predispositions. Fulero & Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?,* 17 Ohio N Univ L Rev 229 (1990); Penrod, *Predictors of Jury Decision Making in Criminal and Civil Cases: A Field Experiment,* 3 Forensic Reports 261 (1990). However, courts tend to be critical and restrictive of this area of inquiry. In fact, some courts will not allow any attitudinal questions on the grounds that they are irrelevant or too invasive.
- ***Hardship:*** These questions are meant to give the jurors an opportunity to describe any physical or financial reasons that would make jury service an undue hardship.
- ***Cause:*** These questions are meant to give the jurors an opportunity to describe any attitudes, values, or beliefs that would make it difficult for them to serve as fair and impartial jurors in this particular case.

Question Sequence

It is a well-established social science fact that ordering of questions in a questionnaire can affect the way the questions are answered. Sigelman, Survey Research Methods: A Reader, "Question-Order Effects on Presidential Popularity" (1989). A few basic principles should help to avoid the more extreme effects of ordering:

- Lead off with demographics and finish with hardship and cause. Demographic questions are the *least* likely to influence other answers and, thus, are ideal introductory questions. Hardship and cause questions, on the other hand, are the *most* likely to influence other answers. We have found all too often that jurors' efforts to be excused for hardship or cause can affect their answers to all subsequent questions. It is neither surprising nor coincidental that jurors seeking to be excused for hardship or cause tend to express far more extreme opinions than jurors not seeking to be excused. Presenting these issues at the end of the questionnaire helps to minimize this effect.
- Go from general to specific and topic by topic. Between the demographics at the beginning and hardship and cause at the end should be the experiential and attitudinal questions arranged by topic (*i.e.,* in a sexual harassment case you may have questions about employers and employees, followed by queries about sexual harassment, followed by questions about the legal system). Within each topic, experiential questions should precede attitudinal questions and both types should be ordered from general areas of inquiry to more specific areas of inquiry. In a sexual harassment case, for example, general employment experience questions ideally should be followed by specific employment experience questions, which should be

followed by general attitudinal questions, which in turn should be followed by specific employment attitudinal questions. While this format is not meant to be fixed or inalterable, the closer it is followed, the easier the questionnaire will be for jurors to follow and fill out.

Designing a Better Question

There are two basic types of questions that can be asked on a juror questionnaire—open-ended and closed-ended questions. Open-ended questions require a narrative response from the prospective juror. Questions beginning with "Why," "What," or "How" are almost invariably open-ended questions. Closed-ended questions require a juror simply to chose one response from a number of possible choices. For example, questions beginning with the query "Do you think?" are almost invariably closed-ended questions. A more detailed analysis of each type of question follows.

Open-Ended Questions

Slowly, over the past 20 years, voir dire questioning has begun to look less like a monolgue and more like a *dialogue* that is necessary to assess prospective jurors' predispositions. This is largely due to the increased use of open-ended questions. Such questions are just as valuable in a questionnaire as they are in oral voir dire.

First and foremost, open-ended questions give prospective jurors an opportunity to express, in their own words, their opinions about a case-relevant issue. And their own words are the simplest means by which to assess the nature and extent of a prospective juror's bias. For example, in a recent case the following open-ended question was asked: "What positive, or negative, opinions do you have about oil or chemical companies?" One juror responded, "They kill nature and rape the environment." After some brief follow-up questions in the judge's chambers, this juror was excused for cause. This example shows several of the great benefits of open-ended questions: they uncover strong biases quickly and efficiently, they set the stage for a cause challenge, and they are a fertile source for follow-up questions in oral voir dire.

This last benefit, open-ended answers as the source for follow-up questions in oral voir dire, cannot be overemphasized. Much can be learned from jurors elaborating in oral voir dire on the open-ended answers they gave on a questionnaire. Often it is not even what a juror says in follow-up voir dire, but rather how the juror says it that conveys the most information. Some jurors fiercely defend an opinion; others back down rather easily. Such reactions speak volumes as to how that juror will interact with other jurors during deliberations.

Closed-Ended Questions

Closed-ended questions have an image problem. As attorneys have come to appreciate the benefits of open-ended questions, closed-ended questions have come to be associated with old-fashioned and ineffective voir dire. This, of course, is not true. For example, a closed-ended question, such as, "Do you *always* believe what a police officer tells you?," may be very effective in a civil rights case where police testimony is important. Closed-ended questions are another tool, like open-ended questions, that attorneys should have in their repertoire. As with any tool, however, closed-ended questions are of little value unless one knows how and when to use them.

Typically, an open-ended question is most useful on a questionnaire to introduce a subject area. Once introduced, the subject area is best probed with a closed-ended question that identifies a specific attitude. Once this specific attitude is identified, however, it is best to go back to an open-ended question to determine why the individual holds this attitude and how strongly the juror holds it. A good example of the complementary use of open-ended and closed-ended questions follows:

- What opinions do you have about large, publicly-traded corporations?
- Do you think large corporations fire employees without good reason?
- Why do you think that?

Alternating between open-ended and closed-ended questions is an effective means for stimulating more thoughtful answers from prospective jurors. Overuse of either type of question tends to stifle jurors' thought processes.

Not only do closed-ended questions allow you to probe into specific attitudes that might be of relevance, they also force jurors to make a decision. This forced choice often can tell you more about a juror's predispositions than an open-ended question, especially if the juror does not respond well to open-ended questions or, as some jurors will call them derisively, "essay questions."

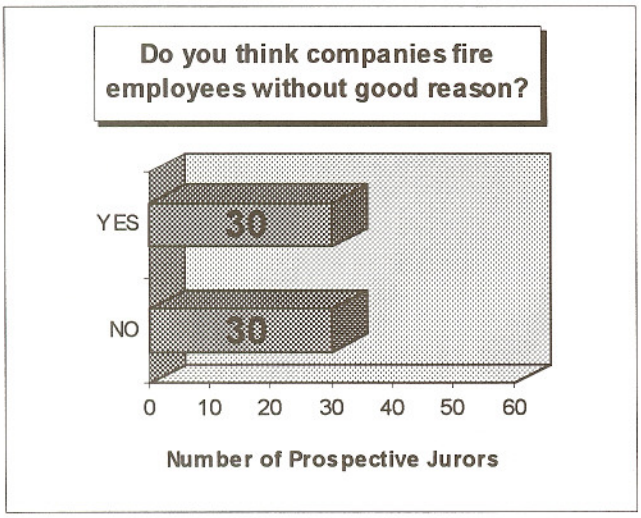
Perhaps most importantly, a closed-ended question can be crafted in such a way as to provide counsel with a strategic advantage in jury selection. Designing such questions for strategic advantage is described next.

Designing Questions for Strategic Advantage

At first glance, the closed-ended question cited in our previous example, "Do you think large corporations fire employees without good reason?," would seem to be excellent for use on a wrongful termination questionnaire. In an actual case, closer examination revealed,

however, that while the question was not a particularly bad one, it was not a particularly good one, either.

Through research, we discovered that the response pattern to this question was rather balanced—that is, roughly the same number of people say "Yes" as say "No." What this response pattern would mean in the courtroom is demonstrated in Graph 1, below.



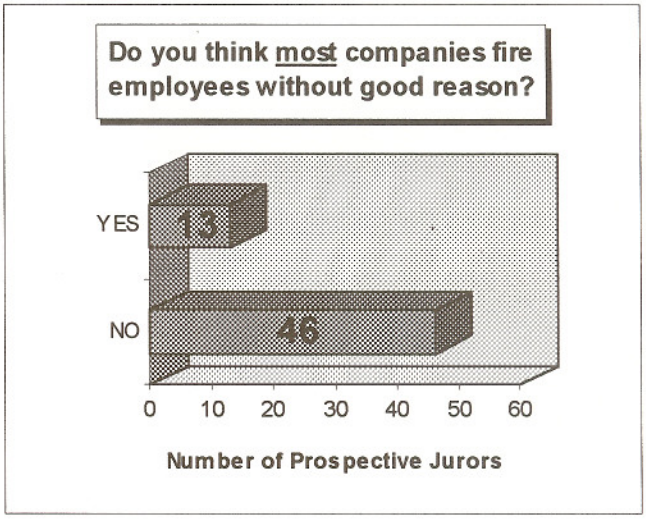
Graph 1

From a defense perspective, for example, this question has identified 30 potential peremptory challenges ("strikes")—that is, 30 individuals who say "Yes, large corporations do fire employees without good reason." Unfortunately for the defense attorney, he or she has only six strikes in superior court. The question, therefore, does little to narrow the defense attorney's focus. Fortunately, however, for the defense attorney, the plaintiff's attorney has the same problem of too many strike candidates and not enough strikes. The question does little to help, or harm, either side; it is, therefore, of little strategic value.

For a question to be of maximum strategic value, it must accomplish two goals. First, the question must narrow one's focus to a realistic number of strike candidates. And second, the question must not make opposing counsel's job too easy by allowing him or her to narrow the focus on your "good" jurors. In simple terms, a good strategic question must *"expose your strikes and bury your keeps."*

For a question to achieve this goal, it must elicit an *unbalanced* response pattern from prospective jurors. An unbalanced response pattern means that jurors are much more likely to give one response, rather than another, to a question. An unbalanced response pattern often can be achieved with a simple rewriting of a balanced question. In the above example, the defendant could rewrite the question as follows: "Do you think *most* large corporations fire employees without good reason?"

The actual responses of a jury panel to this question are illustrated in Graph 2, below.

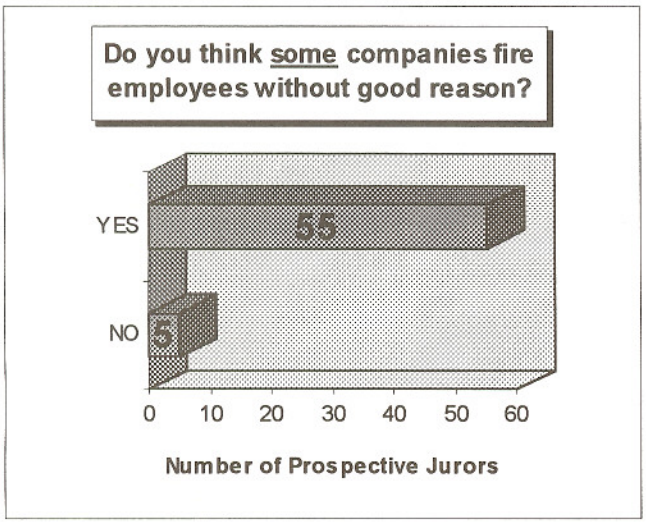


Graph 2

This revised question greatly narrowed the defense attorney's focus from as many as 30 potential strikes to only 13 potential strikes. This exposure of the "worst" jurors ("strikes") for the defendant is only one of the strategic benefits of this rewritten question, however. The rewritten question also buries the defendant's most likely advocates ("keeps") in a group of 46 prospective jurors, all of whom say "No, *most* large corporations do *not* fire employees without good reason." By greatly enhancing the defense attorney's ability to exercise strikes intelligently and reducing the plaintiff's ability to do the same, the rewritten question is of significant strategic value to the defense attorney.

A simple edit in the other direction, however, could have turned the strategic advantage to the plaintiff's benefit. For example, the question could have been rewritten in the following manner: "Do you think *some* large corporations fire employees without good reason?"

Graph 3 displays the projected response pattern to this new version of the question. As you can see, the plaintiff's attorney's strikes are now exposed and his or her keeps are now buried.



Graph 3

The lesson is that balanced questions, while more aesthetically pleasing, are of far less strategic value in jury selection than unbalanced questions. In a sense, it takes an unbalanced question to identify unbalanced jurors.

Conclusion

The use of jury questionnaires is increasing, as judges and counsel become aware of the benefits of their use. The purpose of this article has been to make some suggestions regarding the design of more effective questions and questionnaires, for the benefit of courts, litigants, and jurors alike.

Recommended Reading

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