

57 INSTRUCTION ON JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to submit written questions for the witnesses called to testify in this case. You are not encouraged to submit large numbers of questions because questioning witnesses is primarily the responsibility of counsel. Questions may be submitted only in the following manner.

After both lawyers have finished questioning a witness, and only at this time, if there are additional questions you would like the witness to answer you may then submit a written question for that witness. If you want to submit a question, simply raise your hand and the bailiff will collect your written question. Questions must be directed to the witness and not to the lawyers or the judge. After consulting with counsel, I will determine if your question is legally proper. If I determine that your question may properly be asked, I will ask it. If I do not allow a particular question to be asked, do not guess about what the answer might have been. Do not draw any conclusion from the fact that a question was not asked.

COMMENT

Wis JI-Criminal 57 was originally published in 1992 and republished without substantive change in 2000, when the comment was updated. This revision was approved by the Committee in October 2013; it revised the text and revised the comment to include material that formerly appeared in Special Material 8 Juror Questioning Of Witnesses.

This instruction is provided as a possible guide for those judges who wish to allow jury questioning of witnesses during trial. Questions to the judge from jurors during deliberations raise different issues.

There is no specific statutory or case law authority in Wisconsin requiring or prohibiting juror questioning of witnesses. The only appellate decision to consider the issue is State v. Darcy N. K., 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998), where the court found that the failure to allow juror questions did not prejudice the defendant. This part of the decision is consistent with the conclusion that trial courts have implied or inherent authority to allow juror questioning. See § 906.11: "The judge shall exercise reasonable control over the mode and order of interrogating witnesses. . . ." The court also concluded that when juror questions are

allowed, "a trial court should employ safeguards recommended by the Criminal Jury Instructions Committee." The court's decision incorporated Section III. Recommended Procedures if Questions are Allowed and Section IV. Jury Instructions from Special Material 8 Juror Questioning Of Witnesses [c. 1992].

The discussion below is a revision of material originally published in SM-8, which was withdrawn when its substance was incorporated here. Section III., referred to in Darcy N. K., appears under the heading Recommended Procedures if Questions are Allowed. The text of JI 57 contains a revised version of the instruction recommended in Section IV. of SM-8, also referred to in Darcy N. K.

Advantages and Disadvantages

- a. Advantages
 - i. Allows jurors to resolve issues that are important to them.
 - ii. Brings out relevant material the lawyers missed.
 - iii. Aids jury deliberations by reducing the number of uninformed jurors or resolving questions in the courtroom that would prolong or distract deliberations.
 - iv. Increases juror attentiveness.
 - v. Increases juror satisfaction; decreases frustration and discontent.
 - vi. Helps lawyers direct their cases toward the issues jurors are concerned about.
 - vii. Promotes compliance with the admonition that jurors are not to do research on their own.
- b. Disadvantages
 - i. Disrupts trial strategy of the lawyers who intentionally left a question unasked.
 - ii. Jurors anticipate where the case is going and jump ahead of the lawyers.
 - iii. Makes jurors less impartial and more partisan.
 - iv. Questions may be to the disadvantage of clients.
 - v. Disrupts or delays courtroom procedure and order.

If a trial court decides to allow juror questions, notice should be given to counsel. If counsel objects, proceeding with juror questions should be supported by findings on the record.

Recommended Procedures if Questions are Allowed

There appears to be consensus on the basic procedures to be followed if juror questions are allowed. The major aspects are as follows:

- a. Whether to allow questions lies within the judge's discretion.
- b. Jurors should be given preliminary instructions advising them of the right to submit questions and explaining the procedure to be used.
- c. After a witness is interrogated by counsel, but before the witness leaves the stand, the jurors are asked if they have any questions.
- d. Questions are submitted in writing to the judge and are shown to the lawyers, who may object without the jury knowing of it.
- e. The judge reviews the questions and any objections.
- f. If the judge sustains the objection, the jury is advised that questions cannot be asked.
- g. If the judge overrules the objection, the judge asks the question.
- h. Lawyers are allowed to follow up on issues raised by juror questions.
- i. Make a record of the juror questions submitted and asked.

Jury Instructions

If the jury is to be allowed to ask questions, a preliminary instruction telling the jury about the procedure ought to be given. Thus, the content of the instruction is dependent upon the type of procedure that is adopted. Wis JI-Criminal 57 is based on the procedure outlined above.