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Juror questions tend to focus on central issues in a case, and they can provide valuable insight into the jurors' thinking that can help a defense team fine tune its case.

Why the Defense Is Best Equipped to Provide Answers

Many states recently enacted rules that allow jurors to submit written questions to witnesses during trials. When these rules went into effect, many attorneys were skeptical of the juries' newfound role in trials. Many worried that

a jury's more active role would result in attorneys losing control of the presentation of their cases. However, since the implementation of these rules, several defense attorneys have found that juror questions provide valuable insight into jurors' thought process and that the defense side is the best equipped to respond to these questions, particularly in medical negligence cases.

Some states require that courts allow jurors to ask questions during trial. They include Arizona, Colorado, Indiana, and Florida. In the widely covered Jodi Arias murder trial in Arizona, the jurors submitted more than 100 questions to the defendant directly after they heard 30 days of testimony. Andrew Lu, "Jodi Arias Trial: Can Jurors Question Witnesses?," *Findlaw Crime and Criminals Blog*, (Mar. 7, 2013, 8:53 AM). Several other states, including Illinois and Wyoming, allow jurors to submit written questions in civil cases. In two separate law review articles, Nancy

S. Marder and Shari Seidman Diamond and her colleagues have provided a thorough literature review and explanations of the possible benefits of allowing jurors to ask questions. Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 Loy. U. Chi. L. J., 727 (2010); Shari Seidman Diamond *et al.*, *Juror Questions During Trial: A Window into Juror Thinking*, 59 Vand. L. Rev. 1927 (2006).

What those studies have found is that questions posed by jurors can give attorneys insight into how jurors process a case. Questions can show the attorneys which areas they need to address more thoroughly and clearly. Andrea Krebel, "Juror Questions: Why Attorneys Should Embrace Allowing Jurors to Ask Question," *The Jury Expert*, May 2012, at 1 (Society of Trial Consultants). Importantly, allowing questions asked by jurors to be answered in a court may prevent the jurors from turning to outside sources. If the jurors can receive



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the answers to the questions that they have during trial, they will be less likely to use outside sources such as the Internet to find answers to the questions that they think are important. *Id.* at 2.

Juror questions provide invaluable insight into how members of a jury comprehend the testimony that they hear, or what they have had difficulty understand-

Questions from jurors

that highlight the belief that one health-care provider is responsible for the actions of others will allow the defense to respond and separate out the care provided by a defendant care provider.

ing. The nature of these questions reflects attempts by jurors to understand and evaluate the context of the testimony. This is particularly important in complex medical negligence cases. For instance, it is beneficial to know if the jurors are confused about the terminology or the technology at issue in a medical case while the attorneys still have the opportunity to address it through the witness on the stand or upcoming witnesses. Once jurors begin to deliberate and realize that they are confused, they may send questions to the judge, but at that point, it is too late.

Key jury questions in medical negligence cases can be generally categorized as central or systemic processing questions. This occurs when a decision maker is motivated to understand and to evaluate persuasive communication and scrutinize the quality of the arguments. Diamond *et al.*, *supra*, at 1962; Shelly Chaiken, "The Heuristic Model of Persuasion," in *5 Social Influence: The Ontario Symposium* 3, 30 (Mark P. Zanna *et al.* eds., 1987). These questions submitted by jurors to experts provide a picture of how jurors attempt to deal with defendant and

expert testimony as it is presented at trial. Diamond *et al.*, *supra*, at 1962.

Commonly, jurors ask questions about issues that the attorneys do not believe or have not thought are important. Counsel can use this knowledge to emphasize this information through the testimony of upcoming witnesses to prevent jurors from chasing a trail with little information from the evidence or the witnesses to form a clear understanding. If the information sought truly is not a factor in a case, the attorneys are able to address that fact through witnesses or at least explain why it is not an issue during the closing argument. Krebel, *supra*, at 5.

Defendants Are Best Equipped to Respond

We have found through experience that the defense counsel in medical negligence cases are much better equipped to respond to juror questions than the plaintiff's. Obviously the defendant care provider at counsel table is a major resource. This gives the advantage to the defense regardless of whether a juror question is directed at a fact witness, a fact in the case, the plaintiff's expert, the plaintiff's lay witnesses, or the defendant or defense experts. The ability to tailor follow-up questions to juror-questioned witnesses and shape the lineup of questions to defense witnesses far exceeds the plaintiff's ability simply because the defense has the ability to ask the client-care provider directly. For example, the defendant care providers and defense experts are much more experienced with hospital protocols and guidelines, as well as the interpretation of codes and regulations. The plaintiff's counsel is left flat-footed in responding to those questions without the aid of a physician or another care provider as an assistant.

Similarly, the knowledge base of possible outcomes may elude the plaintiff's counsel if it is raised in a question from jurors. To the defendant's benefit, the defendant will be able to catalogue the different possible outcomes for the patient or plaintiff easily. Going last, the defendant also has the opportunity to expand upon the juror questions with subsequent witnesses. Our experience is that many questions come at the beginning of trial and trail off toward the end. This ability to respond with scientific med-

ical answers early under circumstances that frequently don't permit the plaintiff to rebut provides the defense with a clear advantage. While the inability of a plaintiff to respond will not always result in a defense verdict, the defense has the ability to make the evidence in its favor more consistent with the defense theme. When jurors supplement what they learn from trial presentations and testimony with answers to their questions that help them clarify ambiguities and understand omissions and inconsistencies, they will more commonly follow the theme of the party providing the answers. Diamond *et al.*, *supra*, at 1943.

Two cases illustrate this point well. In the first case, when a defendant care provider testified that there is no literature to support the causation opinions of a plaintiff's expert, the plaintiff had no way to rebut. In that case, the plaintiff's expert testified that the injuries were causally related to the negligent care and treatment by the physician, requiring several months of treatment. The defense expert testified that no literature supported a claim of injury as a result of the type of care at issue. The jurors questioned the defense expert about the issue. The defense was able to persuasively respond about the lack of available literature. The plaintiff had no expert testimony to rebut that contention. *Id.* at 1945.

In another medical negligence suit, the plaintiff claimed that he suffered partial paralysis from nerve damage produced by a medical procedure. The plaintiff's expert testified to a reasonable degree of certainty that the injuries were caused by the treatments received from the defendant over an extended period of time. The defense medical expert attributed the injury to an infection or other ailments or both. Faced with the competing explanations for the injury, the jury focused on the temporal proximity of the injury to the treatment provided by the defendant. One of the juror questions asked how long it would take for the paralysis to manifest itself after the nerve damage. The defense expert responded that the paralysis would be immediate. The plaintiff had no ability to respond with expert testimony. In reaching a verdict for the defendant, the jury concluded that the symptoms would have appeared immediately if the defendant had caused the injury and that other factors not related to the claim

of medical negligence were responsible for the paralysis. *Id.* at 1946.

As jurors listen to the evidence, they often have questions about the meaning of unfamiliar terms and standards. A plaintiff's attorney is often ill equipped to be able to define those through witness testimony, or certainly is ill equipped to define those terms and standards in a fashion through witness testimony that is consistent with the plaintiff's theme.

Undisclosed Opinions

In many states, limitations are placed on the ability of witnesses answering juror questions to render previously undisclosed opinions. Yet in trial, this line is blurred since logical corollaries to disclosed opinions will lead to explanations not previously discussed in expert or defendant depositions. If these corollaries are introduced for the first time based on the questioning of any witness, the defense is obviously the best able of the two sides to respond to those new extrapolations and corollaries. The defendant has a medical brain trust at the counsel table. The plaintiff has nothing to match it.

By definition, a defendant has more experts to respond to juror questions since in addition to presenting hire expert testimony, these defendant care providers also can offer expert testimony. The plaintiffs do not have that advantage. Uninitiated defense counsel will come to appreciate the opportunity to obtain mid-stream glimpses of how the jurors are processing the information coming into evidence and the ability to shore up a point. Omissions can be corrected. E.A. Lucci, *The Case for Allowing Jurors to Submit Written Questions*, 89 *Judicature* 16, 16 (2005). Defense counsel have more opinion witnesses to respond to juror questions, which is a clear advantage.

Uncovering Bias

Juror questions tend to focus on central issues in a case. However, bias will also come through the jurors' questions. It is exceedingly helpful to the defense to have a window into the minds of the biased juror. For instance, one of the most pervasive legal theories in medical negligence claims is the "captain of the ship" doctrine. Under this principle, a doctor is deemed to supervise and be responsible for a team of

health-care providers who perform surgery or provide other care. Jurors sometime lump all the health-care providers together in determining whether or not the care was appropriate. The errors of others can be laid at the feet of the attending physician.

All this makes efforts to distance one health-care provider from the other defendants difficult. Questions from jurors that highlight the belief that one health-care provider is responsible for the actions of others will allow the defense to respond and separate out the care provided by a defendant care provider. The defense is able to delineate the roles of each of the care providers more clearly as separate and distinct in response to the broad side "captain of the ship," "chain of command," or "nurse as the eyes and ears of the physician" plays by a plaintiff's counsel. If these plays by a plaintiff's counsel are connecting with the jurors, questions from the jurors will reveal it, and the defense will have an opportunity to respond.

Bias that favors a plaintiff or sympathy for a plaintiff will also come to light through juror questions. This bias is shown by questions regarding the injuries that a plaintiff has suffered or questions regarding the plaintiff's loss of a normal life. The defense is actually in the best position to respond by returning the focus to medical science, the risk of any procedure, or both, or the proposition that medicine is not an exact science. This leads the jury back to the medical issues and away from focusing on sympathy.

Also, hindsight bias will be applied by some jurors; they will believe that in hindsight, the diagnosis was obvious. Defense attorneys can identify jurors' questions relating to hindsight bias and respond by explaining that medical science is varied, unpredictable, and inexact. The plaintiff only has counsel's textbook knowledge about medical terminology and little or no experience to match that of the day-to-day experiences of the defendant care provider in explaining the unpredictable nature of medical science to the lay public.

Jurors Want Teachers

Jurors will trust and accept the side that has better teachers. Since much medical terminology can be foreign to the average juror, it is the job of the defense counsel to simplify and to teach concepts. Since the defense has

expertise sitting at counsel table, it has the ability to shape responses to questions in a coherent story and explain medical terminology in a fashion that is consistent with defense themes. Jurors essentially are comprised of "patients" who have brought with them their experiences in life with medical care provided to themselves, family, and friends for a variety of ailments. Jurors tend

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to match their own "expert" conclusions to the expert conclusions reached by the expert witnesses. If a juror question reveals a misconception in either side's story, the defense is best able to place the defendant back on the stand and explain the misconceived concept in a manner benefiting the defense theme.

Damages

If allowed, jurors commonly submit questions related to the medical limitations that a plaintiff has related solely to the medical negligence. Jurors submit questions such as,

"What is the plaintiff's physical condition like now?"

"What limitations will the plaintiff encounter in the future?"

The plaintiff typically has the upper hand in responding to these questions. But once questions such as these arise during trial, it signals to the defense a need to shift from simply defending against liability in the case to also defending against damages in the questioning of all witnesses. The defendant physician, the one who actually cared for the plaintiff, has the unique ability to respond to the juror questions persuasively by explaining how the limitations were preexisting or that the plaintiff's condition medically is unchanged.

Jurors Questioning Experts Directly

When jurors directly question the opinions of experts, it means two things: first, **Questions**, continued on page 77

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that the jurors are motivated to understand and to process the information, and second, that the jurors may not agree on the basis for the opinions rendered. Studies have shown that the nature of the questions directed to experts in medical negligence cases generally reflect attempts by the jurors to understand and to evaluate the content of the testimony. Diamond *et al.*, *supra*, at 1963.

Many of the questions that we have reviewed focus on alternative possible causes for a plaintiff's injury. For example, in one medical malpractice case, a juror asked: "What were the other potential causes for the... damage that you observed, and why were they less plausible causes for [the plaintiff's injury] than the cause that you have ascertained?" In another case involving a claim of infliction of emotional distress, a juror asked the psychologist, "What does the term 'reasonable psychological probability' mean?" This demonstrates that the jurors were probing the basis of the expert's conclusions. *Id.*

This is proof that jurors are willing to deal directly with the issues being put before them in their quest to find the answers. While both sides can benefit from some direct questioning of experts by jurors, if those questions come after the plaintiff's expert has left the stand, the defense has all the advantage. It is too late for the plaintiff's attorney to respond with new opinion testimony. If the questions are asked of the plaintiff's expert, the defense then has the luxury of time to consider whether, and how, to respond the juror question the testimony by defense witnesses. The defendant may draw an objection that the question and answer later provided by the defense exceeds the scope of the disclosure of the witnesses' opinions. However, it is commonly and successfully argued that such a question is a logical corollary not only of the disclosed opinion but that it is a logical corollary of the question propounded by a juror and the judge is allowed to let the juror ask it. Once the judge allows the question to be asked of a witness, opening up a new issue, any party should be allowed to ask subsequent witnesses questions related to the same topic. 