

# **Procedures and Strategies for Using a Written Jury Questionnaire**

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October 2003**

The use of written juror questionnaires in civil cases is now routine in many parts of the country. A written jury questionnaire is particularly useful in cases where voir dire by necessity, due to the personal nature of the case, is apt to be quite invasive into a juror's personal life, experiences and opinions. For instance, in race or sex discrimination cases, attorneys must inquire as to personal relevant experiences with all prospective jurors. Any case, which involves highly personal questioning of prospective jurors, is fair game to ask the court to adopt a questionnaire. Use of written questionnaires in criminal cases set the precedent years ago.

Questionnaires vary in length, from three pages with about 25 questions to 15 pages with over 100 questions. Again, the length of the questionnaire and the substance of the questions are entirely related to the expected invasion of privacy in voir dire. As a rule, short is good. A shorter questionnaire increases your chances of its being adopted. A shorter questionnaire also results in a better juror attitude about their task of completing it and more reliable answers as a result. However, attorneys should not shy away from asking tough questions on the questionnaire.

The major benefit for both sides in using a questionnaire is in obtaining reliable answers from each prospective juror about each area of inquiry. Each juror must answer every question. Therefore, the attorneys avoid the entirely useless (and all too common) situation where the court or the attorneys ask a group of prospective jurors if they "have anything substantially different to say" from other responses about any of the inquiry so far. As everyone knows, this approach never leads to important new information about anyone.

Jury questionnaires are by no means appropriate or necessary for each and every case. In fact, it is a misuse of the process to routinely attempt to use a written questionnaire. It is a far better strategy to pick the right case for requesting the court to adopt a questionnaire.

Here is a summary in outline form of some of the lessons learned in over 20 years of trial consulting using a jury questionnaire in civil cases. Contact ITC for further information.

**1. Motion to adopt is written and submitted with supplemental points and authorities.**

At times, depending on the experience and attitude of the trial judge, it is not necessary any longer to submit a written motion accompanied by supplemental points and authorities. More often than not, these days in California, my clients merely make an oral motion and argue the motion directly to the court. If you need sample written motions, however, please contact ITC and we will help you locate such materials.

**2. Discussion with the court regarding adoption of the questionnaire.**

- a. You argue that the questionnaire will save time, will protect the privacy of jurors on sensitive issues, will assure that both sides get **complete information** about **all** of the relevant topic areas, and will identify inflammatory responses before the jury pool is contaminated.
- b. You argue that you believe that without a questionnaire voir dire could become long and irritating to the prospective jurors. Thus, if they fill out a questionnaire, you can guarantee to use only 5 to 10 minutes or so with each juror in the box for follow up questions. Jurors like the speedier procedure.
- c. You point out that often, as jury selection proceeds and everyone gets in a hurry to finish the job, less and less information is obtained about the replacement jurors and especially about the alternates. Statistics show that in about one-third of the cases, alternates actually deliberate. Thus, selection of alternate jurors is every bit as important as the selection of the primary group, and it is important to obtain the same information about each juror. Unfortunately, however, the selection of alternate jurors is often completed in 30 minutes or less, with virtually no information discovered about these jurors! You argue that such a consequence is unfair to the parties.
- d. You defend your questions as non-invasive and as necessary in this case to identify potentially prejudicial attitudes and experiences. You argue that all your questions are relevant. It is best if you can show exactly why a challenged question is relevant.
- e. Generally, you can concede that the other side can include any questions they want on the questionnaire, as long as you get all of yours. [You really do not want a judge writing the questions.]

- f. However, you should choose ahead of time some questions to delete, so that you look agreeable to the judge and the other side during the inevitable negotiations about questions, but then you fight for ones that you really want.
- g. You offer to put the agreed-upon, judge-approved, final version of the questionnaire on your word processing system and to bring enough copies with enough black ink ballpoint pens to the court for 60 to 100 (more or less) prospective jurors. It's important that jurors use black pens when writing answers, for ease of reading the photocopies of the originals.
- h. You offer to handle the reproduction of completed questionnaires, to deliver copies to the other side, and to return the original back to the judge on an agreed-upon schedule.
- i. You agree that all copies will be destroyed after jury selection is completed, or after the case is over and all appeals and any other post-trial activities are completed.

### **3. Administration of the questionnaire to the jurors.**

- a. After jurors are brought into the courtroom, hardship determinations should be made before jurors complete the questionnaire. Thus, no juror's time is wasted.
- b. After hardships, the surviving jurors then complete questionnaire and are asked to return the next morning (or some point in the future) for voir dire and jury selection.
- c. You request that the parties be allowed at least over night to review the questionnaires.
- d. You request that the clerk put completed questionnaires in random order after they are all handed in. Or, you request that the list of surviving jurors (after hardships is completed) be randomized. Thus, the parties will know the order in which **all** jurors will be called into the box. You want to know exactly who will be the first juror called; which one is the 10<sup>th</sup>; which one is the 25<sup>th</sup> and so on. This pre-randomization speeds up jury selection. Both sides can evaluate their positions on peremptory strikes while reviewing questionnaires if they know the order of appearance of the prospective jurors in the box.

- e. You agree that, while the time for follow-up questions will vary from juror to juror, no more than 5 to 10 minutes per juror in the box will be required on average. Thus, follow-up voir dire and the general process of jury selection should take no more than 4 to 6 hours, or less than one day.
- f. You ask the judge to agree to in-chambers voir dire for any juror who requests it, or if you think it is a good idea to protect the privacy of the juror or to protect your client from inflammatory outbursts in court.

#### **4. Questionnaire evaluation.**

- a. You want to have overnight to evaluate the questionnaires after receiving your copy. Often that is not possible, but at least three or four hours are necessary. You can argue that it makes no sense to go to all the trouble of having a written questionnaire if both sides are not given enough time to review the questionnaires properly and make preliminary judgments and formulate follow up voir dire. You can use the intervening time for motions in limine and other pre-trial activities.
- b. Make notes and flag questions on the questionnaire for follow up during oral voir dire. A primary use of a particular item on a questionnaire is that it gives you an avenue or entryway into a particularly important area of inquiry. You can comfortably say to a prospective juror, "Mr. Jones, I see that you wrote here that you do not have a high level of trust in in-house company investigations to figure out what happened when an employee complains about sex harassment. Can you please tell me more about your views on this?" Jurors fill out a questionnaire under oath, and you have a perfect right to inquire further when appropriate.
- c. Your trial team needs about 2 hours to caucus about the evaluated questionnaires prior to jury selection beginning in court. Generally, that is scheduled very early in the morning on which jury selection commences. In the alternative, it can be scheduled during the evening before. These meetings are important so that whoever is asking follow up questions is clear as to which ones need follow up and why.
- d. It is a good idea to make a preliminary judgment about each prospective juror on the basis of his or her responses to the questionnaire. Is this a juror you want to keep, are uncertain about, or want to strike? And you want to make some determinations as to which jurors the other side will strike. But remember, about 25% of the time, you will change your mind about a prospective juror after having conducted follow up voir dire!

## 5. Jury selection proceeds.

- a. On the day that jury selection actually begins, but prior to the commencement of voir dire, the judge and the attorneys should agree to meet outside the presence of the jurors and stipulate to as many **cause challenges** (or other obvious dismissals) as possible, on the basis of the written questionnaire responses only. This procedure saves a great deal of time and reduces unnecessary contamination and "education" of the whole group. If necessary, jurors can be brought into chambers (or the courtroom individually) for cause challenges questioning by both sides and the court. The remaining pool of jurors, then, constitutes the most likely group from which the sworn jurors can be quickly chosen.
- b. If a reasonably adequate questionnaire has been adopted, voir dire is limited to follow-up questions stimulated by a prospective juror's answer to particular questions.
- c. If an inadequate questionnaire has been adopted, then voir dire must proceed in the areas that you deem important to inquire about, whether on the questionnaire or not.
- d. Usually, you have the questionnaire of the juror you are talking to you in your hand when you conduct oral voir dire with that juror, so that you can easily refer to their particular answers when talking to them.
- e. In any event, general questioning of each juror about several topics is necessary, however, to get a feel for each juror and to give you an opportunity to talk to each juror. It is a mistake to skip any one juror, even those you know you are going to strike.

## 6. Strategy considerations.

- a. Request that a court reporter record all of voir dire. You never know when you might need to see the record of what someone actually said or did not say.
- b. Additional cause challenges are often your key to a successful jury selection. In many jurisdictions, the panel frequently will be unfriendly to your case, your client, and/or your witnesses. Thus, a primary strategy consideration during voir dire is for you to make every effort to create the conditions for successful cause challenges. This often requires you to pursue further and deeper questioning of certain prospective jurors.

- c. Discriminatory use of peremptory challenges is prohibited by, among other rulings, Batson and J.E.B. In California Superior Courts, Wheeler is often used in place of Batson. In cases in which gender, race or any other cognizable group characteristic (age, sexual orientation, social class) is present, you must: a) avoid the discriminatory use of peremptories; b) be ready to bring a motion against the other side for their discriminatory use of peremptory challenges; and c) have a ready response to the other side's claim of your discriminatory use of peremptory challenges. It is wise to consider ahead of time whether or not you think the other side will attempt to strike several jurors who might qualify for protection under Batson, J.E.B. or Wheeler (and their extensions). If you know that a particular group will be bad for you, you must never strike members of that group in succession.
- d. Generally speaking, it is best to follow a pre-determined strategy of which jurors to strike. That means you must think about all of the possible reasons you might have for your peremptory challenges ahead of time and not use the precious moments right before such decisions must be made for discussion about new reasons why you might not like someone.
- e. Be prepared to use all of your peremptory challenges, on one hand, if the panel is bad and continues to look bad as you proceed through peremptory challenges. On the other hand, if the panel is good and if a group of good jurors happens to be in the box at key moments, be prepared to pass to put the other side in a dilemma of having to accept the panel or strike. If you "get ahead" in strikes (using fewer than the other side), then you are at an advantage later to potentially shape the jury more to your liking.
- f. Sometimes the other side strikes (for their own reasons) a prospective juror that you're planning to strike also. What this means is that you have been "given" one more strike. Thus, for those jurors about whom you have mixed feelings, you usually wait to strike them later, rather than earlier, in the off chance that the other side may have mixed feelings also and strike them before you do. This kind of patience is especially useful in Federal Court, where, more often than not, you have fewer peremptory strikes to begin with.
- g. Your trial consultant and the other members of your team at the table take notes in your behalf, so that you do not have to write notes and talk to prospective jurors at the same time.

- h. You have a right to consult with your client prior to each peremptory strike. Use that right before the exercise of each peremptory strike in order to talk with your consultant and client.

In summary, the intelligent and professional use of written questionnaires has elevated jury selection procedures to a higher level of sophistication in the last 15 years. In our experience, approximately one-half of the cases on which we consult will be appropriate for a written questionnaire. Of those, at least 75 to 85% have in fact utilized one. The written jury questionnaire is one method that you can comfortably use to increase your confidence in your own peremptory strike decisions during jury selection. Nothing in the world will give you perfect and infallible information about prospective jurors, but in many cases a written questionnaire surely helps.