A FRESH LOOK AT JURORS QUESTIONING WITNESSES: A REVIEW OF EIGHTH CIRCUIT AND IOWA APPELLATE PRECEDENTS AND AN EMPIRICAL ANALYSIS OF FEDERAL AND STATE TRIAL JUDGES AND TRIAL LAWYERS

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ABSTRACT

An Iowa Supreme Court justice, federal district judge, and an Iowa lawyer take a fresh look at the underutilized jury trial innovation of jurors asking questions of witnesses ("the practice"). The Authors start with the first combined comprehensive analysis of Eighth Circuit and Iowa appellate case law on the practice. This analysis reveals some interesting twists and turns, including substantial differences between the two jurisdictions' case law and the fact that the Iowa Supreme Court first mentioned the practice more than 130 years ago in 1884. The Authors incorporate and discuss prior surveys on the subject but, more importantly, also conduct their own extensive and probing empirical study. This study is based on data collected from five online surveys, one each for Iowa trial court judges, federal district judges in the Eighth Circuit, magistrate judges in the Eighth Circuit, and two cohorts of Iowa lawyers, all conducted in the fall of 2015. The Authors found a dramatic difference in virtually all of the components of the study between lawyers and judges experienced with the practice (the clear

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minority) and those inexperienced with the practice (the clear majority). The Authors conclude that the positive benefits of allowing jurors to question witnesses far outweigh the few negatives and provide a suggested written protocol to encourage judges who have been reluctant to try the practice to take the small leap.

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I. INTRODUCTION

In *Bleak House*, Charles Dickens described the fictional case of Jarndyce and Jarndyce:

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises.[1]

Life imitates art. Lawyers absorbed in a complex trial may proceed blithely unaware the jury, sitting mute, is lost and confused. Unanswered questions linger in the jurors' minds, distracting them. As one trial judge noted, "Even lawyers can sometimes lose sight of the forest for the trees. Jurors do not."[2] Common sense, experience, and social science tell us that jurors allowed to ask questions of witnesses will better understand the evidence.[3] Yet most juries must process the evidence during trial in silence, at a cost of diminished understanding and engagement. This Article takes a fresh look at a long recognized but underutilized procedure well within the trial court's discretion: allowing jurors to ask properly vetted questions of witnesses.[4]

1. CHARLES DICKENS, BLEAK HOUSE 3 (Stephen Gill ed., Oxford Univ. Press 1996) (1853).

2. John R. Stegner, *Why I Let Jurors Ask Questions in Criminal Trials*, 40 IDAHO L. REV. 541, 543 (2004).

3. *See, e.g.*, Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question*," 78 CHI.-KENT L. REV. 1099, 1102–06 (2003) (noting the empirically supported, and practical, benefits in permitting jurors to ask questions of witnesses).

4. Judge Bennett has long favored experimenting with innovations to improve jury trials. He has been at the cutting edge of addressing implicit bias in voir dire and jury instructions. *See generally* Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson, Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (confronting the question of "[w]hat, if anything, should we do about implicit bias in the courtroom?"). Judge Bennett's other innovations include: providing cup holders in the jury box; presenting a PowerPoint for voir dire; providing a full and final set of instructions for each juror, complete with a table of contents, before opening statements in all civil and criminal trials; reducing the frequency of side bars; adding stretch breaks every 45 minutes; placing verdict forms in a Word chart so the jurors see exactly what they will have to decide; conducting high-tech paperless trials in an old-historic courtroom; and bringing fresh baked cookies to jurors in longer trials. For a detailed discussion of Judge Bennett's jury trial innovations by his former law clerk for the judicial term of 2007–2008, see Kirk W. Schuler, *In the Vanguard of the American*

This Article analyzes the advantages and disadvantages of allowing jurors to question witnesses, as revealed by case law, academic scholarship, and the experiences of judges and attorneys gleaned from recent surveys undertaken by us and others. Juror questions promote understanding, help counsel identify issues that need more illumination, and motivate jurors to be more attentive.[5] Our goal is to encourage trial judges to experiment with allowing jurors to question witnesses in civil cases using appropriate safeguards. To facilitate this practice, we provide a suggested protocol with jury instructions used by Judge Bennett.

Part II discusses the case law of the Eighth Circuit Court of Appeals from *United States v. Land*[6] to *United States v. Brockman*,[7] the first and last appellate cases, respectively, addressing the practice of allowing jurors to ask witnesses questions. Special attention is devoted to Chief Judge Donald P. Lay's concurring opinion in *United States v. Johnson* (*Johnson I*).[8] Chief Judge Lay called for a halt to the practice because, in his view, it leads to improper questions and distorts the jury's role as a neutral factfinder.[9] The Eighth Circuit decisions have not confronted the use of juror questions in civil cases, but express uneasiness about the practice in criminal cases.[10]

Jury: A Case Study of Jury Innovations in the Northern District of Iowa, 28 N. ILL. U.L. REV. 453 (2008). For additional discussion on enhancing the juror experience through innovation, see Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: WWJW—What Would Jurors Want?—A Federal Trial Judge's View*, 38 ARIZ. ST. L.J. (forthcoming Fall 2016) [hereinafter Bennett, *Reinvigorating and Enhancing Jury Trials*], http://ssrn.com/author=703083.

5. *See* Shari Seidman Diamond et al., *Jurors' Unanswered Questions*, 41 CT. REV. 20, 21 (Spring 2004) (analyzing the advantages and disadvantages of permitting juror questions); *see also* Michael A. Wolff, *Juror Questions a Survey of Theory and Use*, 55 MO. L. REV. 817, 821–33 (1990) (providing a summary of the key arguments for and against juror interrogation of witnesses).

6. *See generally* United States v. Land, 877 F.2d 17 (8th Cir. 1989).

7. *See generally* United States v. Brockman, 183 F.3d 891 (8th Cir. 1999).

8. United States v. Johnson, 892 F.2d 707, 711–15 (8th Cir. 1989) (Lay, C.J., concurring); *see also infra* Part II.A. This case will be referred to hereinafter as *Johnson I* to differentiate it from United States v. Johnson, 914 F.2d 136 (8th Cir. 1990), referred to hereinafter as *Johnson II*.

9. *Johnson I*, 892 F.2d at 713–14.

10. *See Brockman*, 183 F.3d at 899 (quoting United States v. Groene, 998 F.2d 604, 606 (8th Cir. 1993) (citing four cases from the Eighth Circuit as examples of panels of the circuit that "have expressed considerable uneasiness about the practice [of permitting jurors to question witnesses], especially where . . . the individual jurors posit questions within the hearing of the whole jury")).

Part III reviews Iowa case law allowing juror questions, dating back to the late 1800s. These decisions address timeless concerns that jurors may change from neutral factfinders to advocates, or they may ask argumentative or otherwise improper questions without proper precautions and judicial oversight. The Iowa Supreme Court has approved allowing juror questions screened by the court and counsel in *civil* cases as recently as 1980, in *Rudolph v. Iowa Methodist Medical Center*,[11] but only the Iowa Court of Appeals has addressed the practice in *criminal* cases.[12]

Parts IV to IX analyze survey results from a diverse pool of 166 federal and state trial judges and 203 attorneys about their experiences (if any) with jurors asking questions of witnesses. The surveys draw on the experiences of Iowa trial court judges, federal district court judges, and magistrate judges in the Eighth Circuit. The lawyers surveyed include members of the Iowa Academy of Trial Lawyers and the litigation section of the Iowa State Bar Association. As the survey results show, most judges and attorneys with "experience" in allowing juror questions favor the practice, while most of those unfamiliar with the practice do not.

II. CASE LAW OF THE EIGHTH CIRCUIT ON JURORS QUESTIONING WITNESSES

The Eighth Circuit first addressed the issue of jurors questioning witnesses in 1989 with *Land*,[13] and most recently in 1999 in *Brockman*.[14] Despite the relatively short span of time during which these cases were decided, "[t]he Eighth Circuit is the only circuit that has exhaustively examined, criticized, and ultimately approved the practice."[15] The Eighth Circuit has allowed the practice of jurors questioning witnesses in criminal cases.[16] Several Eighth Circuit decisions have raised concerns about the

11. Rudolf v. Iowa Methodist Med. Ctr., 293 N.W.2d 550, 555–56 (Iowa 1980).

12. *See* State v. Mohamed, No. 10–0302, 2010 WL 5394787, at *2–3 (Iowa Ct. App. Dec. 22, 2010).

13. United States v. Land, 877 F.2d 17, 19–20 (8th Cir. 1989).

14. *Brockman*, 183 F.3d at 898–99.

15. Laurie Forbes Neff, *The Propriety of Jury Questioning: A Remedy for Perceived Harmless Error*, 28 PEPP. L. REV. 437, 450 (2001) (providing a detailed examination of the practice of allowing jurors to question witnesses in the federal circuit courts and state courts). As the Ohio Supreme Court observed, "Every federal circuit that has addressed the issue has concluded that the practice of allowing jurors to question witnesses is a matter within the discretion of the trial court." State v. Fisher, 789 N.E.2d 222, 226 (Ohio 2003) (collecting cases).

16. *See* United States v. Waugh, No. 91-3273, 1992 WL 369480, at *2 (8th Cir. Dec.

inherent risks of permitting jurors to question witnesses, especially when jurors ask unscreened questions.[17] Even though the Eighth Circuit has consistently recognized the potential perils arising from juror questions in trial, it has "held that the practice of allowing juror questions is a matter committed to the sound discretion of the district court and is not prejudicial *per se*."[18]

In *Land*, the Eighth Circuit had to decide whether permitting juror questions constituted "plain error" when no objections were made about the procedure at trial.[19] The defendant was convicted on three counts of false statements in violation of 18 U.S.C. § 1001.[20] Guided by two cases arising out of the Fourth Circuit, *DeBenedetto v. Goodyear Tire & Rubber Co.*[21] and *United States v. Polowichak*,[22] the *Land* court determined that the trial court's decision to allow jurors to question witnesses did not constitute plain error.[23] The court noted, however, that the procedure used was "somewhat troubling" because the juror's proposed questions were "stated out loud before the Court had ruled them proper."[24]

A. *Chief Judge Lay's Concurrence in* Johnson I

The same year *Land* was decided, the Eighth Circuit, again, held that

16, 1992) ("This Court approved [the] practice [of a trial judge posing questions submitted by jurors, in writing, as solicited by the court] in the highly unusual situation where jurors are permitted to question witnesses in a criminal case." (citing United States v. Lewin, 900 F.2d 145, 148 (8th Cir. 1990))).

17. *See* United States v. Welliver, 976 F.2d 1148, 1155 (8th Cir. 1992) (explaining that "[i]n at least three cases, members of this court have voiced strong objections to [the practice of juror questions being propounded before other members of the jury]," including Judges Bowman, Beam, and Henley in U*nited States v. Gray*, 897 F.2d 1428, 1429–30 n.1 (8th Cir. 1990); Judges Lay and McMillian in *Johnson I*, 892 F.2d 707, 711–15 (8th Cir. 1989); and Judges Arnold, Bowman, and Magill in *Land*, 877 F.2d at 19, and noting that "[t]hese decisions in which seven, now eight, of the judges of [the Eighth Circuit] have joined make evident that juror interrogation of witnesses presents substantial risk of reversal and retrial").

18. United States v. George, 986 F.2d 1176, 1178 (8th Cir. 1993) (citing *Gray*, 897 F.2d at 1429–30 (8th Cir. 1990)).

19. *Land*, 877 F.2d at 19 (citing FED. R. CRIM. P. 52(b)).

20. *Id*. at 18.

21. DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 516 (4th Cir. 1985).

22. United States v. Polowichak, 783 F.2d 410, 413 (4th Cir. 1986).

23. *Land*, 877 F.2d at 19.

24. *Id*.

permitting juror questioning of witnesses was not plain error in *Johnson I*.[25] As in *Land*, jurors submitted questions "orally to the judge" before the judge "submitted appropriate questions to the witness[es]."[26] The defense counsel did not timely object at trial, and in accord with *Land*, the Eighth Circuit reviewed the issue under plain error.[27] Citing to *Land*, the Eighth Circuit explained that "this court has found that permitting jurors to question witnesses is not itself plainly erroneous."[28] Yet the majority's opinion "express[ed] no opinion on the appearance and propriety of juror questioning in general."[29] The majority merely "conclude[d] the lower court did not plainly err in permitting such questions."[30]

Chief Judge Lay's concurring opinion, which was joined by Judge Theodore McMillian, expressed "concern about the trial judge's practice of allowing jurors to question witnesses from the jury box."[31] According to Chief Judge Lay, "[A]llowing juror questions during trial is inherently prejudicial and should not be condoned. In a criminal case, the practice could reach constitutional dimensions, requiring reversal of a conviction under the due process clause."[32]

Chief Judge Lay's concurrence first highlighted the potential risks associated with juror questions.[33] The concurrence focused on the improper nature of the juror questions posed to the criminal defendant.[34] Chief Judge Lay emphasized that lay jurors, unfamiliar with the rules of evidence, may

25. *Johnson I*, 892 F.2d 707, 710 (8th Cir. 1989).
26. *Compare id.* at 709, *with Land*, 877 F.2d at 19.
27. *Johnson I*, 892 F.2d at 710 (citing FED. R. CRIM. P. 52(b); *Land*, 877 F.2d at 19)).
28. *Id.* (citing *Land*, 877 F.2d at 19).
29. *Id.*
30. *Id.*
31. *Id.* at 711 (Lay, C.J., concurring).
32. *Id.* (footnote omitted).
33. *Id.* at 712–13.
34. *Id.* at 712. The jurors asked the defendant about his past drug use, which was "clearly wrong." *Id.* at 711. Citing to the Federal Rules of Evidence 404(a)(1) and 404(b), Chief Judge Lay explained, "The prosecutor could not have asked the defendant questions about his past drug use." *Id.* at 712 (citing FED. R. EVID. 404(a)(1), 404(b)). As noted below, the Eighth Circuit has continued to express concerns after Chief Judge Lay's concurrence in *Johnson I* that permitting jurors to ask witnesses questions may diminish juror neutrality. *See, e.g.*, United States v. Groene, 998 F.2d 604, 606 (8th Cir. 1993) ("[J]uror questioning may tend to transform jurors from neutral fact finders into advocates. . . .").

ask impermissible questions.[35] "Because the jury will place great weight on answers to their own questions, they easily could end up convicting on an impermissible basis."[36] He also noted that "[i]f the defendant had refused to answer, as was his right, or if counsel had objected, the prejudicial effect on the jury could have been more devastating than were the defendant's answers."[37]

Second, Chief Judge Lay emphasized that the jurors' role as a neutral arbiter between citizens and the government could be distorted if jurors are permitted to question witnesses.[38] Chief Judge Lay focused on the effect juror questioning has on the adversary system:

> *The fundamental problem with juror questions lies in the gross distortion of the adversary system and the misconception of the role of the jury as a neutral factfinder in the adversary process.* Those who doubt the value of the adversary system or who question its continuance will not object to distortion of the jury's role. However, as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct.[39]

Furthering his argument that juror questions disrupt jurors' neutrality, Chief Judge Lay asserted that "even a seemingly innocuous response to a seemingly innocuous juror question can sway the jury's appraisal of the credibility of the witness, the party, and the case."[40] Also, Chief Judge Lay was convinced that a "juror openly engag[ing] in rebuttal or cross-examination, even by means of a neutral question, joins sides prematurely."[41] He claimed that such a juror "potentially closes off [his or her] receptiveness to further suggestions of a different outcome for the case."[42] Chief Judge Lay noted that, although nothing ensures a jury will be open-minded until the conclusion of a trial, eliminating the use of juror questions increases that probability.[43] "There exists too much danger in distortion of the jurors' role when an individual juror can, under the guise of neutrality, become an

35. *Johnson I*, 892 F.2d at 713.
36. *Id.* at 713.
37. *Id.* at 712.
38. *Id.* at 713–15.
39. *Id.* at 713 (footnote omitted).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

advocate in the process."[44] Recognizing the binding effect of *Land*, however, Chief Judge Lay concurred in affirming the defendant's conviction because *Land* held that, absent an objection at trial, questions from the jury "do not constitute plain error."[45]

Chief Judge Lay recognized there were studies "reflecting the views of some social scientists and perhaps some judges and lawyers, that suggest the practice of juror questioning is worth further experimentation in the courts."[46] However, Chief Judge Lay was ultimately more persuaded by the "wise caution" of the Fourth Circuit Court of Appeals: "[J]uror questioning is a course fraught with peril for the trial court. No bright-line rule is adopted here, but the dangers in the practice are very considerable."[47]

After Chief Judge Lay's concurrence was written, other articles, judicial decisions, and studies have addressed his two primary concerns.[48] Several specifically rebut his concern that juror questions distort the jury's role as a neutral factfinder.[49] His concurrence cited to an earlier study conducted by two eminent researchers on the practice of jurors questioning witnesses, Professors Larry Heuer and Steven Penrod.[50] His concurrence stated, "One empirical study tests many aspects of juror questions, but with respect to the risk that juror questions affect their neutrality, the authors write, '[b]ecause of the difficulty of measuring this possible consequence of juror questions, we were unable to test this hypothesis.'"[51] Years later, Professors Heuer and Penrod referred to Chief Judge Lay's concurring opinion, and based on more recent empirical studies, they concluded:

44. *Id.* at 714.

45. *Id.* at 715.

46. *Id.* at 713 (citing Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 L. & HUM. BEHAV. 231 (1988) [hereinafter Heuer & Penrod, *Field Experiment*]).

47. *Id.* (quoting DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 517 (4th Cir. 1985)).

48. *See, e.g.*, Robert Augustus Harper & Michael Robert Ufferman, *Jury Questions in Criminal Cases Neutral Arbiters or Active Interrogators?*, 78 FLA. B.J. 8, 12–13 (2004);. Mott, *supra* note 3, at 1109; Wolff, *supra* note 5, at 830–31.

49. *See, e.g.*, Mitchell J. Frank, *The Jury Wants to Take the Podium—But Even with the Authority to Do So, Can It? An Interdisciplinary Examination of Jurors' Questioning of Witnesses at Trial*, 38 AM. J. TRIAL ADVOC. 1, 19 (2014).

50. *See Johnson I*, 892 F.2d at 713 (citing Heuer & Penrod, *Field Experiment*, *supra* note 46).

51. *Id.* at 713 n.4 (quoting Heuer & Penrod, *Field Experiment*, *supra* note 46, at 255) (alteration in original).

"Jurors allowed to ask questions do not become advocates rather than neutrals."[52] Flash forward nearly two decades, two nationally known and highly regarded Texas trial lawyers of unparalleled repute, Stephen Susman and Thomas Melsheimer, clearly and convincingly rebut Chief Judge Lay's and others' concerns about the practice.[53] In our view, they successfully rebut the objections that: (1) asking questions turns jurors into advocates; (2) juror questions favor the plaintiff because the plaintiff goes first; (3) jurors ask impermissible questions or questions calling for inadmissible evidence; and (4) the practice materially adds to the length of the trial.[54] After their rebuttal, Susman and Melsheimer summarize the benefits of the practice:

> The use of juror questions in a trial has enormous benefits to the fact-finding process and the juror experience. Based on our experience, the use of these questions increases juror understanding of the issues in real time, and does so in a way familiar to an increasing number of jurors from younger generations. It encourages jurors to pay attention to the trial by investing them with the power to inquire about an issue that is important in their mind. This is especially true in a trial lasting more than a few days. Finally, the substance of questions asked can provide important insight to the lawyers about how their case is perceived by the

52. Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 260 (1996) [hereinafter Heuer & Penrod, *Note Taking and Question Asking*]. In this later work, Heuer and Penrod reference two studies: (1) they collected data from "judges, lawyers, and jurors for 67 Wisconsin state court trials"; and (2) they collected data from "judges, lawyers, and jurors for 160 state and federal court trials conducted in 33 states." *Id.* at 256–57. Heuer and Penrod relied on evidence that indirectly addressed Chief Judge Lay's concerns, namely, their national studies' verdict data indicated the practice of allowing jurors to ask questions "did not have any significant effects on the verdicts." *Id.* at 261. It is also notable that the judges from Heuer's and Penrod's studies were asked what their preferred verdict would have been, and the rate of agreement between the judge's preferred verdicts and the juries' verdicts was not affected by the juror questions. *Id.* Nor were the impressions of attorneys less favorable following the use of juror questions. *Id.* "Rather, both attorneys were perceived somewhat more favorably in question asking trials." *Id.* Heuer and Penrod noted one might expect the opposite outcome if jurors actually become less neutral. *Id.*

53. Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trial in Civil Cases*, 32 REV. LITIG. 431, 448–55 (2013) (providing a comprehensive discussion rejecting the common objections to jurors asking questions of witnesses).

54. *Id.* at 450–52.

> jury, and what issues demand more clarification or attention.[55]

In addition to Professors Heuer and Penrod's empirical studies, case law from other jurisdictions rebuts Chief Judge Lay's concern that jurors become advocates when permitted to ask questions.[56] For example, the Ohio Supreme Court reasoned that the concern that a juror question will distort a juror's role "rests on the erroneous premise that one must be passive to be impartial."[57] Citing to the state's evidentiary rule on the interrogation of witnesses by the judge in trial,[58] the Ohio Supreme Court reasoned that "the ability of a factfinder to question witnesses is not inconsistent with the duty of impartiality."[59] The court then continued:

> Having determined that jurors may submit questions and, at the same time, maintain impartiality, we conclude that the mere *possibility* that a juror may submit a biased question or engage in premature deliberation does not violate the Ohio or United States Constitution. The issue of whether juror questions are aimed at advocacy rather than clarification cannot be answered in the abstract, but instead requires courts to examine the nature of each question in the overall context of a trial. We conclude that the trial court is in the best position to render such a determination and, within its sound discretion, disallow improper juror questions.[60]

55. *Id.* at 452 (footnote omitted). Susman and Melsheimer were preeminent in the outcome of our extensive empirical studies on the practice discussed at length later in this Article when they noted that obstacles to this practice "apart from simple inertia, is the presence of trial lawyers who do not try many cases and thus can neither rely on sufficient experience to be comfortable advocating these practices to their client, nor predict how they would be utilized in court." *Id.* at 437.

56. *See, e.g.*, State v. Fisher, 789 N.E.2d 222, 229 (Ohio 2003); *see also* State v. Doleszny, 844 A.2d 773, 783–85 (Vt. 2004).

57. *Fisher*, 789 N.E.2d at 229.

58. *Id.* ("Evid. R. 614(B) expressly authorizes the trial court—the factfinder in a bench trial—to 'interrogate witnesses, in an impartial manner, whether called by itself or by a party.'").

59. *Id.* The following year, the Supreme Court of Vermont echoed this point: "It is difficult to perceive how we can accept this role of a judge [(to ask questions of witnesses in a bench trial)] as consistent with that of a neutral fact-finder, while rejecting this role for jurors as inconsistent with their neutrality." *Doleszny*, 844 A.2d at 785 (citing State v. Culkin, 35 P.3d 233, 254 (Haw. 2001) ("noting similarities between trial judge and juror questioning of witnesses and determining that allowing either to ask questions does not affect their roles in the adversarial process")).

60. *Fisher*, 789 N.E.2d at 229.

Other commentators and judges familiar with the practice have disagreed with the conclusion that allowing juror questions undermines the jury's impartiality.[61]

We now turn to Chief Judge Lay's other concern regarding jurors asking impermissible questions.[62] The safeguards approved by the Eighth Circuit since *Johnson I* avoid the prejudicial effects of an improper juror question. For example, four years after *Johnson I*, the Eighth Circuit upheld a trial court's use of juror questions where

> the jury submitted questions in writing to the court to be discussed with the attorneys and ruled upon by the trial judge. The jury was instructed on the questioning procedure used by the court and was told that it should not draw any factual conclusions from what it observed because it was the judge's job to determine which questions were proper. The questions were debated by counsel outside the hearing of the jury, and any question found by the court to be objectionable under the rules of evidence was rejected.[63]

Guided by Eighth Circuit precedent, our recommended procedures for screening juror questions discussed below greatly minimize the dangers of prejudice.

61. *See, e.g.*, Stegner, *supra* note 2, at 548 ("Simply because an answer has been given does not transform a juror into an advocate. A juror, like a judge, is a disinterested neutral. Once facts are introduced they begin to have an effect; however, it does not make either the judge or the jury when acting as a fact finder less impartial."); *see also* Mott, *supra* note 3, at 1119 ("This analysis of juror questions does not offer support to the argument that implementation of the questioning procedure jeopardizes the adversary system by allowing jurors to become biased advocates. Instead, the data provide evidence that jurors utilize questions to enhance their role as neutral fact finders."); Heuer & Penrod, *Note Taking and Question Asking*, *supra* note 52, at 261. As discussed below, our survey results indicate that only 16 percent of those judges experienced with the practice of jurors questioning witnesses agreed that it adversely affected the adversarial nature of trials. *Combined Judges Spreadsheet*, *infra* note 169, at Q. 29. The *Doleszny* court observed that "scholarly and professional commentary is near unanimous in its support for allowing jurors to question witnesses." *Doleszny*, 844 A.2d at 781 (citations omitted). The practice is also supported by the American Bar Association. AM. BAR ASS'N, CIVIL TRIAL PRACTICE STANDARDS 3–5 (2007).

62. *Johnson I*, 892 F.2d 707, 712–13 (8th Cir. 1989) (Lay, C.J., concurring).

63. *See, e.g.*, United States v. George, 986 F.2d 1176, 1178 (8th Cir. 1993) (emphasis added).

B. *The Eighth Circuit's 1990 Trilogy and the Appropriate Standards of Review*

Three additional criminal cases were handed down by the Eighth Circuit in 1990, which clarified the standard of review for challenges to the use of juror questions: (1) *United States v. Gray*;[64] (2) *United States v. Lewin*;[65] and (3) *United States v. Johnson* (*Johnson II*).[66]

In *Gray*, the Eighth Circuit affirmed the defendant's conviction for possessing cocaine base in excess of 50 grams with intent to distribute.[67] In reaching that holding, the *Gray* court, echoing *Land*, rejected the defendant's contention that the trial judge erred by allowing jurors to ask witnesses questions:

> Here, as in *Land*, the questions were propounded by jurors from the jury box and within the hearing of the other members of the panel. Nonetheless, the *Land* panel, expressing concern about the procedure followed (allowing juror questions to be stated outloud from the jury box prior to a court ruling on their propriety), found the issue to be one of whether or not prejudice results from the practice and not one of whether the practice itself is improper. We agree, both as a matter of policy, and because we are bound, under the rules of this circuit, by the holding of our earlier panel.[68]

The Eighth Circuit elaborated, "A trial is a search of truth, subject to the burdens of proof imposed upon the parties and the requirements prescribed by the Constitution and the law."[69] The Eighth Circuit concluded, "*While we might not have conducted the trial in the same manner*, we see nothing sufficiently prejudicial to overturn the result reached by the jury."[70] The standard articulated in *Gray* appeared to be for abuse of discretion.[71]

The *Gray* court indicated that it was generally apprehensive about juror questions.[72] The panel suggested that juror questions would be more

64. *See generally* United States v. Gray, 897 F.2d 1428 (8th Cir. 1990).
65. *See generally* United States v. Lewin, 900 F.2d 145 (8th Cir. 1990).
66. *See generally Johnson II*, 914 F.2d 136 (8th Cir. 1990).
67. *Gray*, 897 F.2d at 1429.
68. *Id.*
69. *Id.*
70. *Id.* at 1429–30 (emphasis added) (footnote omitted).
71. *See id.*
72. *See id.* at 1429–30 n.1.

appropriate if the trial court created a procedure in advance to process the questions.[73] However, the panel reiterated that it had significant concerns regarding juror questions:

> We in no way intend to suggest that trial judges of this circuit should permit juror questions. In fact, when conducting a trial, we probably would not follow such a course of action. As indicated by *DeBenedetto*, the practice is fraught with danger which can undermine the fairness of the proceeding. And, if we were to permit such interrogatories at a trial, we might well find the procedure outlined in *Polowichak* more appropriate.[74]

The "procedure outlined in *Polowichak*"[75] by the Fourth Circuit involved requiring "jurors to submit questions in writing, without disclosing the questions to other jurors, whereupon the court may pose the question in its original or restated form upon ruling the question or the substance of the question proper."[76]

The next month, in *Lewin*, the Eighth Circuit was confronted, again, with the issue of allowing jurors to question witnesses in criminal trials.[77] As in *Land* and *Gray*, the trial judge permitted the jury members "to direct their questions, if any, to him orally in court," and the parties' "[o]bjections were discussed at the bench, but within the presence of the jury."[78] The defendants' objections to the questions were overruled by the trial judge, and four of the six jurors' questions were answered.[79] Judge McMillian, writing for the majority, cited Chief Judge Lay's concurrence in *Johnson I* (which he had joined) and indicated that he "does not condone the practice

73. *Id.*
74. *Id.*
75. *Id*.
76. United States v. Polowichak, 783 F.2d 410, 413 (4th Cir. 1986).
77. United States v. Lewin, 900 F.2d 145, 147 (8th Cir. 1990).
78. *Compare id.* at 146–47, *with Gray*, 897 F.2d at 1429.
79. *Lewin*, 900 F.2d at 147. Of the two questions that were not asked, one question was irrelevant and the other question was going to be covered in a jury instruction. *Id.* The jurors' questions were described as "specific and factual in nature." *Id.* at 148. According to the Eighth Circuit, the jurors' questions "sought clarification of previous testimony and did not introduce new or unrelated subject matter." *Id.* Each question was thoroughly analyzed by the Eighth Circuit and no abuse was found. *Id.* at 147–48. The six questions submitted to the trial court in *Lewin* differed significantly from the "approximately 65 written questions" that jurors submitted to the trial court in *George*. *Compare id.* at 147, *with* United States v. George, 986 F.2d 1176, 1178 (8th Cir. 1990).

of inviting juror questions, much less permitting jurors to pose their questions, and requiring counsel to object, within the hearing of the other jurors."[80]

Nonetheless, the *Lewin* court recognized the Eighth Circuit "has held that the practice of allowing juror questions is a matter within the discretion of the district court and is not prejudicial per se."[81] In finding that the trial court did not abuse its discretion in permitting juror questions, the Eighth Circuit was persuaded by the fact that "none of the [four] juror questions" were directed at the defendants; only six questions were asked, and of those, four were allowed to be answered; and it was "not a case in which juror questioning was allowed to become disruptive or abusive."[82] Although it found the trial court did not commit reversible error, the Eighth Circuit cautioned: "[I]f [the trial court] decides to permit jurors to ask questions in future trials, *it should consider requiring jurors to submit their questions in writing, or orally out of the presence of the other jurors, without prior discussion with the other jurors*."[83]

After *Gray* and *Lewin*, the Eighth Circuit reviewed another criminal case, *Johnson II*, in which jurors were permitted to ask questions of witnesses.[84] Contrary to the Eighth Circuit's cautionary instructions in *Lewin*,[85] the trial court in *Johnson II* allowed jury members to ask questions

80. *Lewin*, 900 F.2d at 147.

81. *Id.* (citations omitted).

82. *Id.* at 147–48.

83. *Id.* at 148 (emphasis added) (citing United States v. Palowichak, 783 F.2d 410, 413 (4th Cir. 1986)); *see also* United States v. Bascope-Zurita, 68 F.3d 1057, 1064 (8th Cir. 1995) (upholding the trial court's decision to allow jurors to ask questions and the procedure used for the jurors to question the witnesses where "[t]he district court used a procedure in which juror questions were submitted in writing to the court and evidentiary issues were resolved by the parties prior to the question being submitted to the witness"); United States v. Stierwalt, 16 F.3d 282, 286 (8th Cir. 1994) (upholding the trial court's practice of jurors questioning witnesses where "[t]he juror questions were submitted in writing to the District Court, and evidentiary issues were resolved before the judge read the questions to the witnesses," and the Eighth Circuit did not find that the procedure employed was not in keeping with the Eighth Circuit's directives (citing *George*, 986 F.2d at 1178–79)); United States v. Waugh, No. 91-3273, 1992 WL 369480, at *2 (8th Cir. Dec. 16, 1992) (upholding the trial court's practice of jurors questioning witnesses where, in line with the procedure approved in *Lewin*, "the trial judge posed questions after jurors submitted written questions in response to the solicitation of the court" (citing *Lewin*, 900 F.2d at 148)).

84. *Johnson II*, 914 F.2d 136, 137 (8th Cir. 1990).

85. *Lewin*, 900 F.2d at 148.

of witnesses aloud, and the trial court then "considered the questions before allowing an answer to be given, and counsel were allowed to re-examine witnesses after the jury questions."[86] On appeal, the defendant contended that the trial court erred, in part, by allowing "juror interrogation of witnesses."[87] The Eighth Circuit provided a thorough summary of the evolution of the relevant case law—from *Land* to *Johnson I* to *Lewin*—in which the use of jury questions was upheld.[88]

The Eighth Circuit explained, because the defendant made objections at trial to "some specific jury questions," the Eighth Circuit's review could "be more heightened than for plain error, unlike in *Land*."[89] The Eighth Circuit continued by explaining, although this was the "apparent difference between the facts of *Land* and *Lewin*," the opinion for *Lewin* did not explicitly set forth "whether its review for abuse of discretion was because contemporaneous objections had been made to the jury questions or not."[90] Clarifying this point, the court asserted that abuse of discretion "is necessarily the appropriate standard where a trial objection has been made."[91] Therefore, when reviewing an objection to a question from the jury, the Eighth Circuit reviews for an abuse of discretion, but when reviewing an unobjected-to question, the court reviews for plain error.[92] In the end, the Eighth Circuit found "no plain error in any of the questions asked by the jury, nor [did the court] find an abuse of discretion in those questions allowed over [the defendant's] objections."[93]

C. *The Eighth Circuit's Continuing Uneasiness as to Juror Questions from 1992 to 1999*

Following the 1990 trilogy, several cases were decided by the Eighth Circuit that elaborated on the general concerns of juror questions and reiterated the procedures that should be used to reduce the risks associated

86. *Johnson II*, 914 F.2d at 138. Not surprisingly, based on the precedent discussed above, the Eighth Circuit highlighted that while it was "not determinative" to the court's decision, the trial court "ended its practice of interrogation of witnesses by jurors aloud from the [jury] box." *Id.* at 138–39 n.3.

87. *Id.* at 137.

88. *Id.* at 137–39.

89. *Id.* at 138.

90. *Id.*

91. *Id.*

92. *See id.*

93. *Id.* at 139.

with juror questions. For example, in *United States v. Groene*,[94] the Eighth Circuit discussed its more general concerns about juror questions:

> The reasons given for being skeptical of the procedure employed here are that juror questioning may tend to transform jurors from neutral fact finders into advocates, that the process of formulating questions may precipitate prematurely the deliberation phase of the trial, that jurors may weigh more heavily the answers to questions from each other than the answers to questions from counsel, that jurors may ask questions about legally irrelevant and legally inadmissible evidence, and that an objecting party risks alienating the jury.[95]

Although the trial court permitted the jury to directly question witnesses aloud within the hearing of other jurors in *Groene*, the Eighth Circuit affirmed the trial court on that issue.[96] This is because, as the government pointed out, "the questions at issue were relatively innocuous, since there were so few of them relative to the length of the trial, and since they elicited only clarifications of previous testimony, cumulative evidence, or evidence that supported Dr. Groene's theory of defense."[97]

After expressing the general concerns associated with juror questions and its reasons for affirming the trial court on permitting juror questions, the Eighth Circuit repeated the directives provided in *United States v. Welliver*,[98] *Lewin*,[99] and *Gray*,[100] for permitting juror questions:

> We believe . . . that if juror questions are allowed, the trial court should carefully weigh using a procedure that requires those questions to be submitted in writing or out of the hearing of (and without discussion

94. *See generally* United States v. Groene, 998 F.2d 604 (8th Cir. 1993).

95. *Id.* at 606 (citing DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 515–17 (4th Cir. 1985)); *see also* United States v. Welliver, 976 F.2d 1148, 1154–55 (8th Cir. 1992) ("[W]e state once again that we have strong concerns about juror questioning of witnesses.").

96. *Greone*, 998 F.2d at 606.

97. *Id.* There were 29 questions posed by jurors and 24 were allowed during a 10-day trial. *Id.* It is noteworthy that one year after *Groene* was decided, the Eighth Circuit wrote, "As far as we know, there is no requirement that juror questions be merely 'clarifying,' and we decline [the defendant's] invitation to impose such a requirement. We hold that the District Court did not err in permitting these juror questions." United States v. Stierwalt, 16 F.3d 282, 286 (8th Cir. 1994).

98. *Welliver*, 976 F.2d at 1154–55.

99. United States v. Lewin, 900 F.2d 145, 147–48 (8th Cir. 1990).

100. United States v. Gray, 897 F.2d 1428, 1429–30 n.1 (8th Cir. 1990).

> with) other jurors, since the practice employed here seems to us to carry serious risks of prejudice to the defendant and even, in a proper case, to the government.[101]

Finally, the Eighth Circuit's most recent comments on the issue of juror questions are found in another criminal case, *Brockman*.[102] In *Brockman*, the defendant was convicted on multiple counts of mail fraud, wire fraud, and conspiracy to commit mail fraud and wire fraud.[103] On appeal, the defendant argued that the district court erred by allowing jurors to ask the witnesses questions because it "plac[ed] jurors in the role of advocates rather than impartial factfinders."[104] The Eighth Circuit disagreed and held that the district court's procedure "conformed to" the circuit court's "prior directives."[105] "Indeed, the procedure employed in this case mirrored [the procedure] suggested in *Groene*."[106] The circuit court held that, "Because Brockman has identified no more than speculative prejudice from the district court's procedure or from juror questioning generally, the district court did not commit plain error."[107]

III. IOWA STATE APPELLATE CASE LAW

The practice of allowing jurors to question witnesses in Iowa state courts dates back to the late 1800s.[108] In *State v. George*, the oldest published

101. *Groene*, 998 F.2d at 606 (citing *Welliver*, 976 F.2d at 1154–55; *Lewin*, 900 F.2d at 147–48; *Gray*, 897 F.2d at 1429–30 n.1; United States v. Polowichak, 783 F.2d 410, 413 (4th Cir. 1986); DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 516 (4th Cir. 1985)).

102. United States v. Brockman, 183 F.3d 891, 898–99 (8th Cir. 1999).

103. *Id.* at 895.

104. *Id.* at 898.

105. *Id.* at 899.

106. *Id.*

107. *Id.*

108. The practice of permitting juror questions in trial is an old one: "Juror questioning has been reported in American courts since the late 1800s. Indeed, as the courts acknowledge, the practice is 'firmly rooted in both the common law and American jurisprudence.'" A. Barry Cappello & G. James Strenio, *Juror Questioning: The Verdict Is in After Years of Debate, Courts are Increasingly Allowing Jurors to Question Witnesses, Following Procedural Safeguards*, 36 TRIAL 44, 44 (June 2000) (citations omitted); *accord* Wolff, *supra* note 5, at 817 ("[J]uror interrogation was known in the English common law courts since at least the eighteenth century. Records of juror interrogation in American courts extend to the nineteenth century." (citations omitted)). Two practicing attorneys recently described the trial for the case of *People v. Harrison*, which took place in 1859 in Illinois and included a juror question. *See* Stephen R.

opinion that refers to the practice,[109] the Iowa Supreme Court devotes scant attention to the issue. The brevity of the discussion suggests that the practice was, at that time, commonplace or at least not an oddity. In the words of Iowa's highest court:

> Dr. Kennedy, who was county physician for part of the time that defendant was confined in the jail, and who attended him professionally, while expressing the opinion that at times defendant was insane, did not state it as his belief that he was insane at all times. In answer to a question put by a juror, this witness stated that a large part of the time he regarded him as responsible for any crime that he might commit, but that he did not know how soon that condition might change.[110]

One year later, the Iowa Supreme Court in *Herring v. State*, found no error where a trial court judge permitted the jury to ask a witness about his prior testimony in trial.[111] According to the opinion, the jury was "out for some time" and unable to "agree on the testimony of certain witnesses."[112] The jury returned to the courtroom, a witness was recalled, and he repeated his testimony.[113] Interestingly, at that time, the jury was "told to examine

Kaufmann & Michael P. Murphy, *Juror Questions During Trial: An Idea Whose Time Has Come Again*, 99 ILL. B.J. 294, 295 (2011). In that trial, Abraham Lincoln successfully defended Peachy Quinn Harrison against the charge of murder. *See* Travis H.D. Lewin, *Lincoln's Last Murder Trial:* People v. Harrison, ABA (June 4, 2014), http://apps.americanbar.org/litigation/committees/trialevidence/articles/spring2014-0614-lincolns-last-murder-trial-people-v-harrison.html. Kaufmann and Murphy noted that the transcript from the *Harrison* trial provides that, during the prosecution's questioning of a witness, one juror directly questioned the witness: "Who took you?" Kaufmann & Murphy, *supra* at 295, 297. Neither party objected to the question. *See id.* The main takeaways for Kaufmann and Murphy from the juror's question are worth repeating here: While this juror's question was not the climactic moment in the case, it *was* a sign of something important in its own right: the jury deeply cared about understanding the facts and issues, and the court, without objection by Mr. Lincoln, allowed the jury to be actively involved in reaching the correct verdict. The time has come again in Illinois to allow the jury to ask questions during trial, subject to the trial court's management. *Id*. at 295. Kaufmann and Murphy continued by explaining that "[f]ollowing Lincoln's era, the practice of allowing jurors to question witnesses was abandoned." *Id.* In the modern court system, "[e]very federal circuit that has addressed the issue" and "[t]he vast majority of state courts" concluded that trial courts have discretion to permit the practice of jurors questioning witnesses. *See* State v. Fisher, 789 N.E.2d 222, 226 (Ohio 2003).

109. *See* State v. George, 18 N.W. 298, 301 (Iowa 1884).

110. *Id.* (emphasis added).

111. Herring v. State, 1 Clarke 205, 210–11 (Iowa 1855).

112. *Id.* at 210.

113. *Id.*

him," but counsel "for both parties were refused the right to interrogate the witness, after he had repeated his testimony on the trial."[114] Following a dispute between the parties about the witnesses' testimony, the parties' counsel "again insisted on questioning the witness, which the court again refused, ruling that it was for the jury alone to inquire of the witness as to his testimony."[115]

The Iowa Supreme Court found no "good ground of error" from the trial court's decision to permit the jury (and prohibit counsel for both parties) to inquire of the witness.[116] The witness was recalled only for the satisfaction of the jury under the court's supervision.[117]

> We think it would be presuming too much on the ignorance of the jury, to suppose that they were misled by this side-bar altercation [regarding the witness's testimony and the counselors' attempts to inquire of the witness as to his testimony]; and that the refusal to allow counsel to interrogate the witness, was within the discretion of the court.[118]

The Iowa Supreme Court elaborated on the practice of permitting jurors to ask questions of witnesses in *Truman v. Bishop*.[119] The appellant's counsel claimed that "certain jurors were guilty of such gross misconduct during the trial as to require the verdict to be set aside on that ground."[120] The high court affirmed the judgment, stating, "It is always allowable, and we think courts generally approve, of jurors asking occasional questions of witnesses while giving their testimony."[121] On the other hand, the court noted that it is "manifestly improper for a juror to enter upon disputes, and call for the readings of minutes of testimony previously given, and to enter upon a discussion and controversy with counsel in the case as to the construction of written evidence."[122] The Iowa Supreme Court, noting the trial court's jury instructions, concluded the plaintiff was not prejudiced "by the unseemly and reprehensible conduct of said jurors."[123]

114. *Id.*
115. *Id*.
116. *Id.* at 211.
117. *Id.*
118. *Id.*
119. Truman v. Bishop, 50 N.W. 278, 279 (Iowa 1891).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

A. Rudolph *and the Iowa Supreme Court's Approval of Juror Questions in Civil Trials*

The Iowa Supreme Court revisited the practice of allowing jurors to question witnesses in a civil case in 1980. In *Rudolph*, the court stated that "the right of jurors to ask questions of witnesses" was an "issue[] of first impression."[124] The *Rudolph* court expressly approved the practice with procedural safeguards.[125]

In *Rudolph*, the hospital appealed an adverse judgment on a jury verdict in a malpractice action.[126] "[T]he evidence showed hospital employees had permitted [the plaintiff's] head to drop sharply backward while transferring him from a hospital cart to his bed after the surgery."[127] He "became partially paralyzed," and required further surgery and a lengthy convalescence.[128] A juror contacted the judge "in chambers before court convened on the third day of trial," when the treating surgeon was to resume his testimony.[129] The juror inquired whether jurors were allowed to ask questions of witnesses.[130] The trial judge responded that if the juror "had a question at the conclusion of the doctor's testimony he should write it out and the judge would deal with the matter at that time."[131] After the attorneys completed their examination of the surgeon, the judge informed the jurors that if they had questions for the witness, such questions should be submitted in writing to the judge.[132] A juror submitted two questions for the surgeon about possible causes of spinal cord swelling.[133] The trial court reviewed the

124. Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550, 553 (1980). When *Rudolph* was written, *George*, *Herring*, and *Truman* were far more difficult to find in the absence of modern full-text legal research tools, such as LexisNexis and Westlaw. Thus, it is understandable that those cases were not brought to the opinion author's attention. *See id.* at 555 (stating, "We have not previously decided whether jurors may submit questions to be asked witnesses.").

125. *Id.* at 556.

126. *Id.* at 553.

127. *Id.*

128. *Id.*

129. *Id.* at 555.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 556. The juror's requested written questions asked, "Would the previously described incident involving the alleged dropping of plaintiff's head necessarily result in visible disruption or damage to the dura or other parts of the spine? . . . How is the depth of the drilling of the intervertebral disc determined insofar as the depth varies from

questions with counsel and offered each counsel the opportunity to ask them.[134] When defense counsel declined, plaintiff's counsel posed the juror's questions to the witness after slightly rewording them.[135] The hospital's motions for mistrial and new trial were denied.[136] On appeal, the hospital argued that the trial court committed reversible error.[137] The Iowa Supreme Court disagreed and affirmed the judgment.[138] Citing one federal and four state court decisions, the *Rudolph* court explained, "In jurisdictions where the issue has arisen, courts have generally recognized the discretion of the trial court to allow such questions."[139] The *Rudolph* court stated, "we approve the practice in principle," and set forth the proper procedure for trial court judges to follow when permitting a juror's question to be asked:

> As finders of fact, jurors should receive reasonable help in resolving legitimate questions which trouble them but have not been answered through the interrogation of witnesses by counsel. Of course the questions must call for admissible evidence, and trial court discretion must be exercised to prevent abuse of the practice.
>
> When jurors manifest a desire to ask questions, the court should direct that the questions be submitted to the court in writing. The court should then conduct a hearing out of the presence of the jury in which objections may be made. When the court determines that questions are proper and may be asked, the inquiry of the witness should be conducted by the court rather than by counsel, unless counsel agrees to a different procedure. Finally, counsel should have the opportunity for additional interrogation of the witness on the subject raised by the questions after the court has asked the juror's questions.[140]

As *Rudolph* squarely held, Iowa trial courts have discretion to permit jury questions of witnesses in *civil* cases using the procedure outlined in that

person to person?" *Id.* These questions in *Rudolph*, as Professor Wolff later noted, "aid a juror's understanding of medical terminology and its relation to a plaintiff's injury." Wolff, *supra* note 5, at 822. This line of questioning illustrates that jurors questioning of witnesses can "clarify issues about which [the jurors] are confused." *Id.*

134. *Rudolph*, 293 N.W.2d at 556.
135. *Id.*
136. *Id.* at 553–54.
137. *Id.* at 553.
138. *Id.* at 561.
139. *Id.* at 555 (citations omitted).
140. *Id.* at 556.

case, which mirrors the procedure approved by the Eighth Circuit.[141] To date, the Iowa Supreme Court has not addressed the practice in *criminal* cases.

B. *The Iowa Court of Appeals Applies* Rudolph *in Criminal Cases*

The Iowa Supreme Court has not discussed the issue of allowing juror questions since *Rudolph.* The Iowa Court of Appeals, however, has applied *Rudolph* in two criminal cases. First, thirty years after *Rudolph*, in *State v. Mohamed*, the Iowa Court of Appeals addressed the practice in the context of alleged ineffective assistance of counsel.[142] The jury found Atif Mohamed guilty of indecent exposure in violation of Iowa Code section 709.9.[143] Mohamed appealed based on his trial counsel's failure to "object to questions submitted by jurors to be asked of witnesses."[144] Mohamed claimed due process violations under the Sixth and Fourteenth Amendments of the United States Constitution and Article One, Section Ten of the Constitution of the State of Iowa.[145] During the jury trial, jurors were permitted to submit questions to both the victim and a prosecution witness.[146] The trial court judge adopted the procedure approved for civil cases in *Rudolph*:

> The questions were shown to both the prosecutor and Mohamed's defense counsel, and then asked by the court to the witnesses. Counsel was then allowed to conduct additional re-direct and re-cross examination. A slight modification occurred when Mohamed was testifying, as his defense counsel was allowed to choose which jury submitted questions would be asked of him. The questions were then asked by defense counsel and the State was allowed to follow with re-cross examination. There was never direct interaction between the jurors and the witnesses.[147]

The Iowa Court of Appeals, citing *Rudolph*, stated, "Mohamed correctly notes that our supreme court has approved jury questioning only in civil

141. *See* United States v. Groene, 998 F.2d 604, 606 (8th Cir. 1993).

142. State v. Mohamed, No. 10–0302, 2010 WL 5394787, at *2 (Iowa Ct. App. Dec. 22, 2010) (citing IOWA CODE § 709.9 (2007)).

143. *Id.* at *1.

144. *Id.* at *2.

145. *Id.*

146. *Id.* at *1–2.

147. *Id.* at *1.

cases, not criminal cases."[148] Next, after summarizing the parties' arguments regarding the jurors' questions, the Iowa Court of Appeals decided to preserve the issue for a possible postconviction relief proceeding given the inadequate record and the lack of Iowa Supreme Court precedent addressing juror questions in criminal cases:[149]

> While we have guidance on the use of jury questions in civil cases in Iowa, and in criminal cases from other jurisdictions, the question remains open as to permitting jury questions in the criminal context in Iowa. With an unreported hearing on the issue of how the jury questions issue was handled in this case, we do not know defense counsel's position or strategy. As Mohamed is now claiming his counsel was ineffective for not objecting to the use of jury questions, the record is incomplete for our resolution of his claim. We express no opinion as to whether counsel had a duty to object to the questioning procedure, as every lawyer is entitled to their day in court to explain his or her decision. We preserve this claim for a possible post-conviction relief proceeding.[150]

A year later, in *State v. Buchanan*, the Iowa Court of Appeals held that the defense counsel did not provide ineffective assistance by failing to object to jurors submitting questions for witnesses.[151] In *Buchanan*, the jury found the defendant guilty of possession of crack cocaine with intent to deliver, in violation of Iowa Code section 124.401(1)(*c*).[152] During the trial, a juror asked a court attendant whether jurors were permitted to ask witnesses questions.[153] The trial judge explained the procedure outlined in *Rudolph*.[154] Juror 1 had four questions, Juror 2 had three questions, and Juror 3 had two

148. *Id.* at *2 (citing Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550, 555 (Iowa 1980)).

149. *Id.* at *3.

150. *Id.* (citing State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978); State v. Johnson, 784 N.W.2d 192, 198 (Iowa 2010)).

151. State v. Buchanan, 800 N.W.2d 743, 750 (Iowa Ct. App. 2011).

152. *Id.* at 745 (citing IOWA CODE § 124.401(1)(c) (2009)).

153. *Id.* at 747.

154. *Id.* ("There is a procedure for a juror to ask a question and this is the procedure: First, you have to write that question down. Then the court attendant will give that question to me. We'll take a recess so that the attorneys and I can discuss that question outside of your hearing. We'll bring you back in and if the decision is that the question should be asked, I will then read the question to the witness and the witness will answer that question.").

questions.[155] After explaining to the jury that "[t]here are certain rules that permit and do not permit certain questions to be asked," the court asked Juror 1's question.[156]

The *Buchanan* court decided on direct appeal that "the record [was] adequate to address Buchanan's [ineffective assistance of counsel] claim because the hearing addressing the juror's questions was reported."[157] The crux of Buchanan's argument was summarized by the appellate court: "[Buchanan] contends counsel 'breached an essential duty by permitting [jurors to submit questions to the witnesses] and that procedure amounted to a structural error resulting in prejudice.'"[158] Buchanan needed to prove: "(1) counsel failed to perform an essential duty and (2) prejudice resulted."[159]

Noting the trial court's "careful application of the juror questioning procedure" approved for civil cases in *Rudolph*, the *Buchanan* court found "no breach of duty by counsel's failure to object to the issue of jury questioning."[160] The *Buchanan* court was guided by the "analysis and reasoning" in *Rudolph*, which it found "helpful and applicable to the instant case."[161] The *Buchanan* court observed, "[A]s the State correctly point[ed] out, '[a]lthough *Rudolph* happens to be a civil case, nothing about the decision limits its holding only to civil cases. In fact, *Rudolph* favorably cites five criminal cases from other jurisdictions, but no civil cases.'"[162]

As to whether there was "prejudice," the Iowa Court of Appeals determined that the defendant failed to show "a reasonable probability that

155. *Id.* One of Juror 1's questions was proper: "How was the defendant addressed by the officers before he ran? By name or 'Hey you'?" *Id.* One of Juror 2's questions was proper: "Were the suspect's fingerprints on the bag?" *Id.* None of Juror 3's questions were deemed appropriate. *Id.*

156. *Id.* Juror 2's question was not asked because, as the trial court informed the jury, another witness was supposed to answer that question. *Id.* In the end, the court did not have to ask Juror 2's question because the prosecutor asked the question on direct examination of another witness. *Id.* at 747 n.1. Thus, only one juror question was asked in *Buchanan* by the trial judge. *Id.* at 749.

157. *Compare id.* at 748 (citing IOWA CODE § 814.7(3)), *with* State v. Mohamed, No. 10-0302, 2010 WL 5394787, at *3 (Iowa Ct. App. Dec. 22, 2010).

158. *Buchanan*, 800 N.W.2d at 747.

159. *Id.* (citing State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008)).

160. *Id.* at 749 (citing State v. Vance, 790 N.W.2d 775, 785 (Iowa 2010)); *see also* Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 550, 556 (Iowa 1980).

161. *Buchanan*, 800 N.W.2d at 748.

162. *Id.* (third alteration in original).

the [one juror question the court read or the second question posed by the prosecutor] had any effect on the outcome of trial."[163] The appellate court held, "Because Buchanan ha[d] failed to prove that prejudice resulted from counsel's alleged breach, his claim for ineffective assistance of counsel must fail."[164] In the context of case law on jurors questioning witnesses from Iowa and the Eighth Circuit, we conducted a comprehensive online survey of federal and Iowa trial court judges and Iowa trial lawyers, discussed in detail below.

IV. THE SURVEY RESULTS

A. *Data Collection*

We gathered data from five cohorts about jurors submitting questions of witnesses ("the practice"). This included three distinct groups of trial judges, one state and two federal—Iowa trial court judges and U.S. district and magistrate judges from the ten districts within the Eighth Circuit. The other two cohorts were groups of Iowa lawyers. The first group of lawyers was from the Iowa Academy of Trial Lawyers (IATL), Iowa's prestigious invitation-only organization whose members include plaintiff and civil defense lawyers as well as a more limited number of lawyers that specialize in the prosecution and defense of criminal cases.[165] The second group of lawyers was from the litigation section of the Iowa State Bar Association (ISBA).[166]

The data was collected through five extensive online survey questionnaires. Each member of a cohort was sent an e-mail with an

163. *Id.* at 750 (citing State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009)) (noting that neither the one juror question the court read or the second question posed by the prosecutor had any effect on the outcome of the trial).

164. *Id.* (citing State v. Polly, 657 N.W.2d 462, 465 (Iowa 2003)).

165. IOWA ACAD. OF TRIAL LAW., http://www.iowaacademyoftriallawyers.com/ (last visited Feb. 17, 2016) ("Membership in the IOWA ACADEMY OF TRIAL LAWYERS is by invitation only, upon sponsorship and recommendation from peers and judges and unanimous approval by the Board of Governors. Membership is limited to 250 attorneys who have displayed exceptional skills and the highest integrity, and who have dedicated their professional lives primarily to trial practice.").

166. The ISBA is the oldest voluntary state bar association dating back to 1874, four years before the formation of the American Bar Association, and it includes approximately 8,000 members. *History*, IOWA ST. B. ASS'N http://www.iowabar.org/?page=History (last updated June 1, 2011).

invitation to take the survey by clicking on a link.[167] We received responses from 91 Iowa trial judges; 43 U.S. District judges; and 32 U.S. Magistrate judges, for a total of 166 responding judges. We received responses from 113 lawyers who were members of the IATL and 90 lawyers who were members of the litigation section of the ISBA, for a total of 203 lawyers. The data from the five surveys was electronically collected and collated into spreadsheets for each of the five cohorts.[168] The three judge cohorts then were combined into a combined judge spreadsheet and the two lawyer cohorts into a combined lawyer spreadsheet.[169]

167. The data was collected electronically from September 30 to October 9, 2015. A five response Likert scale was used for most questions in the survey with the following available responses: "agree," "strongly agree," "neutral," "disagree," and "strongly disagree." When this Article uses "agree," "agreed," "favor," or "favored," unless specifically noted, we have aggregated the responses "strongly agree" and "agree." The same is true for "disagree" and "disagreed," which the responses "strongly disagree" and "disagree" were aggregated. We elected to use the Statistical Standards for the National Center for Educational Statistics, Standard 5-3-5, to round percentage data in this Article to whole numbers. "The National Center for Education Statistics (NCES) is the primary federal entity for collecting and analyzing data related to education in the U.S. and other nations." *About Us*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/about/ (last visited Feb. 17, 2016). The percentages discussed for some answers to some questions do not add up to 100 percent for three reasons: (1) rounding; (2) a small number of respondents occasionally elected to provide comments rather than an answer; and (3) on the Likert scale questions with the answer "neutral" are most often not discussed for purposes of brevity.

168. The five surveys are: Mark W. Bennett, Thomas Waterman, & David Waterman, *Survey of 8th Cir. District Judges: Jurors Submitting Written Questions for Witnesses* (2015) [hereinafter *Survey of 8th Cir. District Judges*] (on file with authors); Mark W. Bennett, Thomas Waterman, & David Waterman, *Survey of 8th Cir. Magistrate Judges: Jurors Submitting Written Questions for Witnesses* (2015) [hereinafter *Survey of 8th Cir. Magistrate Judges*] (on file with authors); Mark W. Bennett, Thomas Waterman, & David Waterman, *Survey of IATL Lawyers: Jurors Submitting Written Questions for Witnesses* (2015) [hereinafter *Survey of IATL Lawyers*] (on file with authors); Mark W. Bennett, Thomas Waterman, & David Waterman, *Survey of ISBA Lawyers: Jurors Submitting Written Questions for Witnesses* (2015) [hereinafter *Survey of ISBA Lawyers*] (on file with authors); Mark W. Bennett, Thomas Waterman, & David Waterman, *Survey of Iowa Trial Judges: Jurors Submitting Written Questions for Witnesses* (2015) [hereinafter *Survey of Iowa Trial Judges*] (on file with authors).

169. *Combined Spreadsheet from Survey of IATL Lawyers* and *Survey of ISBA Lawyers*, *supra* note 168 [hereinafter *Combined Lawyer Spreadsheet*] (on file with the authors); *Combined Spreadsheet from Survey of Iowa Trial Judges*, *Survey of 8th Cir. District Judges*, *Survey of 8th Cir. Magistrate Judges*, *supra* note 168, [hereinafter *Combined Judges Spreadsheet*] (on file with authors).

B. *Overview*

As discussed in more detail below, most Iowa judges and lawyers and most federal district and magistrate judges in the Eighth Circuit are not accustomed to jurors questioning witnesses.[170] Perhaps not surprisingly, both lawyers and judges who have experienced the practice of jurors submitting question for witnesses, while in the minority of those surveyed, had a much more positive and encouraging view of the practice than those who had not experienced it.[171] Moreover, this remained true for every single attribute and metric of the practice we analyzed, including how the practice affects the fairness and efficiency of the trial, the juror understanding of the case, the accuracy of the verdict, and whether jurors ask too many questions or questions that are too argumentative.[172]

V. THE SURVEY RESPONDENTS' EXPERIENCE WITH JUROR QUESTIONS

A. *Lawyers*

Iowa lawyers have not had significant experience with the practice of jurors submitting questions for witnesses. Sixty-nine percent of the ISBA lawyers and 60 percent of the IATL members had not experienced a trial with juror questions in either Iowa state or federal court.[173] Twenty-four percent of the IATL members and 16 percent of the ISBA lawyers had experienced the practice in Iowa state courts.[174] Only 4 percent of the IATL and 9 percent of the ISBA lawyers had experienced the practice in Iowa federal courts.[175] Four percent of the IATL and 2 percent of the ISBA lawyers had experienced the practice in both Iowa state and federal courts.[176]

Combining the totals for all lawyers, 67 percent had not experienced the practice in any court; 33 percent had experienced the practice in some court, including 21 percent in Iowa state court, 7 percent in Iowa federal

170. *See infra* Part V.

171. *See infra* Part VI.

172. *See infra* Part VI.

173. *Survey of IATL Lawyers*, *supra* note 168, at Q. 1; *Survey of ISBA Lawyers*, *supra* note 168, at Q. 1.

174. *Survey of IATL Lawyers*, *supra* note 168, at Q. 1; *Survey of ISBA Lawyers*, *supra* note 168, at Q. 1.

175. *Survey of IATL Lawyers*, *supra* note 168, at Q. 1; *Survey of ISBA Lawyers*, *supra* note 168, at Q. 1.

176. *Survey of IATL Lawyers*, *supra* note 168, at Q. 1; *Survey of ISBA Lawyers*, *supra* note 168, at Q. 1.

courts, 4 percent in both Iowa state and Iowa federal courts, and 2 percent in courts outside Iowa.[177] Of the combined lawyers who had experienced the practice, 44 percent had only experienced it at one trial; 50 percent between two and five trials; 5 percent between six and ten trials; and 1 percent in more than 20 trials.[178]

One lawyer commented that he had been involved in a trial 35 years ago in Fall River, Massachusetts, which used the practice, prompting him to ask more questions than normal in subsequent trials.[179] Another reported favorable experience with the practice was in federal court in Omaha and that lawyers for both parties liked it.[180] One lawyer commented that the practice was used in Air Force courts-martial.[181]

B. *Judges*

Although a higher percentage of federal district and magistrate judges allow the practice compared to Iowa trial court judges, no cohort of these judges allows the practice in more than 30 percent of civil and criminal cases combined.[182] Eighty-one percent of the Iowa trial court judges, 60 percent of the federal district judges, and 59 percent of the magistrate judges in the Eighth Circuit have not used the practice in jury trials.[183]

Only 7 percent of Iowa trial court judges used the practice in civil trials and another 3 percent used it in both civil and criminal trials.[184] Interestingly, one judge allows the practice only in criminal cases.[185] Of the federal judges, 22 percent of the magistrate judges and 23 percent of the district judges allow the practice in civil cases.[186] Another 7 percent of the federal district judges

177. *Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 1.

178. *Id*. at Q. 20.

179. *Survey of IATL Lawyers*, *supra* note 168, at Q. 1, cmt. 4.

180. *Id.* at Q. 1, cmt. 1.

181. *Id.* at Q. 1, cmt. 3.

182. *See Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 1 (30 percent); *Survey of 8th Cir. Magistrate Judges*, *supra* note 168 at, Q. 1 (22 percent); *Survey of Iowa Trial Judges*, *supra* note 168, at Q. 1 (11 percent).

183. *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 1 (30 percent); *Survey of 8th Cir. Magistrate Judges*, *supra* note 168 at, Q. 1 (22 percent); *Survey of Iowa Trial Judges*, *supra* note 168, at Q. 1 (11 percent).

184. *Survey of Iowa Trial Judges*, *supra* note 168, Q. 1.

185. *Id.*

186. *Survey of 8th Cir. Magistrate Judges*, *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 1.

also allow the practice in criminal trials.[187]

When Iowa trial court and federal district court judges who have not permitted the practice were asked why not, they gave two primary reasons that were fairly split: philosophical objections (37 percent and 39 percent respectively) and that they have never been asked to use the practice (46 percent and 35 percent respectively).[188] On the other hand, far fewer magistrate judges had philosophical objections (17 percent), were waiting to see if more colleagues adopted the practice (17 percent), or waiting for lawyers to request the practice (50 percent).[189] Only 4 percent of Iowa trial court and federal district court judges were waiting to see if colleagues adopted the practice.[190] Only 6 percent of the Iowa judges, 4 percent of the federal district judges, and 11 percent of the magistrate judges indicated that lawyers have objected to the practice.[191] Concerns about reversals for using the practice were given by 9 percent of both the Iowa trial court and federal district court judges and 6 percent of the magistrate judges.[192]

Combining the judge cohorts, 41 percent of the judges indicated their number one reason for not allowing the practice was the fact that lawyers failed to request it.[193] This was followed by 32 percent who were philosophically opposed to the practice.[194]

Several of the magistrate judges indicated they were new to the bench and had not yet had a trial.[195] Several Iowa trial court and federal district court judges commented that they have never been asked by lawyers to use the practice.[196] One Iowa trial court judge indicated that "the issue has never

187. *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 1.

188. *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 2; *Survey of Iowa Trial Judges*, *supra* note 168, at Q. 2.

189. *Survey of 8th Cir. Magistrate Judges*, *supra* note 168, at Q. 2.

190. *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 2; *Survey of Iowa Trial Judges*, *supra* note 168, at Q. 2.

191. *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 2; *Survey of 8th Cir. Magistrate Judges*, *supra* note 168, at Q. 2; *Survey of Iowa Trial Judges*, *supra* note 168, at Q. 2.

192. *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 2; *Survey of 8th Cir. Magistrate Judges*, *supra* note 168, at Q. 2; *Survey of Iowa Trial Judges*, *supra* note 168, at Q. 2.

193. *Combined Judges Spreadsheet*, *supra* note 169, at Q. 2.

194. *Id*.

195. *Survey of 8th Cir. Magistrate Judges*, *supra* note 168 at Q. 1, cmts. 1–6.

196. *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 1, cmt. 3; *Survey of Iowa*

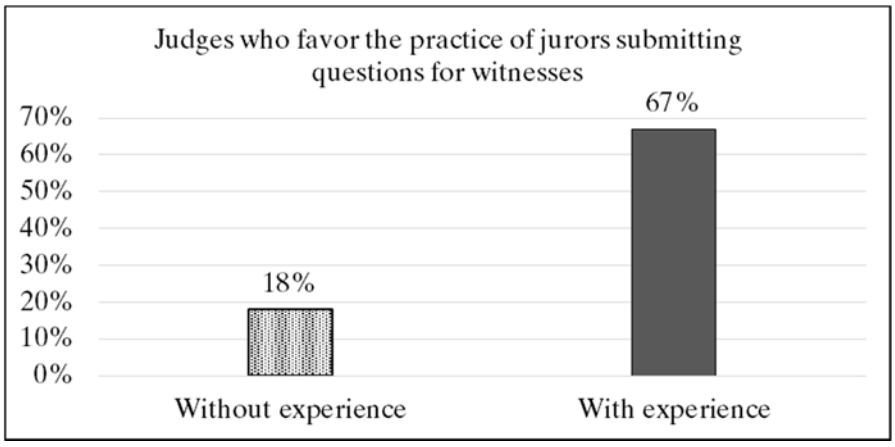
arisen, I have never suggested it, nor has a juror ever requested it."[197] Five other Iowa trial court judges commented that no juror has ever requested the practice.[198] One judge did not "think our present rules allow questions from the jury."[199]

VI. THE CHASM BETWEEN THE NEGATIVE PERCEPTION OF THE PRACTICE BY THOSE WHO HAVE NEVER USED IT AND THE POSITIVE EXPERIENCE OF THOSE WHO HAVE

A. *Judges*

Combining the judge cohorts, only 18 percent of the judges "inexperienced with the practice" favored it.[200] By contrast, 67 percent of the judges "experienced with the practice" favored jurors asking questions,[201] as indicated in Figure 1 below.

Figure 1 (Judges)



We then examined the combined judge cohorts and compared those inexperienced with the practice with those experienced with the practice on their perceptions of the following criteria: the fairness of the trial, jurors'

Trial Judges, *supra* note 168, at Q. 1, cmts. 1–5, 7, Q. 2, cmts. 11, 15, 21 & 22.

197. *Survey of Iowa Trial Judges*, *supra* note 168, at Q. 1, cmt. 3.

198. *Id*. at Q. 2, cmts. 8, 11, 14, 21 & 22.

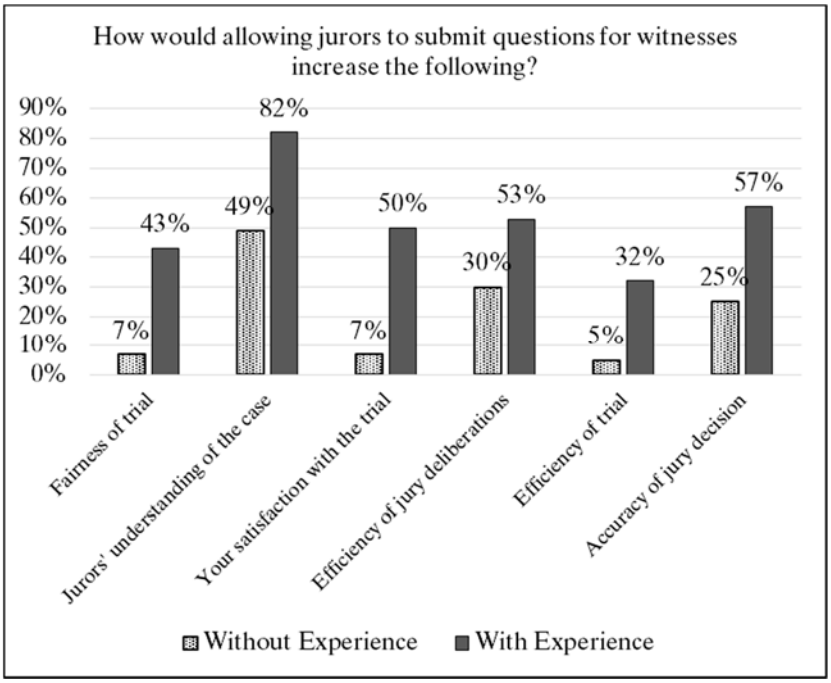
199. *Id*. at Q. 2, cmt. 20.

200. *Combined Judges Spreadsheet*, *supra* note 169, at Q. 19. Twenty-five percent were neutral. *Id.*

201. *Id*. at Q. 44. The neutrals dropped from 25 to 9 percent. *See id*.

understanding of the case, judges' satisfaction with the trial, efficiency of jury deliberations, efficiency of the trial, and accuracy of the jurors' decision.[202] For each criteria the judges were asked if the practice "decreased," had "no effect," or "increased" the effect on the trial.[203] As Figure 2 below establishes, judges inexperienced with the practice had dramatically less favorable perceptions of the effects of the practice on trials than those experienced with the practice.[204] This remains true for each of the five criteria measured.[205] However, it is important to note that on two of the criteria, "fairness of the trial" and "efficiency of the trial," less than a majority of judges experienced with the practice found it to increase fairness and efficiency.[206] Exactly 50 percent of the judges experienced with the practice indicated an increased satisfaction with the trial.[207]

Figure 2 (Judges)



202. *Id*. at Qs. 4, 21.
203. *Id*.
204. *See Combined Judges Spreadsheet*, *supra* note 169, at Qs. 4, 21; *infra* Figure 2.
205. *Combined Judges Spreadsheet*, *supra* note 169, at Qs. 4, 21.
206. *Id.*
207. *Id.*

We asked the combined judge cohorts whether the practice negatively changes the adversary nature of trials.[208] Forty-five percent of the judges inexperienced with the practice agreed that it changed the adversary nature of trials for the worse.[209] That dropped to 16 percent for judges experienced with the practice.[210]

One of the most dramatic differences between the judges inexperienced with the practice and those experienced with the practice is their views on jurors asking too many questions.[211] Sixty percent of the judges inexperienced with the practice perceived that jurors would ask too many questions.[212] That decreased to just 2 percent for judges experienced with the practice.[213] Indeed, when judges experienced with the practice were asked, on average, how many questions per witness are asked by the jurors, 67 percent indicated one; 27 percent answered two to three; and only 6 percent answered four to six.[214]

Along a similar line, 66 percent of the judges inexperienced with the practice worried that jurors would ask too many argumentative questions.[215] This decreased to 35 percent of the judges experienced with the practice, who also indicated that this "seldom" happens (57 percent) or "never" happens (43 percent)—not a single judge responded otherwise.[216]

In terms of lawyer objections to juror questions, 18 percent of the judges experienced with the practice indicated objections were "never" made, and 65 percent indicated they "seldom" received an objection.[217] When asked how often they sustained objections to juror questions, 17 percent answered "never"; 67 percent answered "seldom"; and 14 percent answered "frequently."[218] Eighty-nine percent of the judges have "never" (43 percent) or "seldom" (46 percent) raised an objection to a juror question sua sponte.[219]

208. *Id*. at Qs. 12, 29.
209. *Id*. at Q. 12.
210. *Id*. at Q. 29.
211. *Id.* at Qs. 13, 30.
212. *Id.* at Q. 13.
213. *Id.* at Q. 30.
214. *Id*. at Q. 35.
215. *Id.* at Q. 14.
216. *Id.* at Q. 34.
217. *Id*. at Q. 37.
218. *Id*. at Q. 41.
219. *Id*. at Q. 42.

When asked what the most frequent objections to juror questions were, judges indicated "irrelevant" (43 percent); "other" (35 percent); "hearsay" (8 percent); "unduly prejudicial" (8 percent); and "will be answered by another witness" (8 percent).[220] The most frequently sustained objections were "irrelevant" (44 percent); "hearsay" (28 percent); and "will be answered by another witness" (21 percent).[221] Seventy-three percent of the judges agreed that lawyers do not object to juror questions any more often than they object to other lawyers' questions.[222]

Judges who do not allow jurors to submit questions in criminal trials gave the following reasons for their decision: it "is bad policy" (26 percent); it "unfairly shifts the burden of proof" (22 percent); it "undermines the presumption of innocence" (17 percent); and it "violates due process" (17 percent).[223]

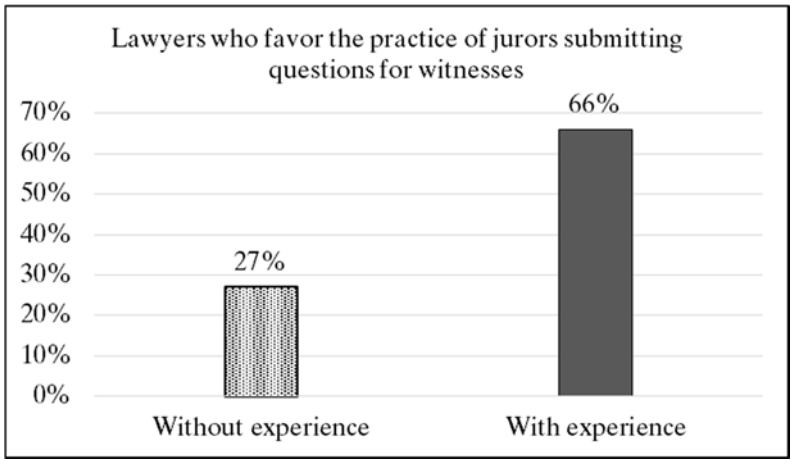
Judges experienced with the practice were asked if they used and then discontinued the practice.[224] Ninety-two percent answered, "No."[225] No Iowa trial court judge or Eighth Circuit magistrate judge answered, "Yes."[226] One federal district judge commented: "The problem is with a juror or jurors becoming an advocate. I stopped the practice . . . because of that . . . ."[227] Another federal district judge who stopped the practice commented: "I think that jurors will concentrate on their own views and questions rather than listening to the evidence."[228]

B. *Lawyers*

Combining the lawyer cohorts, 27 percent of the lawyers "inexperienced with the practice" favored it.[229] By contrast, 66 percent of the lawyers "experienced with the practice" favored the practice,[230] as indicated in Figure 3 below.

220. *Id*. at Q. 38.
221. *Id*. at Q. 39.
222. *Id*. at Q. 40.
223. *Id*. at Q. 46.
224. *Id*. at Q. 43.
225. *Id.*
226. *Survey of 8th Cir. Magistrate Judges*, *supra* note 168 at Q. 43; *Survey of Iowa Trial Judges*, *supra* note 168, at Q. 43.
227. *Survey of 8th Cir. District Judges*, *supra* note 168, at Q. 43, cmt. 1.
228. *Id.* at cmt. 2.
229. *Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 19.
230. *Id.* at Q. 43.

Figure 3 (Lawyers)



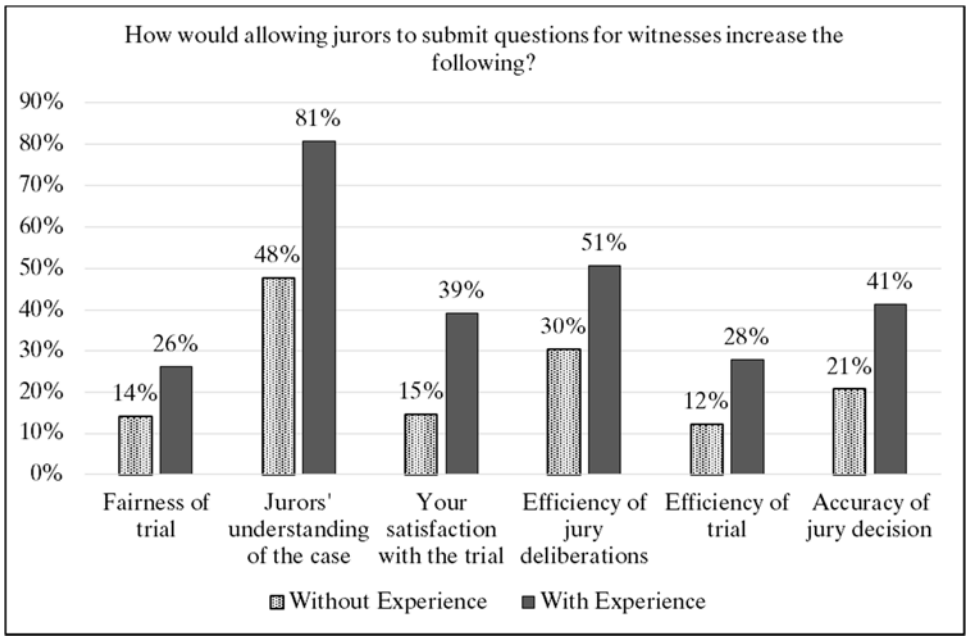
Because the practice is not widespread, lawyers do not believe other lawyers, in general, like the practice.[231] Only 5 percent of the lawyers inexperienced with the practice agreed that lawyers in general like the practice.[232] That increased to only 26 percent by lawyers experienced with the practice.[233] Yet, even among these lawyers experienced with the practice, 56 percent agreed that lawyers in general do not like it.[234] However, as noted above, when asked if they personally favored the practice, 66 percent of those experienced with the practice favored it.[235]

We then examined the combined lawyer cohorts and compared those inexperienced with the practice to those experienced with the practice on the following criteria affecting trials: "the fairness of the trial," "jurors' understanding of the case," "satisfaction with the trial," "efficiency of jury deliberations," "efficiency of the trial," and "accuracy of the jurors' decision."[236] For each criteria, the lawyers were asked if the practice "decreased," had "no effect," or "increased" the effect on the trial.[237] As Figure 4 below shows, those lawyers inexperienced with the practice had

231. *Id*. at Qs. 16, 33.
232. *Id*. at Q. 16.
233. *Id*. at Q. 33.
234. *Id*.
235. *Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 43.
236. *Id.* at Qs. 4, 21.
237. *Id.*

dramatically less favorable perceptions of the effects of the practice on trials than those experienced with the practice—the graph displays the "increased" responses.[238]

Figure 4 (Lawyers)



The data in Figure 4 is fully consistent with every question asked in the two surveys of lawyer cohorts; dramatic differences exist between lawyers inexperienced with the practice and lawyers experienced with the practice.[239] Our hypothesis was repeatedly and consistently confirmed. Lawyers experienced with jurors submitting questions for witnesses generally approved of the practice—lawyers inexperienced with the practice disapproved.[240]

We probed the combined lawyer cohorts about whether the practice negatively changes the adversary nature of trials.[241] Fifty-three percent of the

238. *Id.*
239. *Id. passim*.
240. *Id.*
241. *Id.* at Qs. 12, 29.

lawyers inexperienced with the practice held that view.[242] That decreased to 24 percent for lawyers experienced with the practice.[243]

Among lawyers, a significant difference between those inexperienced with the practice and those experienced with the practice was their views on jurors asking too many questions, although this was not as dramatic as for judges.[244] Sixty-four percent of the lawyers inexperienced with the practice (compared to 60 percent of the judges) perceived that jurors would ask too many questions.[245] That decreased to 26 percent for lawyers experienced with the practice (compared to 2 percent of the judges).[246] Indeed, when lawyers experienced with the practice were asked, on average, how many questions per witness were asked by the jurors, 65 percent indicated one, 33 percent answered two to three, and only 2 percent answered four to six.[247] Similarly, 64 percent of the lawyers inexperienced with the practice worried that jurors would ask too many argumentative questions.[248] That decreased to 14 percent of the lawyers experienced with the practice.[249]

In terms of lawyer objections to juror questions, 49 percent of the lawyers experienced with the practice indicated objections were "seldom" made; 46 percent indicated objections were "frequently" made; only 4 percent indicated they were "never" made.[250] When asked how often objections to juror questions were sustained, 8 percent answered "never"; 50 percent answered "seldom"; and 42 percent answered "frequently."[251]

When asked what are the most frequent objections to juror questions, lawyers indicated "irrelevant" (52 percent); "unduly prejudicial" (20 percent); "other" (13 percent); "will be answered by a later witness" (10 percent); and "hearsay" (5 percent).[252] The most frequently sustained

242. *Id.* at Q. 12.

243. *Id.* at Q. 29.

244. *Compare id.* at Qs. 13, 30, *with Combined Judges Spreadsheet*, *supra* note 169, at Qs. 13, 30.

245. *Compare Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 13, *with Combined Judges Spreadsheet*, *supra* note 169, at Q. 13.

246. *Compare Combined Lawyer Spreadsheet*, *supra* note 169 at Q. 30, *with Combined Judges Spreadsheet*, *supra* note 169, at Q. 30.

247. *Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 32.

248. *Id.* at Q. 14.

249. *Id.* at Q. 31.

250. *Id*. at Q. 34.

251. *Id*. at Q. 38.

252. *Id*. at Q. 35.

objections, according to the lawyers, are "irrelevant" (36 percent); "unduly prejudicial" (22 percent); "all parties do not want the question asked" (22 percent); "will be answered by a later witness" (14 percent); and "hearsay" (11 percent).[253] Forty-one percent of the lawyers agreed that lawyers do not object to juror questions any more often than they object to other lawyers' questions, but 36 percent disagreed.[254]

VII. DIFFERENCES BETWEEN PLAINTIFF AND DEFENSE LAWYERS

We also looked at the differences concerning the practice of allowing jurors to ask questions of witnesses between lawyers who primarily represent plaintiffs or defendants.[255] First, among lawyers in the IATL inexperienced with the practice, not a single plaintiff or defense lawyer indicated "strongly agree" when asked if they favor the practice.[256] Only three plaintiff and three defense lawyers indicated "agree."[257] Ninety-one percent of the defense lawyers either "disagree" or "strongly disagree" with the practice compared to 80 percent of plaintiff lawyers.[258] In the "strongly disagree" category, 71 percent primarily represented defendants and 40 percent plaintiffs.[259]

The lawyers in the ISBA litigation section presented a somewhat different story. Among these lawyers inexperienced with the practice, 64 percent of plaintiff lawyers either "strongly agree" or "agree" with the practice.[260] None of the defense lawyers inexperienced with the practice "strongly agree," but 32 percent "agree" with the practice.[261] Thirty-six percent of plaintiff lawyers either "disagree" or "strongly disagree" with the practice compared to 56 percent of defense lawyers.[262] In the "strongly disagree" category, 32 percent primarily represented defendants and 21

253. *Id*. at Q. 39.

254. *Id*.

255. *Survey of IATL Lawyers*, *supra* note 168, at Q. 2; *Survey of ISBA Lawyers*, *supra* note 168, at Q. 2.

256. *Survey of IATL Lawyers*, *supra* note 168, at Q. 19. We filtered all answers to the survey by applying the "primarily represent" "defendants" or "plaintiffs" from Q. 2 to all other questions in the survey for both lawyer cohorts.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Survey of ISBA Lawyers*, *supra* note 168, at Q. 19.

261. *Id.*

262. *Id.*

percent plaintiffs.[263]

Turning to the ISBA litigation section lawyers experienced with the practice, we observed an interesting twist. A greater percentage of lawyers who primarily represent defendants (77 percent) favor the practice compared to lawyers who primarily represent plaintiffs (72 percent).[264] Likewise, a greater percentage of plaintiff lawyers disagree with the practice (14 percent) than defense lawyers (7 percent).[265] Interestingly, not a single ISBA lawyer experienced with the practice, either plaintiff or defense, "strongly disagree" with it.[266]

Of the IATL members experienced with the practice, a greater percentage of lawyers who primarily represent plaintiffs (69 percent) favor the practice compared to lawyers who primarily represent defendants (45 percent).[267] Likewise, a greater percentage of defense lawyers disfavor the practice (40 percent) than compared to plaintiff lawyers (23 percent).[268] Yet, for both plaintiff and defense lawyers, the single highest percentage response across the five Likert scale responses (strongly agree, agree, neutral, disagree, and strongly disagree) was that 40 percent of defense lawyers agree with the practice.[269]

VIII. ANALYSIS AND COMPARISON WITH OTHER SURVEYS

In a national study of jurors submitting questions for witnesses in 2006, it was reported "that juror questions during trial were permitted in 15% of state and 11% of federal trials."[270] Thus, we were somewhat surprised that the practice was not more widespread in the Iowa trial courts and the Eighth Circuit district courts. But, this is one of the significant findings of this study. As Judge Bennett recently wrote: "In a small but increasing number of states, jury questions of witnesses is not only encouraged but required by state law."[271] Indeed, in 1993, the Arizona Supreme Court created the

263. *Id.*
264. *Id.* at Q. 43.
265. *Id.*
266. *Id.*
267. *Survey of IATL Lawyers*, *supra* note 168, at Q. 43.
268. *Id.*
269. *Id.*
270. Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1929 (2006) [hereinafter Diamond et al., *Juror Questions During Trial*] (footnote omitted).
271. Bennett, *Reinvigorating and Enhancing Jury Trials*, *supra* note 4 (manuscript at

Arizona Jury Project "to improve juror comprehension and to increase juror participation in their process of fact-finding."[272] One of the innovations the Arizona Jury Project studied and adopted was the practice of jurors submitting questions to witnesses.[273] In a detailed study of the 829 juror questions submitted by jurors for witnesses in 50 civil jury trials, the authors concluded:

> [J]uror questions generally do not add significant time to trials and tend to focus on the primary legal issues in the cases. Jurors not only use questions to clarify the testimony of witnesses and to fill in gaps, but also to assist in evaluating the credibility of witnesses and the plausibility of accounts offered during trial through a process of cross-checking. Talk[ing] about answers to juror questions does not dominate deliberations. Rather, the answers to juror questions appear to supplement and deepen juror understanding of the evidence. In particular, the questions jurors submit for experts reveal efforts to grapple with the content, not merely the trappings, of challenging evidence. Moreover, jurors rarely appear to express an advocacy position through their questions.[274]

We agree.

In 2005–2006, the Seventh Circuit Bar Association American Jury Project (Seventh Circuit Jury Project) was created to study jury trial innovations in the federal district courts of the Seventh Circuit—including jurors submitting questions for witnesses.[275] The Seventh Circuit Jury

38) (footnote omitted).

272. *Id*. (manuscript at 13–14) (footnote omitted)*; accord* THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 9 (1994) [hereinafter THE POWER OF 12]. This is a comprehensive report to study, evaluate, make recommendations, and monitor ways to improve jury trials, the effectiveness of juries, and the quality of their verdicts. *See generally* THE POWER OF 12.

273. THE POWER OF 12, *supra* note 272, at 90–92; *see also* Diamond et al., *Juror Questions During Trial*, *supra* note 270, at 1929 n.3.

274. Diamond et al., *Juror Questions During Trial*, *supra* note 270, at 1931.

275. Bennett, *Reinvigorating and Enhancing Jury Trials*, *supra* note 4 (manuscript at 15).

> The Seventh Circuit Jury Project was an outgrowth of the American Bar Association American Jury Project which "produced a single set of modern jury principles, entitled *Principles for Juries and Jury Trials* 'ABA Principles' that the ABA proposed be used as a model for state and federal trial courts conducting jury trials across the country." The revised ABA Principles were approved by the ABA House of Delegates in February 2005 at the ABA

Project's consideration of juror questions of witnesses was based on the prior American Bar Association American Jury Project's Principle 13(C), which provides in part: "In civil cases, jurors should, ordinarily be permitted to submit written questions for witnesses."[276] Judge Bennett recently summarized the findings of the Seventh Circuit Jury Project on this issue as follows:

> Seventy-four percent of the judges, forty-seven percent of the lawyers, and sixty-seven percent of the jurors thought juror questions increased the fairness of the trial. None of the judges, only seven percent of the lawyers, only five percent of the losing lawyers, and one percent of the jurors believed the juror questioning decreased the fairness of the trial.
>
> Seventy-seven percent of the judges, sixty-five percent of the lawyers, fifty-eight percent of the losing lawyers and eighty-three percent of the jurors thought juror questioning increased or helped juror understanding.
>
> The primary purposes for jurors asking questions in descending order were: to get additional information; to clarify information already presented; to check on a fact or information; and to cover something the lawyers missed.[277]

As shown in Figure 5 below, the data collected here yielded somewhat similar results regarding judges and lawyers experienced with the practice. The data was similar in the sense that judges were more likely to see the practice as increasing the fairness of the trial compared to lawyers. Yet, both judges and lawyers in our survey were markedly less convinced that the practice increased the fairness of jury trials than the judges and lawyers in the Seventh Circuit Jury Project.[278]

> midyear meeting. The Seventh Circuit Project self-proclaimed it "took a leading role nationwide in testing the usefulness and benefits" of the ABA Principles in "fifty jury trials . . . ."

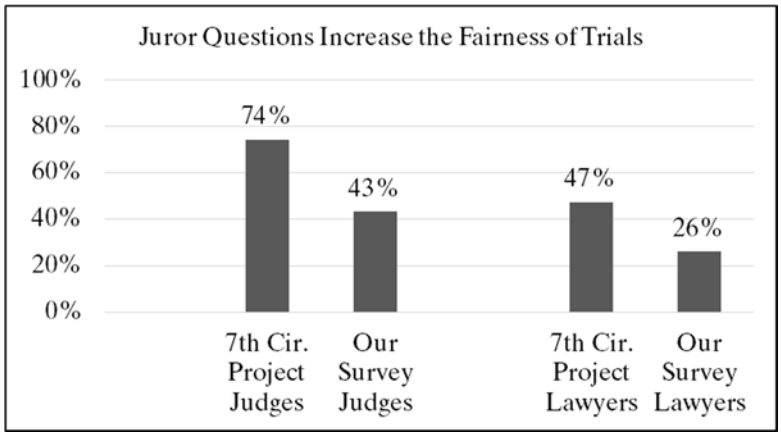
Id. (footnotes omitted).

276. AM. JURY PROJECT COMM'N, SEVENTH CIRCUIT BAR ASS'N, SEVENTH CIRCUIT AMERICAN JURY PROJECT: FINAL REPORT 15 (2008) [hereinafter SEVENTH CIRCUIT JURY PROJECT].

277. Bennett, *Reinvigorating and Enhancing Jury Trials*, *supra* note 4 (manuscript at 40) (footnotes omitted).

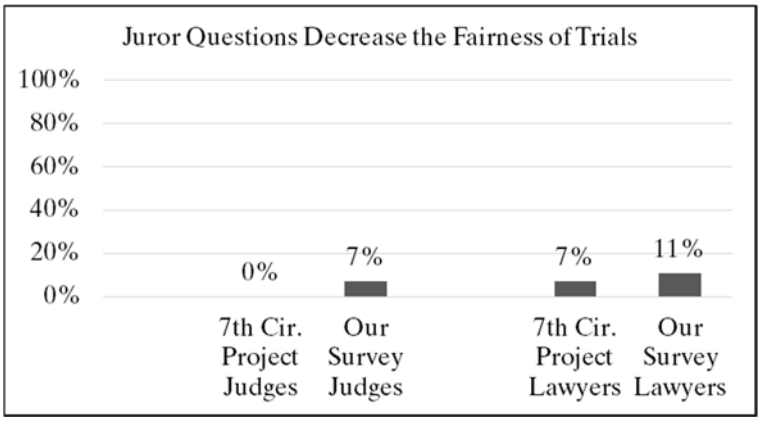
278. *Compare Combined Lawyer Spreadsheet*, *supra* note 169, at Qs. 3, 4, 6, 21, 23, *and Combined Judges Spreadsheet*, *supra* note 169, at Qs. 3, 4, 6, 21, 23, *with* SEVENTH CIRCUIT JURY PROJECT *supra* note 276, at 22 (noting 74 percent of judges and 47 percent

Figure 5 (Judges and Lawyers)



The judges and lawyers experienced with the practice were also slightly more inclined to believe that the practice decreased the fairness of the trials than the judges and lawyers in the Seventh Circuit Jury Project,[279] as illustrated in Figure 6 below.

Figure 6 (Judges and Lawyers)



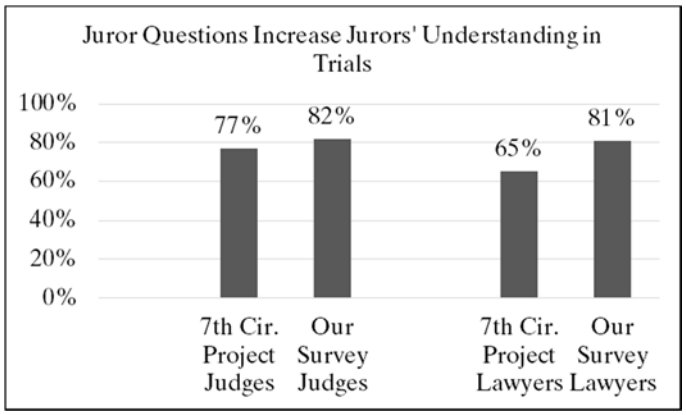
Ironically, when it comes to whether the practice increased the jurors'

of attorneys found the practice of permitting juror questions increased the overall fairness of the trial).

279. *Compare Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 21, *and Combined Judges Spreadsheet*, *supra* note 169, at Q. 21, *with* SEVENTH CIRCUIT JURY PROJECT, *supra* note 276, at 22.

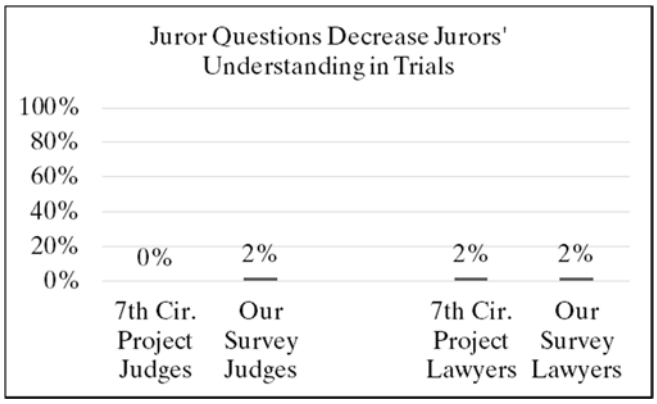
understanding of the trials, judges and lawyers in our survey were slightly more inclined to agree that it did,[280] as illustrated in Figure 7 below.

Figure 7 (Judges and Lawyers)



In terms of decreasing the jurors understanding of the trial, there was virtually no difference between the lawyers and judges in our survey and the lawyers and judges in the Seventh Circuit Jury Project,[281] indicated by Figure 8 below.

Figure 8 (Judges and Lawyers)



280. *Compare Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 21, *and Combined Judges Spreadsheet*, *supra* note 169, at Q. 21, *with* SEVENTH CIRCUIT JURY PROJECT, *supra* note 276, at 22.

281. *Compare Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 21, *and Combined Judges Spreadsheet*, *supra* note 169, at Q. 21, *with* SEVENTH CIRCUIT JURY PROJECT, *supra* note 276, at 22.

Argumentative questions from jurors have been identified as "[t]he most controversial aspect of juror questioning during trial" by a leading jury scholar.[282] In our study, 66 percent of the judges inexperienced with the practice and 64 percent of the lawyers inexperienced with the practice worried about argumentative questions.[283] However, while 35 percent of the judges experienced with the practice still worried about argumentative questions, 100 percent of those judges indicated it seldom (57 percent) or never (43 percent) happened.[284] The extensive data from the Arizona Jury Project indicated only 8.3 percent of the juror questions were argumentative, and one case and one juror were responsible for a significant number of the argumentative questions.[285] The researchers concluded, "[A]lthough an occasional juror may exceed reasonable bounds in suggesting questions, the court retains control to intervene in such a situation, declining to allow excessive or inappropriate questioning."[286] We agree. In fact, the solution is an easy one. As Professor Diamond, et al., observed: "On the rare occasions that a juror submits an argumentative question, the judge should either rephrase the question or should not ask it, even if the question would otherwise be proper."[287]

We also agree with the authors of the Arizona Jury Project that the practice of jurors submitting questions for witnesses, if wisely monitored by trial judges pursuant to a well-conceived written protocol, has all of the advantages they identified over two decades ago:

> We agree with many authorities which have concluded that carefully controlled juror questioning enhances active participation by jurors in the fact-finding process and improves juror comprehension. Among the advantages of juror questioning are: it assists in clarifying information and avoiding confusion; jurors remain more alert and better focused; jurors seem more satisfied concerning their roles at trial; and their questions may reveal juror confusion or misconduct. If proper safeguards are announced and carefully followed, no substantial risks

282. Diamond et al., *Juror Questions During Trial*, *supra* note 270, at 1964.

283. *Combined Lawyer Spreadsheet*, *supra* note 169, at Q. 14; *Combined Judges Spreadsheet*, *supra* note 169, at Q. 14.

284. *Combined Judges Spreadsheet*, *supra* note 169, at Q. 34.

285. Diamond et al., *Juror Questions During Trial*, *supra* note 270, at 1965.

286. *Id*.

287. *Id.* at 1970.

are incurred.[288]

The Seventh Circuit Jury Project also found that "permitting jurors to submit written questions for witnesses" achieved "the intended goal of enhancing juror understanding of the evidence presented at trial."[289] Indeed, 83 percent of the jurors surveyed "reported that the ability to submit written questions helped their understanding of the facts."[290]

We also believe concerns that juror questions will unduly lengthen trials are illusory. The data indicated that only 2 percent of the judges experienced with the practice believed jurors submit too many questions.[291] As Professor Diamond, et al., have noted, "[F]ears that trial time will be extended substantially by permitting juror questions appear unwarranted," as shown both in their study and also a pilot study in New Jersey.[292]

IX. THE WRITTEN PROTOCOL FOR JURORS SUBMITTING WRITTEN QUESTIONS FOR WITNESSES

We suggest each judge adopt a written protocol similar to the one used by Judge Bennett the past several years in civil cases, discussed below, because it strikes an appropriate balance between "enabling but not provoking juror questions."[293]

A pretrial order should set forth the court's policy of allowing jurors to submit written questions to witnesses. It should attach the judge's proposed stock instruction for juror questioning of witnesses. Here is the instruction Judge Bennett uses:

Instruction #__ - QUESTIONS BY JURORS

When the attorneys have finished questioning a witness, you may propose questions in order to clarify the testimony.

- Do not express any opinion about the testimony or argue with a witness in your questions

288. THE POWER OF 12, *supra* note 272, at 91 (footnote omitted).

289. SEVENTH CIRCUIT JURY PROJECT, *supra* note 276, at 24.

290. *Id.* at 13.

291. *Combined Judges Spreadsheet*, *supra* note 169, at Q. 30.

292. Diamond et al., *Juror Questions During Trial*, *supra* note 270, at 1941–42 (footnotes omitted); JURY SUB-COMM. OF THE CIVIL PRACTICE COMM., REPORT ON PILOT PROJECT ALLOWING JUROR QUESTIONS 7 (2001), https://web.archive.org/web/20030816112708/http://www.judiciary.state.nj.us/reports/civappa.pdf.

293. Diamond et al., *Juror Questions During Trial*, *supra* note 270, at 1966.

- Submit your questions in writing by passing them to the Court Security Officer (CSO)
- Do not sign your questions

I will review each question with the attorneys. You may not receive an answer to your question:

- I may decide that the question is not proper under the rules of evidence
- Even if the question is proper, you may not get an immediate answer, because a witness or an exhibit you will see later in the trial may answer your question

Do not feel slighted or disappointed if your question is not asked. Remember, you are not advocates for either side, you are impartial judges of the facts.[294]

294. The Seventh Circuit Jury Project Manual Phase Two suggests the following preliminary and final instructions on this issue:

Preliminary Instruction:

In this trial, we are using a procedure that you may not have seen before. As members of the jury, you will be permitted to submit questions for a witness after the lawyers have finished questioning the witness. Here is how the procedure works: After each witness has testified and the lawyers have asked all of their questions, I will turn to the jury to see if anyone has any additional questions. If you have a question, you should write it down and give it to the court staff.

You may submit a question for a witness to clarify or help you understand the evidence. Our experience with juror questions indicates that a juror will rarely have more than a few questions for one witness, and there may be no questions for some witnesses.

If you submit a question, the court staff will provide it to me and I will share your questions with the lawyers in the case. If your question is permitted under the rules of evidence, I will read your question to the witness so that the witness may answer it. In some instances, I may modify the form or phrasing of a question so that it is proper under the rules of evidence. On other occasions, I may not allow the witness to answer a question, either because the question cannot be asked under the law or because another witness is in a better position to answer the question. Of course, if I cannot allow the witness to answer a question, you should not draw any conclusions from that fact or speculate on what the answer might be.

Here are several important things to keep in mind about your questions for the witnesses:

First, all questions must be submitted in writing. Please do not ask questions

In jury selection, the judge should explain to potential jurors that they will be able to ask questions of witnesses and briefly explain the process to them. The judge may want to explain that this can help empower jurors, heighten their interest in the case, and improve their understanding of the issues. The process enables the attorneys to glean knowledge about what the jurors are thinking and where any confusion lies.[295]

After the examination of each witness is completed, the judge should ask the jurors if they have any questions and, if so, to pass them down to the Court Security Officer, bailiff, or other designated court staff. The designated staff person then would hand the questions to the judge, who should quickly review them after shuffling them, if there is more than one, so the lawyers will not know which juror asked which question. The judge should then call the lawyers up for a quick sidebar. The lawyers then have the opportunity to review the questions and lodge any objections. The judge

orally of any witness.

Second, witnesses may not be recalled to the witness stand for additional juror questions, so if you have a question for a particular witness, you should submit it at the end of that witness's testimony.

Finally, as jurors you should remain neutral and open throughout the trial. As a result, you should always phrase any questions in a neutral way that does not express an opinion about the case or a witness. Remember that at the end of the trial, you will be deciding the case. For that reason, you must keep an open mind until you have heard all of the evidence and the closing arguments of counsel, and I have given you final instructions on the law.

Final Instruction:

During the trial, written questions by some members of the jury have been submitted to be asked of certain witnesses. Testimony answering a question submitted by a juror should be considered in the same manner as any other evidence in the case. If you submitted a question that was not asked, that is because I determined that under the rules of evidence the answer would not be admissible, just as when I sustained any objection to questions posed by counsel. You should draw no conclusion or inference from my ruling on any question, and you should not speculate about the possible answer to any question that was not asked or to which I sustained an objection.

AM. JURY PROJECT COMM'N, SEVENTH CIRCUIT BAR ASS'N, SEVENTH CIRCUIT AM. JURY PROJECT, PROJECT MANUAL PHASE TWO 6–7 (2008), http://www.americanbar.org/content/dam/aba/migrated/jury/pdf/Phase_Two_Project_Manual.authcheckdam.pdf. We think these instructions are too long, and judges outside the Seventh Circuit are unlikely to give them because of their length.

295. *See, e.g.*, *id.* at 1–2 (citations omitted) (noting the rationale for pilot testing the practice and providing a list of authorities supporting the practice).

should immediately rule on any objections at sidebar. If the judge has white noise that can be activated for the sidebar, then the ruling is reported. If not, the judge should make a record of the oral ruling to the lawyers the next time the jury is out of the courtroom.

If any questions are going to be asked, the judge asks them one at a time. After each answer, the party that called the witness has an opportunity to ask any follow-up questions; then, the other parties have the opportunity to ask their follow-up questions.

If the judge has sustained an objection, the judge may want to explain to the jury in general why the question is not being asked (i.e., "not allowed under the rules of evidence," "will be answered by a future witness," etc.). All written questions, both asked and not asked, should be filed with an attached order at the conclusion of the trial.

X. CONCLUSION

"There are things known and there are things unknown, and in between are the doors of perception."[296]

The survey data reflects deep and pervasive perceptions of disfavor and apprehension among most, but not all, judges and lawyers who have never experienced the practice.[297] The inverse is also true: most, but not all, judges and lawyers who have experienced the practice hold a much more favorable view of it.[298]

Based on the survey data from the Seventh Circuit Jury Project, "the Seventh Circuit Jury Project Commission . . . strongly recommend[ed] use of this procedure in future state and federal jury trials."[299] We reach the same conclusion based on the Seventh Circuit Jury Project, the Arizona Jury Project, the findings detailed above from our own extensive survey, and the other information cited in this Article. Accordingly, we strongly recommend that trial court judges and trial lawyers experiment with allowing jurors to submit written questions for witnesses in civil trials with the appropriate

296. State v. Berroa, 6 A.3d 1095, 1097 (R.I. 2010) (quoting Aldous Huxley).

297. *See Combined Lawyer Spreadsheet*, *supra* note 169; *Combined Judges Spreadsheet*, *supra* note 169.

298. *See Combined Lawyer Spreadsheet*, *supra* note 169; *Combined Judges Spreadsheet*, *supra* note 169.

299. SEVENTH CIRCUIT JURY PROJECT, *supra* note 276, at 24.

instructions and safeguards set forth above.[300] We specifically suggest using a written protocol similar to the one currently used by Judge Bennett that strikes an appropriate balance of "enabling but not provoking juror questions."[301] We urge trial court judges and lawyers who have never tried this practice to "open the doors of perception" and overcome their natural fear and dislike of something they have not experienced. We are confident that the vast majority of trial court judges and lawyers who do so will become converts to the practice of allowing jurors to submit written questions to witnesses. Their experience will prove both the wisdom of this empirical study and the truth of a quote frequently attributed to Mark Twain: "It ain't what you don't know that gets you in trouble. It's what you know for sure that just ain't so."[302] Finally, we believe that the practice of allowing juror questions of witnesses under the control of trial judges will enhance not only juror understanding of the evidence in trial but will also enhance greater fairness and justice in jury verdicts.

300. *See supra* Part IX.

301. Diamond et al., *Juror Questions During Trial*, *supra* note 270, at 1966.

302. *See, e.g.*, Nigel Rees, *Policing Word Abuse*, FORBES (Aug. 13, 2009), http://www.forbes.com/2009/08/12/nigel-rees-misquotes-opinions-rees.html.