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Unpredictable Juries: When do their Miscues Constitute Misconduct?

By Lisa Perrochet

Sometimes a verdict comes in that is a real shocker. An obvious question that the parties might ask (especially the losing party) is whether this is the result of a "runaway" jury, or the machinations of an individual juror who used improper means to sway the rest of the panel. Defense counsel and the insurance adjusters working with them in such cases need to explore whether something went wrong during jury selection or deliberations that tainted the verdict.

Jurors do a lot of things that seem to be improper. An interview after the trial may reveal that one juror thought the law as explained in the instructions was too lenient or too harsh and shouldn't be followed. Another juror may have found the instructions were too confusing, so he just followed his gut instinct. Maybe a juror thought the defense expert's clothes were too expensive and concluded she must be just a slick "hired gun" whose opinion should be disregarded. Another juror might have felt that the plaintiff didn't really prove his case, but the evidence suggested the defendant probably harmed others, so awarding money to the injured plaintiff in this case was a form of "rough justice." Do any of these rise to the level of *misconduct* that is likely to result in a new trial?

Probably not. But a number of other actions by jurors, if properly documented, may provide good grounds for a new trial motion or appeal.

In California, the Evidence Code provides that a verdict may not be impeached by inquiring into a juror's mental or subjective reasoning processes, and evidence of what the juror "felt" or how he understood (or misunderstood) the instructions or evidence is inadmissible. "Not all thoughts 'by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such [thoughts] cannot impeach a . . . verdict; a jury verdict is not so fragile.' " (*People v. Steele* 27 Cal.4th 1230, 1262 (2002); *Mesecher v. County of San Diego* 9 Cal.App.4th 1677, 1683 (1992) [declarations that the jury failed to correctly apply the law "at most suggest[s] 'deliberative error' in the jury's collective mental process–confusion, misunderstanding, and misinterpretation of the law"].)

Nonetheless, "jurors may testify to 'overt acts'—that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration.' " (*In re Stankewitz* 40 Cal.3d 391, 398 (1985).) Below are some examples of conduct that, if shown by evidence of *objectively observable* actions that were likely to have influenced the verdict, may be found by a court to be misconduct.

1) **Concealed juror bias.** Did any juror misleadingly answer a question during voir dire? Even if a juror was not directly asked a question that would have revealed the juror's bias, courts have sometimes found that questions to *other* jurors should have prompted all jurors on the panel to understand they should volunteer significant information about their own attitudes or experiences bearing on the question. If, for example, the jurors during voir dire were asked whether they have negative feelings about a class of people, misconduct may be found if a juror failed to speak up at that point, but then during deliberations made broad statements suggesting that people like the plaintiff or defendant are inherently undeserving or untrustworthy. This is not an expression about

mental processes in evaluating the evidence at trial, but about a *pre-existing* bias that impairs the juror's ability to decide the case fairly.

Note, however, that a juror may properly express opinions that a party at trial was not credible, behaved reprehensibly, and so forth. Jurors' "remarks may be candid, even unflattering. But cutting and sarcastic words do not ipso facto constitute jury misconduct." Courts have explained that "jurors are entitled, and expected, to form opinions about the parties . . . *based on the evidence presented at the trial*." That sort of judgment is not an example of improper bias, which is based on preconceptions unrelated to the evidence in the case.

Because concealed bias is a classic example of juror misconduct, counsel—especially in a case with significant potential exposure—should make sure a court reporter is present to transcribe the voir dire process. The transcription of the jurors' answers may be key evidence for posttrial motions.

2) **Prejudging and refusing to deliberate**. Jurors are typically advised to keep an open mind until the last bit of evidence comes in and deliberations have run their course. Sometimes they find this to be a challenge. For example, in one case the court of appeal ordered a new trial because a juror reportedly said, before closing arguments, that the jury "could bring in a verdict already." A related type of misconduct is the juror who sits stubbornly in a corner and refuses to engage in any discussion about the case.

3) **Jury nullification**. Jurors may not like the law as it is presented in the instructions, but one juror's musings after the fact about how his or her feelings about the law led to that individual's vote on the verdict form will ordinarily be deemed to be inadmissible evidence of mental processes. And mere "deliberative error in failing to follow the instructions" is usually not actionable. However, objective evidence that "the jury *intentionally agreed* to disregard applicable law" is misconduct. Such an agreement may be express or implied by evidence of an extensive discussion during deliberations about the need to depart from the instructions to achieve a result that is at odds with the applicable law.

3) **Extraneous information discussed during deliberations.** Sometimes a juror, often with the best of intentions, may try to help educate the jury panel by bringing in "evidence" gleaned from outside sources (internet searches, dictionaries, investigation of the location at issue in a case), or by offering certain "expertise" from the juror's prior experience that goes beyond common lay experience. Any such discussion is an objective fact that can be grounds for a new trial. For example, in one case, a professional transportation consultant serving as a juror committed misconduct by making comments during deliberations "in the nature of an expert opinion concerning the placement of crossing gate 'sensors.'" Note that a declaration in which jurors describe whether they did or did not pay attention to extraneous information is inadmissible evidence of mental processes—the mere fact that deliberations were tainted by outside sources is often enough to warrant a new trial.

A jury may not consider extraneous *law* any more than it may consider extraneous *evidence*. It's therefore important to find out whether any jurors expressed their understanding of the law beyond what was set forth in the instructions—such as how an allocation of fault will affect the amount of economic or noneconomic damages paid by the defendant, or the standards by which certain awards (such as punitive damages or medical cost recovery) may be altered through post trial motions.

Misconduct does not occur, however, when jurors bring their common experience to bear in evaluating the evidence. "Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them." Distinguishing between merely "describing a personal experience in the course of deliberations" and improperly introducing new evidence or law into the jury room is sometimes difficult, as there is not a clear bright line between these two circumstances.

Moreover, sometimes the evidence will show the jurors effectively avoided any prejudice by agreeing that improperly introduced information was not to be considered. For example, in one case, jurors ignored a court admonition and discussed the evidence of a codefendant's out-of-court settlement, from which they inferred the defendant himself was liable. But the Court of Appeal found no misconduct warranting a new trial because there was evidence the jury recognized it had to decide the issue of liability for itself.

4) **Considering the effect of attorney fees, the availability of insurance, or the parties' financial condition**. Related to the "extraneous information" problem described above is the not uncommon scenario of jurors who discuss the fact that the plaintiff's attorney will get a percentage of any recovery, and who agree to increase an award so that the plaintiff receives a correspondingly larger payment. Similarly, juries sometimes speculate that the award will be paid by insurance. Just engaging in that discussion may be misconduct, although a court is more likely to order a retrial if there is further evidence that the jury overtly agreed that an award higher than what the evidence would otherwise support is permissible because for example, an insurer, rather than the defendant, will bear the burden of paying. Courts have also found that commentary during deliberations on the wealth or poverty of a litigant "is misconduct where the asserted wealth . . . is not relevant to the issues of the case." A declaration of the jurors' conduct (as opposed to their reasoning) may support a new trial motion if, for example, the jurors verbally agreed to raise the amount of an award after someone observed that the plaintiff was unemployed, or that the defendant could easily absorb the cost of paying for the plaintiff's harm.

5) **Including nonrecoverable elements of damages in the verdict**. Sometimes a jury may believe that a verdict should contain sums that go beyond those provided for in the instructions on the measure of damages. Posttrial jury interviews thus often cover whether the award included any amounts needed to "punish" the defendant, beyond what was necessary to compensate the plaintiff. A less obvious example, but an important one to explore, is the prospect that a jury calculating an emotional distress award has included the distress of having to go through trial, which may be very real, but is noncompensable as a matter of law. Similarly, the law places limits on awarding noneconomic damages for damage to personal property. A juror declaration saying one juror "intended" to include an improper element of damages in the verdict will be inadmissible as an example of evidence of mental processes. But a declaration saying the jury *discussed* and overtly *agreed* to award such damages may be the ticket to a new trial.

6) "**Quotient" or "compromise" verdict**. Sometimes a jury struggles to arrive at a consensus on the amount to award, and ultimately agrees to use a formula to arrive at the final figure, such as by collecting each juror's proposed number and then awarding an average. Jurors are not supposed to surrender their independent evaluation of the evidence to reach a verdict. A caution is in order, however: many times, a promising argument that a compromise verdict was entered fizzles because the prevailing party submits a counterdeclaration saying that the jurors merely took a "straw poll" but then, when an average was calculated, the jurors individually agreed

it was fair — rather than agreeing in advance to be bound by the mathematical process. Where the jurors supersede the "quotient" verdict with subsequent deliberations of this type, the courts do not find misconduct.

7) **Communications with others about the case.** Jurors are routinely admonished not to discuss the case while it is ongoing, but the temptation to violate that rule has frequently proved too great to resist. As has been reported in many recent articles, the culture of sharing information through social media makes that temptation even stronger. Some jurors just can't resist "tweeting" about their experiences or posting commentary on Facebook. A red flag may appear if jurors report seeing others tapping away on their smart phones during trial or deliberations, and a good jury investigator can help unearth examples of such behavior. Many judges are willing to order a new trial when they find this type of misconduct has occurred.

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Obtaining information to support a claim of misconduct on any of the grounds outlined above may not be easy. Opposing counsel may truthfully tell jurors they are not required to talk to counsel for the losing party, and may even warn the jurors that any interview may be an attempt to get affidavits to overturn the verdict. However, counsel are not permitted to *mislead* jurors in any way, such as by falsely telling them that it would be improper for them to share information with counsel for any party, or by threatening that if the jurors provide an affidavit they will be dragged into court as live witnesses. Anyone having preliminary discussions with jurors after a trial should be on the lookout for such tactics, as they could give rise to a claim of *attorney* misconduct that prevents one side from undertaking an entirely permissible investigation. (*See Lind v. Medevac, Inc*. 219 Cal.App.3d 516, 519-20 (1990) [a winning or losing attorney has the right to contact jurors after the trial and develop facts by way of juror affidavits to impeach their own verdict].)

If support for a potential misconduct argument does surface, it is essential to set up the argument first in the trial court, by motion for new trial, as the evidence supporting these arguments usually cannot be presented for the first time in an appellate brief. Moreover, the phrasing of any declarations in support of a new trial motion is tricky; great care must be taken to avoid injecting language suggesting that the argument is based on a juror's mental processes, rather than on objective indicia of overt behavior constituting misconduct. With the above principles in mind, defense counsel and insurance adjusters can make an informed decision about whether to spend the time and resources to challenge a judgment based on a claim of misconduct.

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