Hastings Law Journal

Volume 13 | Issue 4 Article 6

1-1962

The Jury Room

Bruce W. Belding

THE JURY ROOM

By BRUCE W. BELDING*

"If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice."[1]

COURTS HAVE long looked with disfavor on attempts by lawyers, court officers, adverse parties, students or analysts of jury systems, and bystanders to discover what transpired during a jury's deliberations.

However, information as to events occurring during the jury's deliberations may be important and desirable for a number of reasons; *inter alia,* information on which to base a motion for new trial on grounds of jury misconduct; observing jury's reaction to and comprehension of court's instructions; seeing how individual jurors conduct themselves to determine effectiveness of attorney's panel selection and voir dire questioning; studying human behavior as applied to jury system; and determining reactions to certain techniques of argument.

I. *To Impeach Verdict*

Normally, proof of prejudicial misconduct of the jury is adequate ground for setting aside the verdict.[2] But proof is usually difficult to obtain, especially since most courts follow Lord Mansfield's rule that a juror may not testify as to misconduct of the jury during its deliberations,[3] or as stated in a leading American case, "a juror cannot impeach his own verdict."[4] Hence, interested parties have been forced to their ingenuity to devise ways to discover this information.

Wigmore suggests that since Lord Mansfield's rule requires proof of misconduct to depend solely on testimony of "some person having seen the transaction through a window or by some other means,"[5] a bailiff or other court officer, who may have been present at the jury's deliberations, may prove their misconduct, even though in so doing he is committing a gross breach of duty; but an actual participant in the misconduct (juror himself) may not testify, thereby excluding the

* Member, Second Year class.

[1] Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir. 1948).

[2] CAL. CODE CIV. PROC. § 657.

[3] Vaise v. Delaval, 1 T.R. 11 (K.B. 1785).

[4] McDonald v. Pless, 238 U.S. 264, 267 (1915).

[5] Vaise v. Delaval, 1 T.R. 11 (K.B. 1785).

better testimony, and possibly tempting the parties to bribe the bailiff.[6] However, the courts have precluded "unauthorized invasions"[7] into the privacy of the jury and made misconduct of such officers which may be prejudicial to the jury's deliberations grounds for a new trial.[8] These decisions seem primarily intended to preserve the sanctity of the jury room, but they also serve to limit the sources of information regarding the jury's deliberations, leaving the jurors themselves as the main source of such information.

One of the main reasons for the persistence of Lord Mansfield's rule is to protect jurors from fear of having their course of deliberations publicized.[9] Therefore, it seems to follow that there is a correlation between exclusion of juror testimony and any post-trial interrogation of jurors.[10] Interrogation of jurors (extra-judicially) after trial, in order to discover the required proof of misconduct, has not only been held by the American Bar Association to be unethical,[11] but is generally frowned upon by the courts. For example, in *Northern Pac. Ry. v. Mely*,[12] it was said, "We do hold for future guidance that it is improper and unethical for lawyers, court attachés, or judges in a particular case to make public the transactions in the jury room or to interview jurors to discover what was the course of deliberation of a trial jury."[13]

It is suggested that such a broad statement could be tempered along the lines of the holding in *Primm v. Continental Cas. Co.*,[14] where again disfavor with post-trial juror interrogation was shown, but was qualified by saying "without prior permission of the court, to be granted only upon good cause being shown."[15] This seems to embody all the safeguards necessary to protect the sanctity of the jury room, plus allowing certain questioning, but at the court's discretion. This procedure seems to preclude indiscriminate advances at jurors by attorneys, but would allow interrogation upon a court's determination that good cause existed.

---

[6] 8 WIGMORE, EVIDENCE § 2353 (McNaughton rev. 1961).

[7] Remmer v. United States, 347 U.S. 227, 229 (1954).

[8] 66 C.J.S. *New Trial* § 58c at 180 (1950).

[9] McDonald v. Pless, 238 U.S. 264 (1915).

[10] United States v. 120,000 Acres of Land, 52 F. Supp. 212, 213 (D.C. 1943), stated the importance of adherence to the rule of excluding juror testimony in impeachment of verdict, and stated, "An equal respect for the verdict after rendition in so far as any jury room deliberations is necessary."

[11] A.B.A., Canons of Professional Ethics, Canon 23: "A lawyer must never converse privately with jurors about the case. . . ." The A.B.A. Committee on Professional Ethics and Grievances, in opinion 209 (1947), ruled that it is professionally improper and unethical ". . . for a lawyer to interview, after verdict, jurymen who were on the panel as to what took place in the jury room and as to what the salient points were which caused the jury to arrive at a given verdict."

[12] 219 F.2d 199 (9th Cir. 1954).

[13] *Id.* at 202.

[14] 143 F. Supp. 123 (W.D. La. 1956).

[15] *Id.* at 127.

It has been suggested that although courts look with disfavor on post-trial interrogations by attorneys, they "fail to make a distinction between inquiry for impeachment of verdict and inquiry for trial tactics,"[16] and that the latter should be allowed. The distinction is based on the grounds that since neither testimony of jurors nor of third persons who talked to the jurors is admissible to impeach the verdict, such inquiry is futile; whereas to inquire as to the effectiveness of his arguments in order to improve his trial tactics would be less objectionable since only for the attorney's personal benefit. Perhaps this is a valid distinction, but it must be noted that if such interrogation were to be allowed, it must be supervised, for to require jurors to discern between questions bordering on verdict-impeachment and those of tactical benefit to counsel is a fine line to be drawn by a lay juror.

The Ohio Supreme Court has relaxed the rule prohibiting impeachment of verdict by jurors to the extent of permitting jurors to testify concerning misconduct of third parties, such as court officers.[17] Other courts have used this, or similar extensions of the rule: *Mattox v. United States*[18] allowed a juryman to testify as to facts regarding the existence of extraneous influence; *Southern Pac. Ry. v. Klinge*[19] held similarly regarding outside influence such as bribes; *United States v. 120,000 Acres of Land*[20] held "testimony as to outside acts, declarations, or information will be heard." California recognizes two exceptions to the general rule that affidavits of jurors may not be used to impeach a verdict: to show verdict was arrived at by chance,[21] and that bias or disqualification of a juror was concealed by false answers on voir dire.[22]

Hence, it is apparent that certain deviations are permitted from Lord Mansfield's rule, *i.e.*, not all juror testimony in impeachment of verdict is excluded. Nevertheless, assuming the correlation between Lord Mansfield's rule and post-trial interrogation, such deviations may be quite important when an attorney seeks permission to question a juror. If the attorney can assert suspicion of interference by an outside source, or false answers on voir dire, or verdict obtained by chance, the court may weigh this more heavily since such testimony would be ad-

[16] Note, 10 OKLA. L. REV. 174, 176 (1957).

[17] See Note, 10 OHIO ST. L.J. 262 (1949), but the article notes that this is a minority contention, that McDonald v. Pless, 238 U.S. 264 (1915), still represents the majority view.

[18] 146 U.S. 140 (1892).

[19] 65 F.2d 85 (10th Cir. 1933).

[20] 52 F. Supp. 212, 213 (D.C. 1943).

[21] CAL. CODE CIV. PROC. § 657.

[22] Kollert v. Cundiff, 50 Cal. 2d 768, 329 P.2d 897 (1958). Note, however, that in California misconduct of a juror is grounds for a new trial only if prejudice results therefrom. Forrest v. Pickwick Stages System, 101 Cal. App. 426, 433, 281 Pac. 723, 725, (1929).

missible by a juror. Permission may be denied more readily if the evidence sought would not be later admissible.

Sentiment toward relaxation of Lord Mansfield's rule is noted in the dissent to *Kollert v. Cundiff*[23] by Carter, J., who advocates rejection of the doctrine that a juror's affidavit cannot be used to impeach his verdict, and also in the *Model Code of Evidence*[24] and the *Uniform Rules of Evidence*.[25] Each seems to suggest a more liberal view, allowing juror testimony regarding conditions bearing on the verdict. Therefore, if certain relevant juror testimony is considered admissible, perhaps a relaxation of rules regarding post-trial inquiries will follow. A trial judge may be more liberal in allowing juror interrogation if testimony may be received regarding relevant conditions; this should confine areas of inquiry sufficiently to preclude "fishing expedition" type inquiries.

II. *Recording Jury Deliberations*

What better way is there to study the operation of the jury system —its strength and weakness—than to actually "eavesdrop" on a jury's deliberations? This was the same question in the minds of the participants in the University of Chicago's Jury Research Project (sponsored by the Ford Foundation) when they actually recorded the deliberations of six petit juries. Perhaps this would be unknown to this date except to the participants if part of one of the deliberations had not been played back to a conference of 10th Judicial Circuit Judges at Estes Park, Colorado in July 1955. This aroused such a furor as to cause the leaders of the project to be brought before a congressional committee hearing cases regarding the internal security of the United States,[26] and to result in the legislation noted below.

Today federal law imposes a fine of one thousand dollars or a year in prison, or both, upon any person "recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting."[27] The California Penal Code makes the same a misdemeanor.[28]

The practice of recording jury proceedings is condemned not only by legislation, but by judicial decisions and legal writers. Wigmore states that, "the communications originate in a confidence of secrecy; this confidence is essential to the due attainment of the jury's constitutional purpose; the relation of juror is clearly entitled to the highest

[23] 50 Cal. 2d 768, 774, 329 P.2d 897, 901 (1958) (dissent).

[24] MODEL CODE OF EVIDENCE rule 301, comment *a* (1942) permits "juror to testify to every relevant matter except his mental processes and the effect which any act or event had on his mental operations with reference to the verdict."

[25] UNIFORM RULES OF EVIDENCE rules 41, 44 (1952).

[26] *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate*, 84th Cong., 1st Sess. (Oct. 1955).

[27] 18 U.S.C.A. § 1508 (1956).

[28] CAL. PEN. CODE §§ 167, 891.

consideration and the most careful protection; and the injury from disclosure would certainly overbalance the benefits thereby gained."[29] Cardozo aptly stated, in *Clark v. United States*,[30] "freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." In *Remmer v. United States*[31] the court stated: "A juror must feel free to exercise his function without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions."[32] It is true that the University of Chicago committee purported to obtain the consent of court and counsel prior to recording any deliberations,[33] but court and counsel may not consent away one of the basic principles of our jury system. Freedom of discussion is basic to jury proceedings, and this can only be insured by maintaining secrecy.[34] Therefore, it seems that in the constant quest for information as to what took place in the jury room, actual recording exceeds all acceptable limits.

However, in conclusion, it is suggested that the demand for information as to what occurred during deliberation may be satisfactorily and safely satisfied by vesting in the court a discretion as to allowing post-trial interrogation, as suggested in the *Primm* case, *supra*. This would relax the present rules regarding post-trial interrogation, and would parallel what appears to be a relaxation of Lord Mansfield's rule, reflecting a more liberal view by the courts as to the admissibility of certain testimony by jurors—a desirable result.

[29] 8 WIGMORE, EVIDENCE § 2346, at 678 (McNaughton rev. 1961).

[30] 289 U.S. 1, 13 (1933).

[31] 347 U.S. 227 (1954).

[32] *Id.* at 229.

[33] *Hearings, supra* note 26.

[34] Remmer v. United States, 347 U.S. 227 (1954).