

**Draft Rule 265.1 Juror Questions**

(a) *Discretion of Trial Court.*<sup>1</sup> On its own initiative or on a party’s request, the trial court in its discretion may allow jurors to submit written questions to witnesses who have appeared and testified.<sup>2</sup>

(b) *Procedure for Juror Questions.*

(1) Before voir dire or, at the latest, before the presentation of evidence, the trial court must inform the parties if juror questions will be allowed.<sup>3</sup>

(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. The trial court may modify these instructions as the circumstances of the particular case may require.<sup>4</sup>

*After the parties have asked their own questions of each witness and before each witness is excused,<sup>5</sup> you may submit in writing any questions you have for that witness. Any questions you submit should be about the testimony the witness has given. Your questions should not give an opinion about the case,*

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<sup>1</sup> On February 20, 2009, the SCAC voted (38-1) against prohibiting juror questions and (36-2) in favor of giving trial judges discretion to allow juror questions. Seven SCAC members voted in favor of removing everything in the rule except subdivision (a); 32 members voted in favor of including additional guidance regarding the procedure. Several SCAC members indicated support for a mixture of mandatory and discretionary provisions.

**Giving the trial court discretion to allow juror questions is inconsistent with SB 445, unless the good-cause provision in SB 445 effectively gives the trial court discretion in determining whether to allow such questions.**

<sup>2</sup> The SCAC recommended (without a vote) that the rule specify that jurors should only be allowed to ask questions of live witnesses. Subdivision (a) is revised to reflect the SCAC’s recommendation.

<sup>3</sup> During the SCAC meeting on February 20, Stephen Susman described a recent trial in which a judge decided to allow juror questions *after* voir dire. Judge Tracy Christopher indicated she would modify the draft to allow judges to make the decision after voir dire. Nobody objected, so the subcommittee modified the draft accordingly.

<sup>4</sup> This sentence is modeled after similar language in the instructions following Texas Rule of Civil Procedure 226a. The SCAC voted (31-3) to require judges to read certain instructions to the jury. But certain SCAC members expressed concern about not providing any leeway for judges to modify the instructions. Judge Christopher suggested adding this sentence. Nobody objected, so the subcommittee modified the draft accordingly.

<sup>5</sup> Per SCAC discussions, the instructions are revised to clarify that juror questions must be asked of live witnesses.

**SB 445 requires the submission of juror questions “before jury deliberations begin.” It is unclear whether this means directly before deliberations or at some point before deliberations.**

*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 your question is not asked.<sup>6</sup>*

*You must treat the answers to your questions the same way you treat any other testimony.<sup>7</sup> 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 person.<sup>8</sup> 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 about the witness's testimony. Your questions should not give an opinion about the case, criticize the case, or*

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<sup>6</sup> Fourteen SCAC members voted in favor of having the judge ask juror questions, 1 SCAC member voted in favor of having the lawyers ask juror questions, and 22 SCAC members voted in favor of giving the judge discretion to decide who will ask juror questions. This edit is intended to reflect the majority vote.

<sup>7</sup> The subcommittee modified this sentence to clarify that questions are not testimony.

<sup>8</sup> The subcommittee made this change to clarify that jurors should not rely on anyone else to generate questions.

*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.<sup>9</sup> After the parties have asked their own questions of each witness, the judge will tell you to pass the form to the bailiff.<sup>10</sup> 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.*

*You must treat the answers to your questions 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.*

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- (3) After the parties have asked their own questions of each witness who appears and testifies, the trial court must ask the jurors to pass the juror-question form to the bailiff with any questions the jurors have for that witness.<sup>11</sup>

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<sup>9</sup> Consistent with SB 445, this provision is designed to protect anonymity. It is unclear whether SB 445 is intended to prompt additional measures to protect anonymity.

<sup>10</sup> To further protect anonymity, the SCAC considered requiring each juror to submit a juror-question form, even if the form is blank. The SCAC voted (24-4) against that approach, in part because of the extra burden associated with collecting additional forms. But because the SCAC favored the concept of protecting anonymity, Judge Christopher added the comment following the rule to clarify that judges may take additional measures, such as requiring each juror to submit a juror-question form, in order to protect anonymity as much as possible.

<sup>11</sup> The SCAC considered (but did not vote on) a similar provision: "At the end of each live witness, the judge will ask the jurors to pass the juror-question form to the bailiff with any questions they have for that witness." Judge Christopher suggested adding the provision to clarify when the court will consider juror questions and that juror questions should be directed only to live witnesses. The first clause has been modified to be more consistent with the instructions in subdivision (b)(2)a.

- (4) 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 to obtain a ruling outside the jury's hearing.<sup>12</sup> 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.<sup>13</sup>
- (5) In its discretion, the trial court may re-word the question or decide that the question should not be asked.

If the trial court re-words the question, the trial court must read the re-worded question and allow the parties to make objections to the re-worded question on the record and obtain a ruling outside the jury's hearing.

- (6) If the trial court allows a verbatim or re-worded juror question, the trial court may either ask the question or allow a party to ask the question of the witness. The parties will be allowed to ask any follow-up questions.<sup>14</sup>
- (7) The trial court must include any submitted juror-question form in the record.<sup>15</sup>

**Comment to 2009 Change:** To the extent possible, the trial court should take steps to maintain the anonymity of the juror who asks a question. In addition to instructing jurors not to put their names on juror-question forms, the trial court may want to take a break after each witness to allow jurors to write any questions in the privacy of the jury room. Alternatively, the trial court may want each juror to have a juror-question form in the jury box and ask each juror to pass the form to the bailiff, even if the juror did not write a question on the form.

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<sup>12</sup> **SB 445 provides that “counsel for each party will be given an opportunity, *out of the presence of the jury and witnesses, to object to the questions”.*** (Emphasis added.) That approach 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).

The SCAC felt it would be overly burdensome and time consuming to remove the jury each time objections are made. The requirement to make objections “outside the jury's hearing” gives trial judges the option of keeping the jury in the courtroom as long as the jury is unable to hear the objections.

<sup>13</sup> The SCAC voted narrowly (12-11) to retain the sentence.

<sup>14</sup> **This is consistent with SB 445, which provides that “counsel for each party will be given an opportunity to cross-examine witnesses after a juror question”.**

<sup>15</sup> The SCAC discussed but did not decide whether the forms will be in the clerk's or reporter's record.