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Employing Common Sense in West Virginia Trial Courts: Encouraging Juror Note-Taking and the Questioning of Witnesses by Jurors

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I. INTRODUCTION

Our current jury system has come under increasing scrutiny after recent high-profile verdicts such as the Rodney King verdict and the infamous O.J. Simpson verdict.¹ In light of these and other verdicts from complex and very emotional trials, concern has grown regarding jurors’ ability to understand cases sufficiently to be able to decide them intelligently.² Many scholars suggest that the

¹ See Editorial, Judging Juries, USA TODAY, June 16, 1997, at 18A.
jury system needs to be reformed to improve jurors understanding.\(^3\)

Trials exist to develop the truth,\(^4\) and jurors are an essential element of this truth-finding process. Unfortunately, many of our courts have become entrenched in habit and fail to explore common sense methods that assist jurors in comprehending evidence and furthering the truth-finding function.\(^5\) In a recent publication, United States Supreme Court Justice Sandra Day O'Connor commented that aspects of the jury system that worked as recently as fifty years ago work less effectively today and need some repairs.\(^6\) She went on to say that we should be surprised that “so little of the necessary repair work has been done.”\(^7\)

Our current jury model developed at a time when the issues that came before jurors were within their common experience\(^8\) and at a time when many jurors were illiterate.\(^9\) Today, jurors function at a higher literacy level, but they are asked to render verdicts on complex and technical issues that involve vast amounts of complicated evidence during lengthy trials.\(^10\) Because of the increase in complexity, many trials have become an educational exercise where jurors are “taught” the facts through expert witnesses.\(^11\) Unfortunately, our jury system has not evolved to accommodate this shift to more complex trials. Therefore, to make jurors’ jobs easier and increase jurors’ ability to understand the evidence, courts should employ techniques that aid jurors in “learning” the facts.\(^12\) Courts should employ common sense techniques to increase juror comprehension, such as jurors asking questions of witnesses and taking notes during the trial. These techniques can be implemented easily; cost effectively; and, with the right procedures in place, virtually risk-free.

This Note provides insight from courts, legal scholars, and psychological research showing the benefits that trial courts, such as West Virginia circuit courts, may receive from employing these common sense procedures. Part II of the Note addresses juror note-taking during trial. This Part discusses the perceived “risks” of juror note-taking, a survey of West Virginia law regarding juror note-taking, and model procedures for juror note-taking. Part III of the Note addresses the questioning of witnesses by jurors during trial. This Part discusses the risks associated with jurors questioning witnesses and the research regarding the risks

\(^3\) See Sandra Day O’Connor, Juries: They May be Broken, But We Can Fix Them, 44 FED. L. 20 (June 1997).

\(^4\) See United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir. 1979). But see discussion infra Part IV.A. Some scholars dispute that a trial exists to develop the truth.

\(^5\) See generally Schwarzer, supra note 2, at 575.

\(^6\) See O’Connor, supra note 3, at 22.

\(^7\) Id.

\(^8\) See id.

\(^9\) See Watkins v. State, 393 S.W.2d 141, 145 (Tenn. 1965).

\(^10\) See Schwarzer, supra note 2, at 575.

\(^11\) See id. at 588.

\(^12\) See id.
and the benefits of juror questioning. After reviewing the risks and research regarding the risks, this Part suggests model procedures for juror questioning and provides a survey of West Virginia law regarding juror questioning. Finally, Part IV of this note briefly concludes that trial courts, including West Virginia trial courts, should employ juror note-taking and juror questioning of witnesses to assist jurors in understanding the evidence and ultimately determining the facts.

II. TAKING NOTES

A. Research Regarding the “Risks” and Benefits of Juror Note-Taking

Historically, courts have expressed disdain for juror note-taking because of the fear that jurors with more detailed notes may dominate deliberations. Additionally, courts have expressed fear that jurors will be distracted by the task of note-taking and miss important evidence or the witness’s demeanor. Courts also fear that jurors will give too much weight to their notes and use the notes as “evidence” rather than relying on the official transcript. Despite this history of apprehension, appellate courts have consistently allowed juror note-taking and left the decision to the discretion of the trial court judge.

A recent psychological study conducted by Steven Penrod and Larry Heuer suggests that the perceived risks involved in jurors taking notes do not exist or are nominal. The Penrod and Heuer study included 135 trials where note-taking was permitted. Questionnaires were distributed to participating jurors before the jurors left the courtroom. Judges and lawyers were also asked to complete questionnaires while the jury was deliberating.

13 See United States v. Darden, 70 F.3d 1507, 1537 (8th Cir. 1995) (citing United States v. Bassler, 651 F.2d 600, 602 n.3 (8th Cir.), cert. denied, 454 U.S. 944 (1981)).


15 See Schwarzer, supra note 2, at 591.

16 See Price, 887 S.W.2d at 954.

17 See, e.g., United States v. MacLean 578 F.2d 64, 66 (3d Cir. 1978); State v. Triplett, 421 S.E.2d 511, 513 (W. Va. 1992) (Syl. Pt. 5).

18 See Steven D. Penrod & Larry Heuer, Tweaking Commonsense: Assessing Aids to Jury Decision Making, 3 PSYCHOL. PUB. POL’Y & L. 259 (1997). Steven Penrod is a faculty member at the University of Nebraska-Lincoln, Department of Psychology, and Larry Heuer is a faculty member at Barnard College, Department of Psychology.

Although the publication does not make it clear, the study included cautionary instructions similar to the admonishing instructions recommended in this note. Pursuant to the author’s request, Steven Penrod provided a copy of the instructions.

19 See id. at 265.

20 See id. at 264-65

21 The questionnaires were not the same questionnaires given to the jurors. However, they did evaluate the same hypotheses as the juror questionnaires.
First, the study revealed that note-taking did not distract the juror taking the notes, nor did it distract the non-note-takers on the jury.\textsuperscript{23} Both note-takers and non-note-takers reported that they were not distracted by the note-takers.\textsuperscript{24} Additionally, the participating judges and attorneys said that they neither expected nor found note-taking to be distracting to the jurors.\textsuperscript{25} The attorneys participating in civil trials felt more strongly concerning this than the attorneys participating in the criminal trials.\textsuperscript{26} The study also found that note-takers did not have an undue influence over non-note-takers.\textsuperscript{27} The note-takers and non-note-takers agreed that the note-takers should not and did not have any advantage over the non-note-takers during deliberations.\textsuperscript{28} Further, the study found no evidence to support the argument that better educated jurors participated more during deliberations when aided by notes.\textsuperscript{29} Also, jurors’ notes were found to be unbiased, accurate records of the trial.\textsuperscript{30} Jurors reported that their notes were valuable records rather than doodles.\textsuperscript{31} One skeptical judge who participated in the experiment reported that, of the eight trials he participated in, only one juror doodled in the notes and most notes were well organized, articulate, and showed that the jurors had a grasp of the issues in the case.\textsuperscript{32} Furthermore, the notes did not favor one side or the other.\textsuperscript{33} The quantity of notes was positively correlated with the time each side spent presenting evidence.\textsuperscript{34} Common sense tells us that the advantage of note-taking outweighs the risks—how many judges and lawyers would feel comfortable making decisions in a lengthy, complex trial without notes?\textsuperscript{35} Some studies indicate that what our

\textsuperscript{22} See Penrod & Heuer, supra note 18, at 265.
\textsuperscript{23} See id. at 267.
\textsuperscript{24} See id.
\textsuperscript{25} See id. at 267.
\textsuperscript{26} See id.
\textsuperscript{27} See Penrod & Heuer, supra note 18, at 268.
\textsuperscript{28} See id.
\textsuperscript{29} See id.
\textsuperscript{30} See id. at 269.
\textsuperscript{31} See id.
\textsuperscript{32} See Penrod & Heuer, supra note 18, at 269.
\textsuperscript{33} See id. at 270.
\textsuperscript{34} See id.
\textsuperscript{35} See O'Connor, supra note 3, at 24.
\textsuperscript{36} See Schwarzer, supra note 2, at 591. The author, William W. Schwarzer, is a former United States District Judge for the Northern District of California.
common sense tells us is true: trial court systems reap benefits from juror note-taking. The most obvious benefit is that note-taking provides a valuable method of refreshing the juror's memory.

The Penrod and Heuer study also indicated no difference in recall. However, the researchers noted that the general recall questioning that must be used when conducting research in real trials may not be sensitive enough to pick up marginal differences in performance. The researchers noted that laboratory experiments are more powerful in measuring this outcome because such studies can directly measure juror performance as a function of their opportunity to take notes by asking more specific questions. In their article, Penrod and Heuer referenced laboratory-controlled experiments where note-takers outperformed non-note-takers by a modest margin when asked to recall trial information. The researchers in the laboratory controlled experiments also found a positive correlation between the quantity of notes taken and recall and between the degree of organization in notes and recall. At the conclusion of Penrod and Heuer's experiments, the researchers concluded that juror note-taking presented minimal or no disadvantages, and that juror note-taking modestly increased recall of evidence.

B. Survey of West Virginia Law Regarding Juror Note-Taking

On July 1, 1999, the final version of the West Virginia Trial Court Rules went into effect. The West Virginia Legislature adopted these rules to provide uniformity in the West Virginia circuit courts' local rules. Although twenty-eight out of forty-seven West Virginia trial courts surveyed allowed jurors to take notes in some cases, these new rules do not address juror note-taking. However, in a fairly recent opinion, the West Virginia Supreme Court of Appeals did provide

37 See Penrod & Heuer, supra note 18, at 271 (citing three recent studies that find that trial courts reap some benefit from jurors taking notes).
38 See MacLean, 578 F.2d at 66.
39 See Penrod & Heuer, supra note 18, at 266.
40 See id.
41 See id.
42 See id. The authors refer to a 1994 laboratory experiment of 144 "jurors" watching video-taped trials conducted by Rosenthal, Eisner, and Robinson.
43 See id. at 266.
44 See Penrod & Heuer, supra note 18, at 266.
45 See id. at 271.
46 See W. VA. TRIAL COURT RULES (2000).
47 See id. These rules compliment the West Virginia Rules of Civil Procedure and the West Virginia Rules of Criminal Procedure in providing uniformity for the trial courts.
48 Telephone survey of the West Virginia circuit courts conducted by the author (Jan. 2000).
49 See id.
The question concerning juror note-taking was presented to the court in an appeal of a first-degree murder conviction. In this case, the appellant claimed that allowing jurors to take notes along with several other errors had a cumulative effect and justified overturning the verdict. Of all the alleged errors, the court felt that the only alleged errors that needed to be addressed were the ones concerning juror note-taking. The opinion does not encourage the practice of juror note-taking; it simply states that the decision lies "within the sound discretion of the trial court." The court held the practice permissible as long as counsel was permitted proper voir dire concerning juror capacity to take notes and a cautionary instruction is given concerning the proper and improper uses of note-taking. The Court referred to the Third Circuit case of U.S. v. MacLean as an example of the information that should be included in the cautionary instructions. The court suggested that the jurors be instructed to give precedence to each of their independent recollections rather than the notes; that jurors should not allow themselves to be distracted from the proceeding by note-taking; and, that the jurors should only disclose the contents of their notes to other jurors. The guidelines outlined in Triplett and MacLean provide a good foundation for a court allowing juror note-taking.

C. Model Procedures for Juror Note-Taking

In accordance with the Triplett decision, a trial court should retain its right to decide whether to allow note-taking rather than instituting a blanket rule requiring judges to permit note-taking in every case. A court must first assess if note-taking is appropriate. Juror note-taking should not be required in each case, not because of the risks thought to be associated with it, but because of the automatic elimination of individuals with low literacy skills from the jury pool. West Virginia ranks thirty-third in the nation in the lowest percentage of adults who have trouble performing everyday tasks such as reading maps, short newspaper articles, and understanding instructions.

See Triplett, 421 S.E.2d at 511.

See id.

See id. at 518. Note that the cumulative effect of errors was only one of the appellant's arguments.

See id.

Id. at 519 (quoting Koontz, Phillips & Stamm v. Mylius, 87 S.E. 851 (W. Va. 1916)).

See Triplett, 421 S.E.2d at 520.

578 F.2d 64 (3d Cir. 1978).

See Triplett, 421 S.E.2d at 519-520.

See MacLean, 578 F.2d at 66.

See Syl. Pt. 5, Triplett, 421 S.E.2d at 512 (holding that the trial court has discretion in deciding whether jurors should be permitted to take notes).

See Price, 887 S.W.2d at 954.
articles, etc.—a Level 1 Literacy Rate. Overall, West Virginia was below the national average for individuals who scored at a Level 1 literacy rate. The national average of individuals who function at Level 1 is twenty-two percent and the estimate for West Virginia is twenty percent. However, despite the state performing better than the national average overall, some counties in West Virginia performed far below the national average of individuals performing at a Level 1 literacy rate. In McDowell County, the number of individuals functioning at a Level 1 literacy rate was estimated at thirty-seven percent. These statistics indicate that a large number of potential jurors in McDowell County, greater than one in three, would be automatically disqualified from ever performing jury service if a blanket rule requiring judges to permit note-taking is instituted. Consequently, trial judges, particularly in counties with low literacy levels, should use their discretion in allowing note-taking. Trial judges should consider the complexity of the evidence, and limit note-taking to those trials where the practice would be especially helpful. However, although judges should keep literacy considerations in mind, juror note-taking should be the rule and not the exception.

Once a court chooses to allow jurors to take notes, the trial judge should inform the parties or the decision, prior to voir dire. Informing the parties is important because the lawyers need the opportunity to question the venire members about their ability to read and take notes. Counsel should be given the opportunity to question venire members about their note-taking ability to avoid later challenges claiming that the literate note-takers dominated deliberations and thus, unfairly prejudiced the verdict.

See National Institute for Literacy, The State of Literacy in America, (1998) <http://wvde.state.wv.us> [hereinafter NIL]. This address links the reader to the West Virginia Department of Education web site. Once at the web site, scroll down to “Other WVDE Sites,” then “Adult Education,” and finally “Adult Literacy.”

See id.

See id.

See id.

See id.

See NIL, supra note 61. Currently, West Virginia Code Section 52-1-5a (7) requires that jurors be able to read before being eligible for jury duty. W. Va. Code § 52-1-5a (7) (2000). Consequently, the question arises: Should West Virginia require that individuals be able to write and take notes before being eligible for jury service? This question requires one to weigh the unfairness of automatically disqualifying otherwise competent and intelligent jurors because they did not enjoy the same educational opportunities as others. This unfairness may not be a large consideration in the next twenty years because this concern generally affects our senior population. However, in the interim, a balance between the unfairness of excluding these individuals and the need to improve our jury system must be struck. A detailed discussion of this question is beyond the scope of this Note.

See generally MacLean, 578 F.2d at 65.

See Triplett, 421 S.E.2d at 520.

See id.

Cf. Triplett, 421 S.E.2d at 519-20 (citing the MacLean court’s contention that the danger of note-taking jurors dominating deliberations can be substantially avoided with the procedures adopted by the
Once impaneled, the individual jurors should receive instructions on their ability to take notes.\textsuperscript{71} A court should allow each juror to individually decide whether he or she wants to take notes.\textsuperscript{72} A juror should also be cautioned up-front about the limitations associated with note-taking.\textsuperscript{73}

To properly admonish jury members concerning their opportunities regarding and limitations on note-taking, the following or substantially similar pre-trial instructions should be given:

Ladies and Gentlemen of the Jury:

Because of the potential usefulness of taking notes, you may take notes during the presentation of evidence in this case . . . to ensure a completely fair and impartial trial, I will instruct you to observe the following limitations:

(1) Note-taking is permitted, but not required. Each of you may take notes. However, no one is required to take notes.

(2) Take notes sparingly. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, time, distances, identities, and relationships.

(3) Be brief. Overindulgence in note taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.

(4) Do not take your notes away from court. At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened.

(5) Your notes are for your own private use only. It is improper


\textsuperscript{72} See Schwarzer, supra note 2, at 591.

\textsuperscript{73} See Price, 887 S.W.2d at 954.
for you to share your notes with any other juror during any phase of the trial other than jury deliberations. You may, however, discuss the contents of your notes during your deliberations [with other jurors].

A court should also instruct the jury in the jury charge on how to use the notes during deliberations. Some legal professionals believe that jurors should not take their notes into deliberations because the notes may be incorrect. However, one juror’s memory may be as faulty as another juror’s notes. Consequently, allowing the jurors to take their notes into deliberations with proper instructions poses no greater risk than allowing jurors to deliberate with nothing more than their individual recollections of the evidence. Thus proper instructions should include:

You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror’s notes [or any juror’s independent recollection], upon which you must base your determination of the facts and, ultimately, your verdict in this case.

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74 Price, 887 S.W.2d at 954-55. These instructions were adopted by the Court of Criminal Appeals of Texas after a lengthy discussion on the risks and benefits of juror note-taking. The court reviewed the jury instructions of many jurisdictions and eventually adopted these jury instructions for juror note-taking. Note that the author has altered the court’s instruction slightly.

75 See id. at 955.

76 See Penrod & Heuer, supra note 18, at 268-69.

77 Price, 887 S.W.2d at 955 (referring generally to MacLean, 578 F.2d at 67).
Finally, as the instructions indicate, a trial court should provide a notebook for note-taking and collect the notebooks at the end of the day.78 Jurors' notes should be destroyed at the conclusion of the trial so that the notes may not be used to impeach the jury's verdict.79

III. JURORS POSING QUESTIONS TO WITNESSES

A. The Risks Associated with Juror Questioning of Witnesses

Allowing jurors to question witnesses is more controversial than allowing juror note-taking80 because of the increased possibility of violating a party's rights.81 However, like juror note-taking, procedures may be employed to minimize and even eliminate most concerns associated with juror questioning.82 Once these concerns are essentially eliminated, trial courts should employ this common sense technique to assist jurors in understanding the evidence.83

Most of the concerns expressed by judges, lawyers, and other scholars center around jurors posing the questions directly to the witnesses in open court.84 When a court allows direct questioning of a witness by a juror, one of the largest risks is that jurors may ask questions that elicit testimony that is not legally admissible and/or legally relevant.85 Jurors cannot be expected to know the rules of evidence or apply them when asking questions.86 Therefore, the potential risk that a juror question will be improper or prejudicial is great.87

Furthermore, prejudicial lines of direct questioning vigorously pursued may lend the juror's questions more weight in the eyes of the juror posing the

78 See id.
80 See Schwarzer, supra note 2, at 591.
81 Cf. DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 517 (4th Cir. 1985) (“[J]uror questioning is a course fraught with peril for the trial court. . . . [T]he dangers in the practice are very considerable.”).
82 See Cohee v. State, 942 P.2d 211; Schwarzer, supra note 2, at 592-93.
83 See Schwarzer, supra note 2, at 591.
84 See generally United States v. Ajmal 67 F.3d 12 (2d Cir. 1995); United States v. Bush 47 F.3d 511 (2d Cir. 1995); DeBenedetto, 754 F.2d 512.
85 See Bush, 47 F.3d at 516 (2d Cir. 1995) (Lay, J., concurring); See also DeBenedetto, 754 F.2d at 516 (“[W]e believe that the practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial to verdict. Our judicial system is founded upon the presence of a body constituted as a neutral fact-finder to discern the truth from the positions presented by the adverse parties. The law of evidence has as its purpose the provision of a set of rules by which only relevant and admissible evidence is put before that neutral fact-finder. Individuals not trained in the law cannot be expected know and understand what is legally relevant, and perhaps more importantly, what is legally admissible.”).
86 See DeBenedetto, 754 F.2d at 516.
87 See id.
questions and in the eyes of the other jurors. For example, if a judge chooses to exercise control over the juror's improper questions, this may embarrass or even antagonize the jurors because they do not understand the rules. Even if the judge refuses to allow the improper question to be asked, the other jurors have heard the question. Despite instructions to disregard the question, the harm has already occurred because the jurors will form thoughts and impressions concerning why the question was not permitted and speculate on the answer. Still worse, a juror's questions may turn to commentary concerning the witness's credibility through the juror's leading questions or through the juror's tone of voice. Such commentary may launch the jury into premature deliberations rather than the jury remaining a neutral fact-finding body until all the evidence is presented.

In addition to asking improper questions, many legal professionals fear that jurors questioning witnesses will place counsel for the parties in a dilemma. This dilemma arises when counsel for one of the parties is forced to object to questions posed by the same people counsel hopes to persuade. The concern is that if counsel objects to questions posed by the jurors, they will alienate the jury.

Another significant concern is that allowing jurors to question witnesses will compromise the juror's neutrality and upset our long-standing tradition of an adversarial system. By allowing juror participation, many fear that jurors will depart from the traditional role of a passive listener, and thus jurors will become an adversary. Also, courts fear that this participation inevitably leads the inquirer to draw conclusions or settle on a given legal theory before the parties present all the evidence and before the court has instructed the jury on the law.

All of these concerns are valid. However, in the proper environment, courts can have the best of both worlds. Courts can simultaneously promote juror understanding by allowing juror questions and protect the right of the parties to a

88 See id.
89 See id.
90 Cf. United States v. Feinberg, 89 F.3d 333, 337 (7th Cir. 1996) ("[W]here jurors are allowed to blurt out their questions, the district court almost invites a mistrial.").
93 See United States v. Bush, 47 F.3d 511, 515 (2d Cir. 1995).
94 See id.
95 See id.
96 See United States v. Johnson, 892 F.2d 707, 713 (8th Cir. 1989) (Lay, J., concurring) ("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 fact-finder in the adversary process.") (emphasis omitted); See also Morrison, 845 S.W.2d 882. After Morrison, jurors are not permitted to question witnesses in Texas criminal courts.
97 See Morrison, 845 S.W.2d at 887.
98 See id.
B. Benefits of Juror Questioning of Witnesses

The most obvious benefit to allowing juror questions is increased comprehension of the evidence. Common sense tells us that jurors will not understand all of the evidence all of the time: it may be the meaning of a word, the significance of an exhibit, or an answer lost in a moment of distraction. In complex trials, the material may be foreign to the juror, making comprehension difficult the first time the juror hears the information. Consequently, because a trial is often a building process, a juror that does not understand evidence early in the process and does not have an opportunity to clarify the misunderstanding may miss the significance of later evidence.

During a complex case concerning child abuse, this intuitive sense of the benefit of juror questioning led West Virginia circuit court judge Jeffrey Reed to allow jurors to pose questions to witnesses after a juror spontaneously asked to present a question open court. In discussing whether to allow the practice, the judge commented to counsel at a bench conference:

I’m a little bit more inclined to do it in cases where there’s a lot of expert testimony, because I think that lends itself to more questions by jurors. And I think it also lends itself to being for the Court to make sure that there’s not misinterpretation or miscommunication with the experts.

You know, fact witnesses might be a little bit different, although I think if I open it up, I’m going to open it up for any witness. But I think when you have this type of technical information . . . it cries out for questions more than just a regular type of case, you know, a [Breaking and Entering]. You know, when you’ve got a lot of expert witnesses, I think technical things, you know, x-rays, CT scans, other types of issues, that this jury is not, you know, as familiar with and it’s not easily understood, I think it would make juror questioning a little bit more

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99 See Schwarzer, supra note 2, at 592-93.
100 See generally id. at 592.
101 See Schwarzer, supra note 2, at 593.
102 See id.
103 See id.
104 See State v. Porter, 96-F-22 and 96-F-23 (Cir. Ct. of Wood County July 30, 1997).
In addition to providing a clarifying function, allowing juror questions may help an otherwise confused juror become an effective participant in the deliberations. A confused juror may allow himself or herself to be dominated by those who claim to have understood the evidence. By allowing an opportunity to clear up confusion or misunderstanding, the dynamics of the deliberations may change. When a juror has a more complete understanding of the evidence, she will likely be more willing and more confident in discussing her opinions during deliberations. Consequently, the deliberation process becomes more effective.

Finally, allowing jurors to ask questions permits the lawyers to tailor questioning to develop areas that the jurors find unclear in the case. For example, an attorney may initially feel that she will have problems developing a prima facie case for claim X but the element for claim Y are fairly obvious. Therefore, she spends more trial time developing claim X than claim Y. However as the trial proceeds, questions submitted by the jurors indicate that claim X is clear to the jurors but not claim Y. The juror question allows the lawyer an opportunity to adjust her strategy according to the juror’s needs.

Additionally, lawyers may use the “hints” provided by juror questions to focus the jurors on the important issues. If the lawyer senses from the questions that the jurors are focusing on a tangential issue, she may construct her remaining direct examinations and cross examinations or her closing to re-focus the jury on the central issues of the case. In sum, juror questions may provide useful insight to counsel into the thoughts of the jury members.

Some may wonder whether this is a benefit—or is merely giving lawyers another tool to “manipulate” jurors. However, any tool that helps both parties without bias to present the evidence more clearly and accurately for jurors to pass judgment upon it is a benefit. This tool only promotes the ultimate goal of the trial process — assessing the truth and assigning legal rights in accord with that truth.

C. Model Procedures for Juror Questioning of Witnesses

To ensure that all parties receive a fair and impartial trial, certain procedures need to be employed by the trial court. A trial judge should retain the discretion to allow or disallow juror questioning, and juror questioning should not be mandated in every case. However, trial judges should employ juror questioning when appropriate, and not look upon the practice with disfavor. Again, as with juror note-taking, juror questioning should be the standard practice of trial courts and not the exception.

105 Id. at 360-61.
106 See Schwarzer, supra note 2, at 593.
107 See id.
108 Cf. id.
109 See id.
The potential risk of juror questioning, particularly direct questioning, has lead many courts to require the following procedure: (1) jurors submit questions in writing to the judge; (2) outside the jury’s presence, the judge and counsel review the questions and counsel may object; and (3) the judge presents the approved questions to the witness. Some states even statutorily require this procedure because of the potential risk in allowing direct questioning by jurors.

These procedures have several advantages. First, by requiring that the question be submitted in writing, the concern of other jurors’ hearing the improper question and developing their own ideas about the question is eliminated. Also, the fear of a juror being embarrassed in front of the other jurors by a judge refusing his or her question goes away. The juror cannot be embarrassed if the other jurors never hear the refusal.

Next, requiring the jurors to submit the question to the court for review by the judge and lawyers outside the jury’s presence eliminates other concerns surrounding jury questioning. The most obvious concern allayed is the dilemma presented when attorneys are forced to make objections to the jury’s questions in front of them. The opportunity for the judge and the attorneys to review the questions is essential to guaranteeing the fairness of the process. The attorneys and the judge can immediately eliminate any obviously improper questions. Obvious questions that could be omitted may include questions about insurance, past sexual history, past criminal activity, or evidence already excluded by motions in limine. After eliminating the obviously improper questions, the attorneys then have an opportunity to argue their objections to other questions without the fear of alienating the jury. Consequently, the juror will not know if the judge or one of

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11 See IND. R. EVID. 614(d); ARIZ. R. EVID. 39(b)(10).
12 Cf. United States v. Stierwalt, 16 F.3d 282, 286 (8th Cir. 1994) (“[E]videntiary issues were resolved before the judge read the questions to the witnesses.”).
13 See generally Bush, 47 F.3d at 514-16. After enumerating many concerns regarding juror questioning, the court required jurors to submit written questions to the judge.
14 See generally id. After enumerating many concerns regarding juror questioning, the court required jurors to submit written questions to the judge.
15 See generally id. After enumerating many concerns regarding juror questioning, the court required jurors to submit written questions to the judge.
16 See Howard, 360 S.E.2d at 795.
17 See id.
18 See generally Polowichak, 783 F.2d at 413.
19 Cf. FED. R. EVID. Note that the Federal Rules of Evidence preclude these examples in most instances.
20 See Howard, 360 S.E.2d at 795.
the attorneys eliminated the question. In addition to eliminating questions, the judges and lawyers may rephrase questions that are improper as submitted but could be admissible if presented differently.121 The judge should keep in mind that the goal of the process is to promote juror understanding of the evidence to discover the truth.122

By requiring the judge to present the question, the juror’s intonations and other nonverbal signals that may cause fellow jurors to infer a bias are removed.123 Consequently, the other jurors will not begin premature deliberations,124 and they are less likely to give more weight to those questions.125 Additionally, this procedure coupled with objecting to written questions outside the jury’s presence minimizes the fear that a juror will become an adversary.126 Requiring the juror to think through the question and write it down thwarts a juror’s temptation to become an amateur Perry Mason.127 The juror loses the emotional momentum that may take over in a setting where direct questioning is permitted.128 Even if this safeguard fails, the judge and the lawyers may eliminate adversarial questions at the objection stage.129

Finally, jurors should be instructed directly after opening statements on the basics of the substantive law in the case.130 This practice helps jurors limit their questions to issues important to the determination of guilt or liability.131 The court can then reiterate and expand upon the instructions concerning the law after closing arguments.132

D. Research Regarding the Risks and Benefits of Juror Questioning of Witnesses

In the research study conducted by Penrod and Heuer, a procedure much

121 See Polowichak, 783 F.2d at 413.
122 See Feinberg, 89 F.3d at 337.
123 See Schwarzer, supra note 2.
124 See id.
125 See generally, Bush, 47 F.3d at 514–16. After enumerating many concerns regarding juror questioning, the court required jurors to submit written questions to the judge.
126 See Feinberg, 89 F.3d at 337.
128 See id.
129 See Howard, 360 S.E.2d at 795.
130 See O’Connor, supra note 3, at 23.
131 See generally, Schwarzer, supra note 2, at 583–584. There are many other benefits to allowing this practice that are beyond the scope of this note. To review some of the other, more compelling, benefits refer to Justice O’Connor’s article, supra note 3, and Schwarzer, supra note 2.
132 See Schwarzer, supra note 2, at 584.
like the one outlined above was tested. Judges were instructed to allow only written questions, allow questions after cross examination for each witness was complete, allow objections outside the hearing of the jury, pose the question to witnesses themselves, and tell the jury that no adverse inference should be drawn from sustaining an objection to a question. The researchers presented questionnaires to jurors, lawyers, and judges after 104 actual trials where juror questions were permitted.

The findings in the study were overwhelmingly unsupportive of the purported disadvantages of juror questioning. First, the study found that although jurors did not know the rules of evidence, they nonetheless asked appropriate questions. Even lawyers who were skeptical before participating in a trial with juror questions, found that their expectations were not realized. Furthermore, the study revealed that counsel were not reluctant to object to inappropriate juror questions outside the jury’s presence. The study revealed that lawyers objected to twenty percent of the questions submitted by jurors in the national study and seventeen percent of the questions submitted in the Wisconsin study. Lawyers objected to at least one question in forty percent of the trials in which a question was asked.

Jurors also did not become embarrassed or angry when attorneys objected to their questions outside their presence. The responses from jurors whose questions drew objections made it clear that they were neither embarrassed nor angry when this happened. Most jurors reported that they were not embarrassed or angry at all.

Additionally, the research data did not support the fear that if jurors are allowed to ask questions, they will become adversaries rather than neutral fact-finders. The study measured several types of evidence that indirectly addresses

133 See Penrod & Heuer, supra note 18, at 273.
134 See id.
135 See id. The research was broken down into two studies. The national study included seventy-one trials and the Wisconsin study included thirty-three trials.
136 See id. at 280.
137 See id. at 276.
138 See Penrod & Heuer, supra note 18, at 276.
139 See id.
140 See id. at 277.
141 See id.
142 See id.
143 See Penrod & Heuer, supra note 18, at 277.
144 See id.
145 See id. at 278.
First, the researchers examined the pattern of jury verdicts and found that the rate of agreement between judges' preferred and jurors' actual verdict was slightly higher in cases where questions were permitted (seventy-four percent vs. sixty-five percent).\textsuperscript{147} The researchers also measured the jurors' perception of the lawyers as a result of the question-asking procedure.\textsuperscript{148} If the jurors lost sight of their role as neutral fact-finders, the researchers expected to find that the jurors perceived the lawyers less favorably.\textsuperscript{149} On the contrary, jurors perceived both lawyers somewhat more favorably in trials where questions were permitted.\textsuperscript{150} Consequently, the research indicates that the jurors' neutrality was not affected.\textsuperscript{151} These same variables along with lawyer satisfaction with the verdicts were used to explore signs of prejudice.\textsuperscript{152} The responses were clearly contrary to those expected if questions had prejudicial effects.\textsuperscript{153}

Jurors also did not overemphasize their own questions at the expense of other trial evidence.\textsuperscript{154} Jurors were rather modest in their appraisal of helpfulness of juror questions.\textsuperscript{155} Moreover, jurors estimated that only ten percent of deliberation time was devoted to matters that were the subject of juror questions.\textsuperscript{156} Neither result would be expected if jurors were overemphasizing the importance of their own questions.\textsuperscript{157}

In evaluating the purported advantages of juror questions, the research revealed that jurors' questions served primarily a clarifying function.\textsuperscript{158} The jurors reported that they felt better informed and were more confident that they had sufficient evidence for reaching a responsible verdict.\textsuperscript{159} On the other hand, judges and attorneys reported that they felt the questions were not very helpful, and lawyers indicated that the questions did not alert them to areas where additional

\textsuperscript{146} See id.

\textsuperscript{147} See id. Even though the rate of agreement was eleven percentage points higher, the researchers cautioned that this was not statistically significant.

\textsuperscript{148} See Penrod & Heuer, supra note 18, at 278.

\textsuperscript{149} See id.

\textsuperscript{150} See id.

\textsuperscript{151} See id.

\textsuperscript{152} See id. at 279.

\textsuperscript{153} See Penrod & Heuer, supra note 18, at 279.

\textsuperscript{154} See id. at 278.

\textsuperscript{155} See id. at 278.

\textsuperscript{156} See id.

\textsuperscript{157} See id.

\textsuperscript{158} See Penrod & Heuer, supra note 18, at 275.

\textsuperscript{159} See id.
development was needed.\textsuperscript{160} Overall, the availability or absence of juror questions did not significantly influence the satisfaction of jurors, judges, or attorneys with the verdicts.\textsuperscript{161} The researchers hypothesized that the reason juror satisfaction was not affected by their ability to take notes is that juror satisfaction where questions were not permitted was fairly high initially.\textsuperscript{162} Because satisfaction was initially high, the satisfaction rate in subsequent surveys could not increase significantly. Consequently, a ceiling effect occurred and the difference could not accurately be measured.\textsuperscript{163} The most persuasive indication of the benefits of juror questioning appears in a 1994 study by Penrod and Heuer.\textsuperscript{164} The authors found that the benefits from juror questioning were likely to occur in cases where the evidence or where the law was particularly complex.\textsuperscript{165}

Perhaps the most persuasive statistic is that attorneys reacted more favorably to juror questioning after participating in trials where the practice was permitted.\textsuperscript{166} The reason for the change in attitude may be attributed to the realization that juror questions posed no serious risk.\textsuperscript{167} The attorneys found that juror questioning did not cause them to lose control of their case.\textsuperscript{168}

In conclusion, juror questioning may promote better juror understanding and alleviate doubts about the trial evidence, particularly in complex cases.\textsuperscript{169} The statistics show that the purported harmful effects are innocuous when questions are written down and counsel objects outside the jury’s presence.\textsuperscript{170} Consequently, trial judges should employ the process and assist jurors in their complicated task.\textsuperscript{171}

\textbf{E. The Mechanics of Juror Questioning of Witnesses}

The mechanics of juror questioning are also important.\textsuperscript{172} An organized

\begin{itemize}
  \item \textsuperscript{160} See id.
  \item \textsuperscript{161} See id. at 276.
  \item \textsuperscript{162} See id.
  \item \textsuperscript{163} See Penrod & Heuer, supra note 18, at 276.
  \item \textsuperscript{164} See id. at 281 (citing Larry B. Heuer & Steven Penrod, Trial Complexity: A Field Investigation of its Meaning and its Effects, 18 LAW & HUM. BEH. 121 (1994)).
  \item \textsuperscript{165} See id.
  \item \textsuperscript{166} See id. at 279.
  \item \textsuperscript{167} See id. at 279-80.
  \item \textsuperscript{168} See Penrod & Heuer, supra note 18, at 280.
  \item \textsuperscript{169} See id.
  \item \textsuperscript{170} See id. at 280-81.
  \item \textsuperscript{171} See id. at 280.
  \item \textsuperscript{172} See Wolff, supra note 91, at 868. ("To ensure orderliness of interrogation, the court must inform the jurors when and how to ask their questions.")
\end{itemize}
process can reduce confusion and expedite the trial. First, a court should provide a notebook for jurors in which to write their questions, and questioning should occur after the testimony of each witness. The end of the witness’s testimony provides a convenient time to present the questions, and maintains a logical flow to the presentation of the evidence. Jurors should be given time at the end of each witness’s testimony to write down questions. This assists jurors in focusing on the testimony and not on the grammar and form of their questions. A juror may write down abbreviated forms of their questions while the witness is testifying, and worry about completing the question at the end of the testimony. Once a judge gives adequate time to write down all questions, jurors should pass the folded sheet of paper to the clerk. If a judge is concerned with maintaining anonymity, all jurors can be required to submit a sheet of paper to ensure the anonymity of the jurors asking questions.

F. Instructions Concerning Juror Questioning of Witnesses

Even with these prophylactic procedures in place, jurors should not be given the power to ask questions without proper guidance. A court should inform jurors of the goals and limits associated with the questioning process. A court can set the tone of the questioning by stating that juror questioning is permitted to promote juror comprehension of the evidence so that a well-reasoned decision may be reached. A court should share that some questions may not be answered because they are not legally relevant or although relevant, some questions are inherently too prejudicial, not appropriate for the witness, or may be answered later in trial. By sharing this information, jurors may be less likely to provide their own reasons for a court not presenting the question. In addition, the instructions

173 See id.
174 See Douglas, 81 F.3d at 325 (instruction given by the trial court judge whose decision was being appealed).
175 See Wolff, supra note 91, at 868.
176 See Berkowitz, supra note 127, at 133.
177 See id.
178 See Douglas, 81 F.3d at 325 (instruction given by the trial court judge whose decision was being appealed).
179 See Schwarzer, supra note 2, at 593. Although a full discussion of the issue is beyond the scope of this note, courts should provide both written and oral instructions for the jurors. The Oklahoma Court of Criminal Appeals has recommended that trial courts provide jurors notebooks containing the instructions along with blank pages for notes, witness lists with descriptions, diagrams, flowcharts or other aids to help jurors in the decision-making process. Cohee v. State, 942 P.2d 211 (1997).
180 See Schwarzer, supra note 2, at 593.
181 See id.
182 See id.
183 See id.
should simply tell jurors that they should not develop their own ideas about why their particular question was not answered, or share with other jurors that a question was unanswered.\footnote{See Douglas, 81 F.3d at 325.}

Also, jurors need to be apprised of the mechanics of the process such as when and where to submit their questions.\footnote{See Wolff, supra note 91, at 868.} Providing these details will eliminate most confusion and lead to a smoothly run trial.\footnote{See id.}

Consequently, the following or similar jury instruction should be given:

At the conclusion of questioning by the attorneys, I am going to allow you as [j]urors to ask any questions you might have.\footnote{Douglas, 81 F.3d at 325.} I will ask you when the attorneys are through questioning the witness if you have any question of that witness.\footnote{Id.} You will be given time to write down the question on the paper that has been handed out.\footnote{Id.} Sufficient time will be given at the end of each witness's testimony to write down questions, so don't spend a great deal of time worrying about the wording of the question while the witness is testifying. So you will not miss any important testimony, write down an abbreviated form of the question while the witness is testifying and complete it during the time given at the end. The clerk will collect the questions and bring them to me.\footnote{See id.} I will review the questions and if I find they are relevant and appropriate under the Federal Rules of Evidence, I will ask the question.\footnote{See generally id.}

If, however, I determine the question is not for some reason appropriate or relevant under the Federal Rules of Evidence, then I may not ask it or I may ask it in a different form.\footnote{See Douglas, 81 F.3d at 326.} Please do not draw any inferences from my decision to not ask a question.\footnote{See id.} The question may simply be irrelevant in the legal sense, may be too prejudicial to allow in court, not appropriate for the witness, or may be answered later in trial.\footnote{See id.} If
I decide not to allow your question, please do not share this fact with the other jurors and do not draw your own inferences from it.  

Keep in mind that the purpose of allowing questions from jurors is to help you understand the evidence. I caution you, therefore, you should only ask questions that will help you understand the evidence so that you may reach a well-reasoned decision during deliberations.

G. Survey of Juror Questioning of Witnesses in West Virginia

The final version of the new West Virginia Trial Court Rules does not address juror questioning. Additionally, a survey of West Virginia case law reveals no guidance concerning juror questioning. Of forty-four circuit judges in West Virginia trial courts, only four have allowed juror questioning in some trials.

IV. CONCLUSION

A. General Conclusions Concerning Juror Note-Taking and Juror Questioning of Witnesses

The process that occurs in a jury trial is analogous to a classroom. Lawyers and judges must teach jurors the relevant facts and law enabling them to make a well-reasoned decision in the end. However, like all other trial procedures, the process of “learning” the facts must comport with the limitations set out in the Constitution, the Rules of Evidence, and the Rules of Civil or Criminal Procedure to ensure that a parties’ rights are not violated. This balancing of truth finding and parties’ rights is the basis of the controversy surrounding jurors’ taking notes and jurors’ posing questions to witnesses.

In a controversial decision by the Court of Criminal Appeals of Texas that

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195 *See id.*
196 *See id.*
197 *See Douglas, 81 F.3d at 326.*
198 *See W. VA. TRIAL COURT RULES (1999). The final version of the West Virginia Trial Court Rules went into effect July 1, 1999. These rules, along with the West Virginia Rules of Civil Procedure and The West Virginia Rules of Criminal Procedure, control over any differing local rule.*
199 *A natural language, term, and key number search of the West Virginia database in Westlaw revealed no decisions concerning juror questioning.*
200 *Phone survey of circuit courts by the author (Jan. 2000).*
201 *See generally O’Connor, supra note 3, at 24; see also Schwarzer, supra note 2, at 588.*
202 *See Schwarzer, supra note 2, at 588.*
banned the practice of jurors questioning witnesses, *Morrison v. State*, Judge Maloney, writing for the majority, stated that “[t]he practice of juror questioning reflects the currently popular movement to downplay long-standing adversarial principles in favor of an intensified focus on truth finding.” He goes on to say that although “the search for truth is an integral part of the adversary process, other equally prominent features characterize our system.” Judge Maloney cites freedom, due process, and quality of life as some of the prominent features that may override the truth finding function. These statements are misguided.

On the contrary, adversarial features such as evidentiary barriers and the ideal of due process characterized by the *Morrison* court as conflicting with the truth-finding function actually support rather than hinder searching for the truth. Due process and evidentiary rules do not keep out the truth, they simply keep out information and procedures that may cause jurors to disregard the important facts and focus on prejudicial information, thus averting the truth. If jurors were allowed to focus on prejudicial information rather than the relevant facts, more innocent individuals might wrongly go to jail or lose a civil judgment. If this occurs, then the ideals of freedom and quality of life are adversely affected. By supporting the jury’s truth finding function, the court system only promotes the ideals of freedom and quality of life.

Consequently, employing common sense measures like juror note-taking and jurors questioning witnesses that assist jurors in developing the truth promote these important principles enumerated by Judge Maloney. When the truth finding function of a jury can be enhanced, a better judicial system will result. The model procedures for juror note-taking and juror questioning advocated in this note minimize or even eliminate the concerns of violating parties’ rights, while promoting truth finding through greater juror understanding.

**B. Conclusions Concerning Juror Note-Taking and Juror Questioning in West Virginia**

West Virginia courts should take advantage of the common sense techniques of juror note-taking and juror questioning to promote truth finding. Currently, the practice should not be required because of the low literacy levels in some areas of the state. However, the practice should be encouraged in most situations, particularly in lengthy or complex trials.

_Leslie Miller-Stover_

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204 Id.
205 See id.
206 See id. at 885 n.7.