

QUESTIONS TO WITNESSES FROM JURORS

At the end of each witness's testimony in this case, we are going to give you as jurors the opportunity to suggest any questions that you would like us to pose to that witness. The court officer will make some paper available to you, and if you have such a question, you should write it down. Please don't discuss your questions among yourselves, but write down any questions that you as an individual juror may have for the witness. And please write your juror number on your questions, in case I need to ask you to clarify them.

After the attorneys have questioned each witness, I will ask the court officer to collect any written questions that you have and pass them to me. I will then confer privately with the attorneys and determine whether the question is permitted by our rules of evidence. If it is, I will then pose that question to the witness.

Now there are a few things you must keep in mind about such questions. First of all, you should limit your questions to important matters, or something in a witness's testimony that you think requires clarification, so that we don't get bogged down or distracted from the

central issues.

You also have to understand in advance that I may have to alter or refuse a question if it does not comply with our rules of evidence. As I have explained, those rules are not intended to keep information from you, but to make sure that all the information you are given is presented in a manner that you can fairly evaluate its worth. If I change, or I decline to ask, a question that you have suggested, you must not be offended or hold that against either of the parties.

Finally, you must not give the answers to your own questions any disproportionate weight. You will have to consider *all* the evidence to arrive at a true verdict.

“[T]he practice of allowing jurors to question witnesses has the potential for introducing prejudice, delay, and error into the trial, and should be utilized infrequently and with great caution.” When a judge allows such questioning, the judge must inform the parties and give them an opportunity to be heard in opposition or to suggest the procedure to be followed. Before jurors are permitted to ask questions, and again in the final instructions, the judge should inform jurors: (1) that they will be given the opportunity to pose questions; (2) that such questions should be written down and passed to the judge; (3) that such questions should be limited to important matters; (4) that the judge may have to alter or refuse questions that do not comply with the rules of evidence; (5) that if a particular question is refused or altered, the juror who posed the question must not be offended or hold that against either party; and (6) that jurors must not give answers to their own questions a disproportionate weight. The judge and the attorneys should discuss the questions, and any objections made and ruled on, outside the hearing of the jury, before they are posed. To avoid delay, the judge might have all jurors submit their questions at one time, at the conclusion of a witness’s examination. The parties should be given the opportunity for further examination after juror questions have been answered. *Commonwealth v. Urena*, 417 Mass. 692, 701-703, 632 N.E.2d 1200, 1206 (1994). See also *United States v. Sutton*, 970 F.2d 1001 (1st Cir. 1992).

“We adhere to the . . . procedures recommended in *Commonwealth v. Urena* . . . with some modifications based on the growing experience with the practice in this and other jurisdictions. (1) The judge should instruct the jury that they will be given the opportunity to pose questions to witnesses.

We suggest that the jury also be instructed not to let themselves become aligned with any party, and that their questions should not be directed at helping or responding to any party. Rather, they must remain neutral and impartial, and not assume the role of investigator or of advocate. (2) Jurors' questions need not be limited to 'important matters,' as we stated in *Urena*, but may also seek clarification of a witness's testimony. Reining in excessive questioning may present the greatest challenge to a judge (3) The judge should emphasize to jurors that, although they are not expected to understand the technical rules of evidence, their questions must comply with those rules, and so the judge may have to alter or to refuse a particular question. (4) The judge further should emphasize that, if a particular question is altered or refused, the juror who poses the question must not be offended or hold that against either party. (5) It is important that the jurors are told that they should not give the answers to their own questions a disproportionate weight. We suggest that the judge also instruct jurors not to discuss the questions among themselves but, rather each juror must decide independently any questions he or she may have for a witness. (6) These instructions should be repeated during the final charge to the jury before they begin deliberations. (7) All questions should be submitted in writing to the judge. We suggest that the juror's identification number be included on each question. This will enable the judge to address problems unique to a juror, as by voir dire, or to give a curative instruction without exposing the entire jury to any potential prejudice. On submission of questions, counsel should have an opportunity, outside the hearing of the jury, to examine the questions with the judge, make any suggestions, or register objections. This may be done at sidebar, or the jury may be removed at the judge's discretion. The judge should rule on any objections at this time, including any objection that the question touches on a matter that counsel purposefully avoided as a matter of litigation strategy, and that, if asked, will cause particular prejudice to the party. Finally, counsel should be given the opportunity to reexamine a witness after juror interrogation. The scope of the examination should ordinarily be limited to the subject matter raised by the juror question and the witness's answer. The purpose of reexamination is two fold. First, it cures the admission of any prejudicial questions or answers; and second, it prevents the jury from becoming adversary in its interrogation" (citations and internal quotation marks omitted). *Commonwealth v. Britto*, 443 Mass. 596, 613-614, 744 N.E.2d 1089, 1105-1106 (2001).

While "[r]eining in excessive questioning may present the greatest challenge to a judge," *Id.*, in some technically complex cases allowing juror questions in order to clarify the evidence may reduce delay and confusion during jury deliberations.