

Draft Rule 265.1 Juror Questions

(a) *Discretion of Trial Court.* On its own initiative or upon a party's written motion, the trial court in its discretion may allow jurors to submit written questions to the witnesses.

(b) *Procedure for Juror Questions.*

(1) Before voir dire, the trial court must inform parties if juror questions will be allowed.

(2) If juror questions will be allowed:

- a. The trial court must read all of the following instructions to the jury after the jury is seated, and may repeat any or all of these instructions to remind the jury of its role:

In this trial, after the parties have asked their own questions of each witness, you can write and submit any questions you have for that witness. Any questions you submit should be to clarify the testimony the witness has given. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You may not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally, and do not assume it is important that I decided not to ask your question.

You must treat your questions and their answers the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony.

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another juror. That is because of my overall instruction that you must not discuss the case among yourselves until you have heard my final

instructions on the law, and I have instructed you to begin your deliberations.

- b. The trial court must provide the jurors with the following form and instruct them to write any questions for the witness on this form:

Juror Question Form

You may submit one or more questions for the witness to help clarify any confusion about the witness's testimony. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You may not argue with the witness through a question. Your questions should be yours alone, and not something you got from another juror.

Write your questions, if any, on this form. Do not put your name on the form. After the parties have asked their own questions of each witness, the judge will tell you to pass the form to the bailiff. The bailiff will give the form to the judge, who will review all your questions with the parties privately. Remember that the judge will apply the same rules to your questions that the judge applies to the parties' questions. As a result, some questions may be changed or rephrased, and others may not be asked at all.

You must treat your questions and their answers the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony. And you must not discuss this case with a fellow juror until the judge has told you to begin your deliberations.

- (3) Upon receipt of a written question from the jury, the trial court must allow the parties to read the question and to make objections to the question on the record and outside the jury's hearing. [On its own initiative or upon a party's request, the trial court may

remove the witness from the courtroom before allowing the parties to read or object to the question.]]¹

- (4) The trial court must rule on any objection to the question. In its discretion, the trial court may re-word the question or decide not to ask the question at all.
- (5) If the trial court re-words the question, the trial court must read the re-worded question, allow the parties to make objections to the re-worded question on the record, and rule on any objection to the re-worded question.
- (6) If the trial court asks the witness a verbatim or re-worded question from the jury, the parties will be allowed to ask any follow-up questions.
- (7) The trial court must include any submitted juror-question form in the record.

¹ Senate Bill 445 provides that a court must hear objections “out of the presence of the jury *and witnesses.*” Tex. S.B. 445, 81st Leg., R.S. (2009) (emphasis added). This is consistent with two opinions in which courts of appeals concluded that juror questions are permissible with appropriate safeguards, such as excusing the jury *and witness* while the court determines the admissibility of the question. *See Hudson v. Markum*, 948 S.W.2d 1, 1-3 (Tex. App.—Dallas 1997, pet. denied); *Fazzino v. Guido*, 836 S.W.2d 271, 275 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (emphasis added).

Judge Tracy Christopher indicated that there is no need to excuse a witness who is already privy to many other things said outside the jury’s hearing. She also noted that even if there is a need to excuse the witness, a judge already has discretion to do so and thus, does not need explicit authority in this rule. Justice Kent Sullivan commented that the boundaries of judicial discretion and available procedural alternatives should be as transparent as possible to all people who will follow this new, essentially foreign procedure. For that reason, he suggested including the bracketed provision explicitly allowing the judge to excuse the witness.