

## EXPOSING JUROR MISCONDUCT

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With every verdict, there is a winner and a loser. Most of the time, neither the winner nor the loser knows exactly why they won or lost. Sometimes, an underlying factor for the verdict involves an injustice to the losing party, and neither side nor the court appreciates what has occurred. Sometimes, jurors fail to abide by all the court's instructions and admonishments. Unfortunately, there is often only one way to determine whether this has occurred. Ask the jurors themselves.

One of the most ineffective aspects of trial strategy is the post-verdict juror debriefing. Properly conducted interviews may uncover misconduct that unjustly influenced the verdict in the case. However, lawyers typically conduct their own interviews in the worst of conditions. Whereas the courthouse may have been appropriate for presenting evidence, it is a poor forum for getting honest, in-depth feedback from jurors in the emotional aftermath of a significant verdict. Debriefings in the courtroom or courthouse corridors following the verdict are too brief, too self-serving, and too unfocused. They are typically conducted as a group discussion rather than as an in-depth individual debriefing.

Both the lawyers and the jurors are poorly prepared for a careful debriefing. The lawyers may be totally unaware that misconduct has occurred and fail to ask crucial questions. Jurors, in turn, often feel defensive and less than forthcoming and forthright about their true motivations for their verdict. They may not even consciously appreciate how they came to

their verdict or that they had done anything wrong. They may also be anxious to get closure on this event in their life and move on, or they may simply be tired after an exhaustive trial and emotional deliberations.

A more precise approach to gathering, organizing, and reporting juror debriefings can be conducted by an independent firm that specializes in this research activity and knows how to gain cooperation and honesty from in-depth, one-on-one interviews, as well as obtaining signed affidavits when misconduct is uncovered. This type of research is generally referred to as a Post-Trial Juror Interview (PTJI). A PTJI generally can serve two purposes:

1. Provide feedback on critical case issues leading to a verdict as well as the reactions to the individuals and parties in a case. This feedback is helpful for refining trial strategies for the next case that has similar events and/or issues.
2. Provide feedback to uncover evidence of juror misconduct that can be used to support motions for a new trial, appeal, or to leverage a reasonable settlement.

This article will focus on the latter application.

### **A. Background and Method**

After conducting hundreds of post-verdict juror interviews, we have found that jurors do not always act in accordance with the court's instructions. Sometimes, this misconduct leads to an adverse verdict and a large damage award. If so, a PTJI can be pivotal to obtaining evidence of misconduct and obtaining a new trial, leveraging a reasonable settlement, or appealing the case.

Establishing the purpose of motions for a new trial or appeal must be established prior to the first juror contact. The PTJI must be carefully structured. Each question should be driven by its usefulness in identifying juror misconduct previously recognized by appellate courts. It must also be worded in a way that is not leading, but probative. A detailed Interview Protocol is therefore developed based on the nature of the case, the purpose of the survey, and to address key topics. Once the Interview Protocol is developed, jurors may be contacted by phone and either interviewed on the phone or in person.

The Interview Protocol, while critical to the preparation and process, should be considered a tool and guideline, not a script. The best consultant/interviewers have extensive clinical training in listening, reflecting responses, and probing for additional information. They also know how to avoid leading a juror to a conclusion that the juror does not genuinely hold. Probes must be open-ended and general. Examples include,

- “Can you tell me more about that?”
- “What do you mean?”

- “Can you be more specific?”

While these kinds of probes may seem obvious, they are often underused by less experienced interviewers. Inappropriate follow-up probes include,

- “Didn't that seem inappropriate to you?”
- “So, you felt like you were being threatened?”
- “Mr. Jones sounds like he already made up his mind.”

These kinds of probes reveal a bias by the interviewer that will be evident in the transcript if the interview was taped, or will cause resentment in jurors and resistance to signing an affidavit that represents the interviewer's view rather than their own.

### **B. Types of Juror Misconduct to Explore**

The Interview Protocol and follow-up probes can be designed to uncover a variety of types of juror misconduct:

#### **1. Discussion of Personal Experiences**

Jurors are not blank slates onto which the evidence is written. Jurors enter the deliberating room with not only their notes and memories of the evidence presented in the courtroom, but their own personal beliefs, experiences, lifestyles and attitudes. Often, these experiences are shared in the context of deliberations. In conducting the PTJI, it is necessary to establish whether any jurors used those experiences in the deliberating room to introduce new evidence and/or help anyone to determine their verdict. If personal experiences were used to persuade jurors to a verdict, an appellate issue has been identified.

## 2. Discussions Outside Deliberations

Jurors are admonished to refrain from discussing the case with any family members or friends during the trial and during deliberations. In most states, jurors are also instructed not to discuss the case with fellow jurors until they enter the deliberating room. Jurors cannot discuss the witnesses or case issues over lunch or during breaks. Evidence suggesting that such discussions occurred outside the deliberating room is a basis for appeal or new trial.

## 3. Failure to Disclose

A juror who conceals personal information about themselves during *voir dire* that is relevant to the case, yet shares such information during deliberations with the jurors, must be investigated. Similarly, if information is discovered about a juror who concealed information during *voir dire* that would be related to the nature of the case, this failure to disclose could be critical (e.g., having a prior conviction, being abused in an abuse case) and should be brought to the attention of the court.

## 4. External Influence

Jurors cannot be influenced by **any outside material, individual or event** during the trial or during deliberations. Jurors cannot consult with outside sources about case issues for their own benefit or the benefit of the jury (e.g., looking up a term in a dictionary, visiting a site of an incident/accident or conducting their own experiment). Evidence can only be presented through the testimony of the witnesses. Jurors who have "special" knowledge about a subject are also not allowed to introduce new information to the

jury based on their own learning. This is especially important when jurors refute testimony of witnesses during deliberations. Jurors may also have been enlightened with new information by watching a television report, reading a news article or hearing information over the radio about a case. In all scenarios, the impact on verdict orientation from information learned through external sources needs to be determined.

## 5. Physical Threats or Harm

Physical threats or actual harm to jurors by the bailiff, fellow jurors, or anyone connected with the case are grounds for appeal. Jurors may feel pressure to conform to a side based on physical threats of harm and such behavior and actions must be uncovered.

## 6. Unusual Behaviors

Jurors may demonstrate unusual behaviors that impede their ability to understand the testimony in the case or impact their ability to participate in deliberations. Such behaviors can include the following: inattentiveness, sleeping, intoxication, problems seeing or hearing, easily distracted or preoccupied (e.g., needing to get back to work), language difficulty, incompetence, or being mentally or physically ill. All jurors should participate actively in listening to the evidence and deliberating. When there is evidence to the contrary, this can be an area for appeal or a new trial.

### 7. Prejudice/Discrimination

Statements made during the course of trial or deliberations about a party or witness' **race, gender, ethnicity** or **sexual orientation** are grounds for appeal or a new trial, especially if such statements show clear bias for or against a party.

### 8. Sympathy

Sympathy is typically found in most cases. However, sympathy can only become grounds for appeal when a juror is unable to separate the sympathy from the facts in the case and has made statements to represent this view.

### 9. Pre-Determined Verdict

Jurors are not to determine their verdict orientation before hearing all of the evidence. Obtaining statements from jurors that a fellow juror identified his or her verdict orientation before all of the evidence was heard can be valuable for an appeal or new trial.

### 10. Reliance on the Judge

Reliance on statements made by the judge during the course of the trial or in response to questions posed by the jury during deliberations can be grounds for an appeal. If one party feels that the judge did not provide accurate information to the jury and the jury based a verdict on such information, this could be an issue to include in an appeal.

### 11. Confusion

Jurors can be confused over the jury instructions or the verdict form. They may take the verdict form questions out of order as well. Reliance on information that was

misunderstood could be used for an appeal.

### 12. Weight of the Evidence

The jury may have relied upon a particular piece of evidence when rendering their verdict. One party may feel that such evidence was unfairly introduced (e.g., a particular study or statistic). The impact of this evidence will need to be assessed.

### 13. Damages: Averaging

Jurors will identify the method used to determine damages in a case. Jurors are usually instructed that they cannot use the method of averaging their individual damage awards without further deliberation. Yet, this is a common practice. It is therefore necessary to determine if jurors actually determined a figure by having each juror provide a number that was then added up and then divided by the number of jurors. If the jury determined ahead of time that they would be committed to the figure that they obtained by averaging and did not vote after the figure was determined, this is important for an appeal. If the jurors discussed the figure afterward and voted again, this process would not be considered grounds for an appeal.

### 14. Damages: Content

Jurors should not take into account the cost of attorney fees for the plaintiff or for the witnesses when determining damages. If jurors discussed attorney fees or what percentage the attorney would get from an award and agreed to add this award on top of a figure identified for the plaintiff, this is ammunition for an appeal.

### *15. Underlying Motives*

Jurors may have a separate agenda that could result in a verdict, or higher or lower damages than the case facts warranted. Underlying motives and messages need to be exposed.

#### *C. The Evidence Must Be Objective*

With each of the stated appellate issues, it is necessary to have the following questions explored and answered in detail:

- Which juror made a statement or acted in a certain manner?
- How many times was a statement made or did a behavior occur?
- At what time during the trial or deliberations did a particular statement or behavior occur?
- The exact content of a statement or description of a behavior by a judge, juror, bailiff or witness.

The event must be more than an impression or feeling. It must be described as an observable behavior or statement. Further, the more jurors who corroborate that a particular behavior occurred or that a statement was made, the more beneficial for the appeal. At a minimum, three jurors should be able to verify that **juror misconduct** occurred.

#### *D. Getting the Interview and Affidavit*

Some jurors will typically decline to be interviewed, or will offer only general feedback that cannot be used as evidence in motions for a new trial or appeal. They may feel awkward about their decision, feel like

they are being investigated for doing something wrong, or they may simply want to get on with their life after serving their public duty. Jurors who voted against a party tend to be particularly resistant to speaking to trial counsel who represented that party. Jurors who acknowledge misconduct will be even more reluctant to sign an affidavit presented by the losing trial counsel.

A consultant as an objective third party has a better chance of gaining the cooperation of jurors. Jurors feel less discomfort with being frank and up-front about what happened. Most jurors even agree to have the interview taped.

Consultants are often more effective than lawyers in obtaining affidavits to be used as evidence in motions for a new trial or an appeal. The consultant may ask the juror if they would review a transcription of a portion of the tape and/or a summary of some their statements and sign off on its accuracy. This is in fact an affidavit, though it may not be specifically referred to as such when the consultant makes the request. When presented by a non-lawyer, the affidavit will seem less threatening. The juror will feel freer to sign it, as long as it is accurate and truthful.

#### *E. Applications*

Affidavits describing specific acts of juror misconduct can be powerful persuaders to support a motion for a new trial or appeal. Juror misconduct is usually hidden and unobservable, especially when it occurs behind closed doors during deliberations.

The revelation of misconduct is often unsettling. The court will have to consider whether both sides received fair treatment and whether the verdict was influenced by any misconduct. If so, a new trial would be warranted.

Sometimes, the mere introduction of this evidence has been leveraged to obtain a settlement with better terms. Ultimately, both sides benefit when the case is finalized for a reasonable amount, rather than dragging out the process to an uncertain end.