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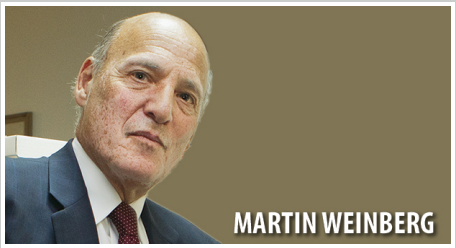
Volume of juror questions at issue in 'O'Brien' appeal

By: Brandon Gee January 8, 2015



The 1st U.S. Circuit Court of Appeals is being asked to consider, for the first time in more than two decades, the propriety of jurors asking questions of witnesses during a criminal trial.

Supporters believe the practice improves a jury's engagement during trial and its comprehension of the facts in a case. Opponents fear the growing practice — common in other jurisdictions but still rare in Massachusetts — can skew deliberations by improperly transforming neutral fact-finders into inquisitors.

The issue is not one that neatly divides prosecutors and defense lawyers.

The 1st Circuit will weigh in on the practice when it considers appeals filed by former Probation Department officials convicted last year of racketeering conspiracy and mail fraud charges for their roles in running a rigged hiring system that awarded positions to politically connected job applicants rather than the most qualified candidates.

Former Commissioner John J. O'Brien and his deputy, Elizabeth V. Tavares, are scheduled to report to the Bureau of Prisons on Jan. 12 to begin serving sentences of 18 and three months, respectively. A third defendant, William H. Burke received probation only.

In a motion for release pending appeal, Tavares focuses largely on the alleged impropriety of U.S. District Court Judge William G. Young permitting jurors to ask hundreds of questions of witnesses during last year's trial. The defendants objected to any questioning by the jurors at the outset of trial and also to some of the specific questions submitted throughout it.

"All told, the jury submitted 281 questions, of which the court asked about 180," states the motion filed by Tavares' appellate attorney, Boston's Martin G. Weinberg. "The number … and types of questions asked by the jury removed the jury from its proper function as a neutral factfinding body and transformed it into an inquisitorial body, more in the nature of a grand jury rather than a petit jury, fatally compromising Ms. Tavares' right to a fair trial."

In an interview, Weinberg said that "where jurors aren't just the finders of the facts, but the elicitors of the facts," the practice unfairly changes the dynamics of the trial.

In a response to the motion, Assistant U.S. Attorney Robert A. Fisher argues that there is no evidence that the jurors were ever biased and notes that all federal appellate courts to consider the issue have "determined that it is a matter within the sound discretion of the trial court, and that juror questions are not per se prejudicial."

In what was a complex 12-week trial, Young was especially justified in facilitating juror questioning, Fisher writes.

"The district court employed … prophylactic measures, required written submissions, provided counsel the opportunity to object privately to the overall procedure and to each question, and the judge exercised discretion in selectively determining which questions would be asked and which would not," the government's opposition states. "In addition, on several occasions during the course of the approximately 40-day trial, the district court reminded the jury as to the danger of reaching conclusions and forming opinions before all of the evidence was received and the parties rested."

Disparate views

Boston criminal defense and civil liberties lawyer Harvey A. Silverglate's opinion on juror questions has evolved over a decades-long career. While formerly opposed to the practice, his position reversed after he served on a jury himself several years ago.

"I was a great believer in the hermetically sealed jury, and the jury playing this narrowly defined role," he said. "Once I was a juror, I saw that was a little too limited and narrow, and there should be some more flexibility."

Silverglate said he realized there were issues that the judge and lawyers in the case assumed the jury was clear on,

when in fact many jurors were confused and would have benefited from the opportunity to ask follow-up questions.

"There's nothing like personal experience," he said. "From that day on I was converted to the point of view that jurors should be able to ask questions of [witnesses through] the judge."

Charlestown lawyer Peter T. Elikann, co-chairman of the Massachusetts Bar Association's Criminal Justice Section, said juror questioning "can be extremely helpful, while at the same time it can be fraught with danger."

Elikann said allowing a jury to ask questions can clear up confusion and provide lawyers with insight into jurors' thinking. But on the flip side, he said, lawyers can lose control of their entire litigation strategy if the jury breaks new ground or otherwise goes in unanticipated directions.

Judges should tightly filter submitted questions and ask only those that seek to clarify testimony already given, Elikann said, and the questions should "not take over the trial and be used as a general investigatory tool."

Nicholas J. Nesgos, a civil litigator at Posternak, Blankstein & Lund in Boston, agrees, though only after experiencing the practice firsthand.

"The first time I was on trial when it was done, … I was apprehensive because I thought it might overtake my role as counsel in sculpting the evidence being presented," he said.

But Nesgos found himself pleasantly surprised during that trial and subsequent ones. The juror questions were "quite focused, perceptive and limited" and did not take on the flavor of cross-examination or witness impeachment, he said. He now supports the practice.

"The judge does have to guard against the juror becoming the inquisitor, the cross-examiner and taking over the role of the lawyer," Nesgos said. "If the judge is an appropriate gatekeeper and provides appropriate instructions to the jurors, that shouldn't happen — and in my experience it doesn't happen."

Others, however, think that allowing jurors to submit questions for witnesses is inherently inappropriate regardless of how closely the process is monitored.

Max D. Stern of Boston's Todd & Weld said that while a judge can reject inappropriate questions, damage can be done merely by allowing jurors to formulate and submit them.

"Once you adopt a point of view, there's an enormous incentive to advance that point of view," he said. "People tend to become advocates at a point far before they should be. If clarifications is all it is, and it's very, very occasional, it would not be particularly harmful. But the problem with asking any questions is it's very hard to limit it."

Retired Superior Court Judge Regina L. Quinlan said she never allowed jurors to submit questions due to similar concerns that they might take it as an invitation to look beyond the evidence and assume the role of a prosecutor or defense attorney.

"If a question is asked and answered, then in deliberations someone is going to be attached to whatever answer that elicited and attach more weight to it," she said. "And if their question isn't asked, they may get suspicious. Not allowing them to get involved in that questioning process, in my view, eliminates those sorts of impacts on the deliberative process."

Quinlan, a self-described "traditionalist," said lawyers know their cases, are best equipped to present them, and have a right to do so without interference from the jury.

While conceding that the practice somewhat dilutes the adversarial process, Silverglate said it advances a higher purpose: achieving accurate and well-reasoned jury verdicts.

"It terrifies lawyers who are control freaks," he said. "But I don't believe trials are conducted for lawyers or judges. They are conducted for the people of the state and district. People who are opposed to jurors asking questions — their real problem is with democracy."

'Fraught with perils'

Young also was the trial judge in the two previous cases in which the 1st Circuit addressed juror questioning of witnesses, *United States v. Sutton* and *United States v. Cassiere*. The court found no fault with the practice in those cases, but made several cautionary statements: "allowing jurors to pose questions during a criminal trial is a procedure fraught with perils"; "the practice, while not forbidden, should be employed sparingly and with great circumspection"; and "the practice should be reserved for exceptional situations, and should not become routine, even in complex cases."

The two prior cases involved a far smaller number of juror questions — seven and 11 — than the hundreds at issue in *United States v. O'Brien, et al.*

Tavares argues that the large number of questions "is alone enough to indicate both that the jury crossed the essential boundary between constitutionally-required neutral factfinder and active investigative body and that the process produced premature deliberation on the merits of the case."

"If this doesn't get reversed, then [the 1st Circuit] never meant what they said" in the previous cases, Stern said.

The number of questions in O'Brien also alarms Michael D. Ricciuti of K&L Gates' Boston office. He said it suggests the practice has become routine in Young's courtroom, rather than the rarity encouraged by the 1st Circuit in the early-1990s cases.

"I think it's problematic. I think it's a very hard appellate issue," the former federal prosecutor said. "But Young is very careful and very thorough. This might be pushing the envelope, but I'm sure he's well thought this out. … This might be one of those really unusual cases where this practice is appropriate."

The government's opposition to Tavares' motion notes that other circuits have grown ever more accepting of juror questioning and cites cases in which as many of 95 questions were allowed. And, in its own previous rulings, the 1st Circuit has said it would focus not on the number of questions asked, but their effect on the case.

Elikann expects the 1st Circuit again will defer to Young's discretion.

"Generally speaking, judges are given a wide discretion," Elikann said, "and even if the judge did it more than observers think he should have, chances are he won't be overturned on an abuse of discretion."

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