

PAYING FORMER JURORS FOR CONSULTATION ON A RETRIAL: SUSPECT TACTIC OR GOOD LAWYERING?

INTRODUCTION

Twenty-one years ago, in 1985, the *National Law Journal* ran an article entitled “Ex-Juror Retained As Trial Consultant.”¹ It concerned a defendant charged with first-degree sexual assault and second-degree burglary.² After the first jury hung, voting five-to-one for acquittal of the defendant, the Connecticut defense attorney hired one of the jurors from the mistrial as a consultant for his client’s retrial.³ The lawyer paid the juror “a nominal fee” for her time and services.⁴ At the time of that incident, Connecticut Chief State’s Attorney, John J. Kelly, said about the tactic: “It leaves a bad taste in my mouth I don’t think there is anything illegal about it, but it seems to taint the entire proceeding.”⁵ The then President of the Connecticut Bar Association, Ralph G. Elliot, commented that “some hard thought must be given to the effect such a practice [i.e., hiring former jurors for consultations] commonly indulged in might have upon the future of the jury system.”⁶

Almost twenty years later, the *National Law Journal* ran a similar piece under the headline: “Hiring Former Jurors As Trial Consultants Catches On: Some Cry ‘Foul,’ Others Call It Good Strategy.”⁷ The facts were similar to the 1985 case. In a rape case, the jury could not reach a verdict, and the case resulted in a hung jury.⁸ After the mistrial, lead counsel for the defendant contacted members of the jury, asking if they would consult with him on the merits of the case in preparation for the second trial.⁹ The California defense attorney stated that consulted jurors “should be compensated” and that “\$50 an hour seems to be a reasonable amount.”¹⁰ Again, as in the 1985 piece, this article also noted that “while in most states hiring a juror is not a

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1. George Gombossy, *Ex-Juror Retained As Trial Consultant*, NAT’L L.J., Dec. 30, 1985, at 3.
 2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Id.* at 6.
 7. Leonard Post, *Hiring Former Jurors As Trial Consultants Catches On: Some Cry “Foul,” Others Call it Good Strategy*, NAT’L L.J., Aug. 16, 2004, at 6.
 8. *Id.*
 9. *Id.*
 10. *Id.*

crime or unethical under professional conduct rules, some in the legal community think it's just not right."¹¹

Despite Mr. Elliot's caveat in 1985,¹² relatively little attention has been paid to the practice of hiring former jurors.¹³ Indeed, though hiring ex-jurors has become more common over the years, the tactic has flown under the radar of widespread notice.¹⁴ While "a bad taste"¹⁵ might linger in the mouths of some, others fully support the utilization of jurors as just another tool to be used in zealously representing a client.¹⁶ The topic is overripe for open discussion.

Juror interviews in general are not a novel subject of critique.¹⁷ In fact, concerns about lawyers fishing for impeachment and harassing jurors have led to rules precluding contact.¹⁸ Consulting members of a hung jury when preparing for retrial, however, is a relatively new twist on an old concern.¹⁹ The new practice differs in context and in purpose. Unlike the concerns of jury abuse, this form of jury contact arises in cases where a retrial has already been ordered. Furthermore, the attorney's motives are often positive: her interest is in improving her personal trial skills and techniques as well as in preventing a second hung jury.²⁰

This Comment discusses the practice of hiring former jurors as consultants. Part I looks at the history of the practice of consulting jurors in preparation for retrial. Part II gives an overview of the current rules and regulations that address juror contact. Part III focuses on the special circumstance of consulting a juror for the purpose of preparing for a retrial. The context of a retrial after a hung jury does not raise the same risks of abuse as other forms of contact with jurors, and a retrial offers a special opportunity to promote justice by allowing lawyers to consult members of a hung panel. Part IV then addresses the truly bothersome aspect raised by the articles mentioned in the introduction—the payment of jurors. Because of the dangers that compensation of former jurors presents, payment should be prohibited. Finally, this Comment concludes by suggesting some rules that allow, but safeguard the practice of pre-retrial jury consultation.

11. *Id.*

12. Gombossy, *supra* note 1, at 6.

13. Post, *supra* note 7, at 6.

14. *Id.*

15. Gombossy, *supra* note 1, at 3.

16. Post, *supra* note 7, at 6.

17. See, e.g., Jennifer Adair, *Post-Verdict Contacts with Jurors by Attorneys*, 23 J. LEGAL PROF. 337 (1999); Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 507-600 (2003); Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509 (1988); Holly M. Stone, *Post-Trial Contact with Court Members: A Critical Analysis*, 38 A.F. L. REV. 179 (1994).

18. See Crump, *supra* note 17, at 528.

19. See Gombossy, *supra* note 1, at 3; Post, *supra* note 7, at 6.

20. See *infra* Part III.

HISTORICAL DEVELOPMENT OF JUROR CONTACT

Today, jury deliberations are closely guarded,²¹ but there was a time when they were not. The roots of the protection of deliberations, found in old English law, were first enacted to exclude from evidence the testimony of jurors regarding jury misconduct.²² Then, after those evidentiary rules became entrenched in legal theory, their rationale was expanded to support the secreting of deliberations in general.²³ On this foundation, the current rules, discussed in Part II, arise.

Before 1787, courts in England received all sorts of evidence to impeach the verdict of a jury, including affidavits by the jurors themselves.²⁴ In that year, Lord Mansfield disallowed the practice in *Vaise v. Delaval*.²⁵ In *Vaise*, the jury essentially flipped a coin to determine the verdict.²⁶ Accordingly, Mansfield handed down what became known as the Mansfield Rule:²⁷ juror are incompetent to testify about their own misconduct.²⁸ Lord Mansfield reasoned that if a juror engaged in misconduct after promising to do justice, he earned a reputation of untrustworthiness and could not be trusted later to give a faithful account of even his own misconduct.²⁹ As one commentator noted, “[t]his reasoning led to the common-law view that inquiry into jury misconduct stops at the jury room door.”³⁰ But, because of its deceptively simple reasoning, the Mansfield Rule suffered a good deal of just criticism as did other draconian, broad-sweeping incompetency rules.³¹ In fact, it may have fallen by the wayside had it not been redefined when it crossed the Atlantic to the United States.³²

In 1866, the Iowa Supreme Court set the Mansfield Rule on a new track with its decision in *Wright v. Illinois & Mississippi Telegraph Co.*³³ The court held that a juror’s affidavit may be used to avoid a verdict,³⁴ as long as there is also “objective, verifiable proof of misconduct.”³⁵ By allowing a juror to impeach a verdict only where other evidence existed, the *Wright* court slightly retracted the Mansfield Rule while providing—the court

21. See *infra* Part II.

22. See Crump, *supra* note 17, at 513-15. For more of the background from which the history below is largely drawn, see *id.* at 513-25.

23. See *id.* at 514-25.

24. See *id.* at 513.

25. (1785) 99 Eng. Rep. 944, 944 (K.B.).

26. See Crump, *supra* note 17, at 513.

27. *Vaise*, 99 Eng. Rep. at 944.

28. See Crump, *supra* note 17, at 513 (referencing the “Mansfield Rule”).

29. *Id.* at 513 & n.26 (“The notion underlying the maxim is that a person who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession a liar or a villain, and therefore untrustworthy as a witness.” (quoting 2 JOHN HENRY WIGMORE, EVIDENCE § 525, at 735 (James H. Chadbourne ed., rev. ed. 1979))).

30. *Id.* at 514.

31. See *id.*

32. See *id.*

33. 20 Iowa 195 (Iowa 1866).

34. *Id.* at 210.

35. See Crump, *supra* note 17, at 515.

claimed—for the concern obviated by the Rule.³⁶ That is, attorneys or other interested parties could not improperly attempt to persuade a juror to question the soundness of the verdict for a reason substantiated by nothing more than the juror's individual conscience.³⁷ Under the court's expanded rationale, the Iowa Rule thus "protect[ed] the 'sanctity and conclusiveness' of jury verdicts" against outside influences.³⁸

Not long thereafter, the Supreme Judicial Court of Massachusetts parsed the distinction between extraneous influences and intrinsic deliberations in *Woodward v. Leavitt*.³⁹ The court held that a juror is competent to testify about a statement which the juror made outside of court before trial,⁴⁰ while holding incompetent the part of the juror's affidavit discussing the jury's deliberations and voting.⁴¹ Here, the court focused on the notion "that juror deliberations should be free and secret to avoid 'distrust, embarrassment and uncertainty' in the verdict."⁴² In its effort to preserve an otherwise tenuous evidentiary rule, the judiciary again extended the rule's underlying rationale. Though originally reasoned as solely an issue of juror competency, the Mansfield Rule's new incarnation in *Woodward* included more broad considerations of the effects of allowing inquiry into deliberations.

The Supreme Court of the United States finally addressed the competency rules in *Mattox v. United States*.⁴³ The Court held juror affidavits competent concerning misconduct where the bailiff allegedly told the jury that the defendant had killed two other people, and the jurors read newspaper accounts of the trial during deliberations.⁴⁴ With this decision, the Court sought to prevent jury tampering and assure the accuracy of verdicts:

It is vital . . . that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering, may be reason for a new trial, variously held as absolute⁴⁵

Notably, however, this was a capital case—with a life hanging in the balance, accuracy was especially important.⁴⁶ Thus, the Court noted with approval both the Iowa Rule and the *Woodward* Test,⁴⁷ while allowing a

36. *Wright*, 20 Iowa at 211.

37. *See Crump*, *supra* note 17, at 515.

38. *Id.* (quoting *Wright*, 20 Iowa at 211).

39. 107 Mass. 453 (Mass. 1871).

40. *Id.* at 470-71.

41. *Id.*

42. *Crump*, *supra* note 17, at 517 (quoting *Woodward*, 107 Mass. at 460).

43. 146 U.S. 140 (1892).

44. *Id.* at 142-44, 147-49.

45. *Id.* at 149.

46. *Id.*

47. *Id.* at 148-49.

greater degree of intrusion into deliberations than had heretofore been allowed. At some level, at least, the accuracy of the verdict outweighs the secrecy of the jury's deliberation.

In the civil context, the Supreme Court proved unwilling to extend the rationale for competency as far as it had in *Mattox*.⁴⁸ The Court held in *McDonald v. Pless*⁴⁹ that public interests outweighed the litigant's private interests in admitting affidavits verifying that the jury utilized a quotient verdict.⁵⁰ The Court expressed three major public concerns: first, admitting evidence of how a jury reached a verdict would encourage harassment of jurors by a defeated party searching for any ground on which to set aside a verdict;⁵¹ second, open and frank discussions within the jury room would be chilled by making those deliberations open to public scrutiny;⁵² and "[t]hird, to include such testimony would encourage losing litigants to tamper with jury verdicts and thus prevent finality of litigation."⁵³ Finally, nearly 230 years after the Mansfield Rule had been handed down on the other side of the Atlantic, the Supreme Court articulated the cornerstones of jury secrecy as they are understood today.⁵⁴ Though *McDonald*, like *Vaise*, involved an evidentiary issue—it did not explicitly address the question of contact with jurors—its reasoning served as the foundation for subsequent contact rules.

The evidentiary competency rules did not per se prohibit contact between attorneys and former jurors; they merely restricted the admissibility of juror's testimony. Under an exclusionary rule, such as the Mansfield Rule, without more, a lawyer could freely speak with a juror after a trial.⁵⁵ But as courts broadened the rationale underlying the evidentiary rules, the focus shifted from the competency of jurors to testify about their own misconduct to the effect of allowing inquiry into deliberations on jurors and the system.⁵⁶ Since evidentiary rules alone were insufficient to govern communication between attorneys and jurors, other rules had to be enacted.

LAW GOVERNING ATTORNEY CONTACT WITH JURORS

When developing ethical canons, governing bodies draw from the principles underlying the juror competency and evidentiary rules to shape the standards of contact between attorneys and jurors. The concerns expressed in *McDonald* found new application in defining the boundaries of permissible post-trial contact. Against these concerns, however, lawyers asserted

48. Crump, *supra* note 17, at 518-19.

49. 238 U.S. 264 (1915).

50. *Id.* at 267-69.

51. Crump, *supra* note 17, at 519.

52. *Id.*

53. *Id.*

54. *See id.* at 520-25.

55. *See id.* at 513-14.

56. *See id.* at 514-25 (giving the historical development of the rule).

their professional interests in allowing some transparency of jury deliberations.

The foremost motive to an attorney is the zealous advocacy for the client.⁵⁷ To a trial lawyer in particular, nothing is more significant to advocacy than the reaction of the jury. Numerous studies affirm that jurors consider the styles of the attorneys at the trial.⁵⁸ Some authors even suggest that juries weigh the lawyers' styles more heavily than the facts of the case.⁵⁹ Thus, an attorney possesses a great interest in understanding how her style affects the minds of the jurors in the box.⁶⁰ Though a lawyer may be able to gain insight by reading about jury psychology⁶¹ or by utilizing mock juries,⁶² neither offers the quality of feedback that jurors in an actual trial can provide because the pressures and atmosphere of a real trial cannot be simulated.⁶³

In sum, there are competing interests coming to bear on standards of attorney conduct. On one hand stand the lawyer's interests in talking with jurors post-trial; such as discovering legitimately impeachable verdicts,⁶⁴ improving personal trial skills,⁶⁵ and understanding what the jury considered significant in deciding the case so to more effectively present similar facts next time.⁶⁶ These interests generally seek to improve the legal system by assuring the accuracy of verdicts and increasing the understanding of its agents.⁶⁷ On the other hand stand the public's interests in keeping jury deliberations secret; such as encouraging open discussion in the jury room by safeguarding against public scrutiny,⁶⁸ assuring the finality of judgments by curtailing fishing expeditions for possible verdict impeachment,⁶⁹ and protecting jurors as individuals by prohibiting harassment.⁷⁰ These interests

57. See MODEL RULES OF PROF'L CONDUCT, *Preamble* [2], at 1 (2003) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

58. See, e.g., NEIL J. KRESSEL & DORIT F. KRESSEL, *STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING* 161-65 (2002); see also DONALD E. VINSON, *JURY PERSUASION: PSYCHOLOGICAL STRATEGIES AND TRIAL TECHNIQUES* 39 (1993) (indicating that studies show that well-liked people are more persuasive than other communicators).

59. See VINSON, *supra* note 58, at 35-36.

60. See WALTER F. ABBOTT, *SURROGATE JURIES*, at ix (1990).

61. See, e.g., KRESSEL & KRESSEL, *supra* note 58 (exploring jury consulting issues); VINSON, *supra* note 58 (explaining psychological strategies for jury persuasion); JEFFERY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* (1987) (compiling information on jury psychology); ROBERT J. MACCOUN, *GETTING INSIDE THE BLACK BOX: TOWARD A BETTER UNDERSTANDING OF CIVIL JURY BEHAVIOR* (1987) (discussing the methods and studies used for learning about jury psychology and what those methods and studies reveal).

62. See generally ABBOTT, *supra* note 60 (discussing the composition and benefits of mock juries).

63. Cf. *JURY TRIAL INNOVATIONS* 207 (G. Thomas Munsterman et al. eds., 1997) ("Post-trial juror interviews permit jury researchers to develop and test emerging theories about juror decision making in real, as opposed to simulated, situations.").

64. See Adair, *supra* note 17, at 342-44.

65. See *id.* at 341-42.

66. See Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 *WAKE FOREST L. REV.* 671, 693-94 (1997).

67. Adair, *supra* note 17, at 341-42.

68. See Stone, *supra* note 17, at 181-82.

69. *Id.*; *Nat'l Indem. Co. v. Andrews*, 354 So. 2d 454, 456 (Fla. Dist. Ct. App. 1978).

70. See Stone, *supra* note 17, at 181-82; Note, *Public Disclosures of Jury Deliberations*, 96 *HARV.*

supposedly foster general belief and confidence in the jury system, and encourage individual participation in it.⁷¹

DR 7-108 of *The Model Code of Professional Responsibility*,⁷² promulgated in 1969, attempted to strike a balance between these interests. It prohibited only those communications intended “to harass or embarrass the juror or to influence his actions in future jury service.”⁷³ A few jurisdictions still follow this regulation, the least restrictive of the Model Rules.⁷⁴

By 1983, when the ABA first promulgated *The Model Rules of Professional Conduct*,⁷⁵ sentiment toward lawyers’ interests shifted. A few states even enacted a per se prohibition against all communication.⁷⁶ The 1983 version of Rule 3.5(b) was ambiguous; it provided that “[a] lawyer shall not . . . communicate *ex parte* with [a juror] except as permitted by law”⁷⁷ Rule 3.5(b) replaced the only rule that allowed jury contact.⁷⁸ Thus, this broad-sweeping prohibition of post-trial communication in effect terminated contact between attorneys and jurors because few states’ laws met the “as permitted by law”⁷⁹ exception.⁸⁰ In *Rapp v. Disciplinary Board of the Hawaii Superior Court*, a federal court held that Rule 3.5(b) was unconstitutionally vague and overbroad on account of the ambiguity of the “as permitted by law” clause.⁸¹ As the rule stood, it gave neither judges nor parties guidance as to what circumstances or standards warrant contact.⁸²

In response to these concerns, the ABA Ethics 2000 Commission revised Model Rule 3.5 in 2002 by adding current subsection (c), which contains more specific restrictions on communication with jurors.⁸³ Rule 3.5(c) of the *Model Rules of Professional Conduct* states:

A lawyer shall not . . . communicate with a juror or prospective juror after discharge of the jury if:

- (1) the communication is prohibited by law or court order;

L. REV. 886, 888-89 (1983).

71. See Note, *Public Disclosures of Jury Deliberations*, *supra* note 70, at 905-06.

72. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-108(D) (1970).

73. *Id.*

74. See, e.g., VA. RULES OF PROF’L CONDUCT R. 3.5(a)(2)(i) (2000).

75. MODEL RULES OF PROF’L CONDUCT (1983).

76. See, e.g., DEL. RULES OF PROF’L CONDUCT R. 3.10(d) (repealed 2003) (“After discharge of the jury from further consideration of a case with which the lawyer was connected, a lawyer shall not ask questions of or make comments to a member of that jury.”).

77. MODEL RULES OF PROF’L CONDUCT R. 3.5(b) (1983).

78. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-108 (allowing contact with the jury under certain circumstances).

79. MODEL RULES OF PROF’L CONDUCT R. 3.5(b).

80. *Rapp v. Disciplinary Bd. of the Haw. Sup. Ct.*, 916 F. Supp. 1525, 1534-38 (D. Haw. 1996) (discussing judicial interpretations of ethics rules).

81. *Id.* at 1536.

82. *Id.* at 1536-37.

83. See CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, REPORTER’S EXPLANATION OF CHANGES, R. 3.5 (2002), available at <http://www.abanet.org/cpr/e2k-rule35rem.html>.

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment⁸⁴

A number of states have adopted provisions the same as or similar to Model Rule 3.5(c),⁸⁵ but many jurisdictions have not yet adopted revised Rule 3.5.⁸⁶ The current Model Rule generally governs lawyer contact with jurors, but at least it elucidates the permissible timing and extent of contact.

A number of jurisdictions put their own spin on juror contact. One common articulation prohibits contact unless the court gives leave “for good cause shown.”⁸⁷ Some jurisdictions further provide that even when leave is given, inquiry into the jury’s deliberation process is prohibited.⁸⁸ Others generally allow communications without leave of the court, but prohibit discussion of the case’s merits.⁸⁹ Though no jurisdiction allows completely unfettered post-trial communication, the most permissive rules allow all contact not otherwise prohibited by law or conducted for improper purposes.⁹⁰

Just as the Model Rules have not been consistently adopted across jurisdictions, the local rules to which courts defer also vary. There is no na-

84. MODEL RULES OF PROF’L CONDUCT R. 3.5 (2003). Comment 3 to Rule 3.5 reiterates the responsibilities of the lawyer with respect to jurors:

A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer.

The lawyer may not engage in improper conduct during the communication.

85. See, e.g., IDAHO RULES OF PROF’L CONDUCT R. 3.5(c) (2004), available at <http://www2.state.id.us/isb/PDF/IRPC.pdf>; Pa. Rules of Prof’l Conduct R. 3.5(c) (West 2002 & Supp. 2005).

86. See, e.g., ALA. RULES OF PROF’L CONDUCT R. 3.5(b) (2003); MONT. RULES OF PROF’L CONDUCT R. 3.5(b) (2004), available at <http://www.montanabar.org/mylegalnews/interlineatedrules.pdf>; see generally CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 638 (2004 ed.) (listing the forty-three states and both the District of Columbia and the Virgin Islands that have adopted the Model Rules in some form, with adoption dates ranging from 1984 to 2002).

87. See, e.g., MASS. RULES OF PROF’L CONDUCT R. 3.5(d) (2002), available at www.mass.gov/obcbbbo/rpc3.htm#Rule%203.5. For example, Rule 3.5(d) of the Mass. Rules of Prof’l Conduct (2005) provides:

A lawyer shall not . . . after discharge of the jury from further consideration of a case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court granted for good cause shown. If a juror initiates a communication with such a lawyer, directly or indirectly, the lawyer may respond provided that the lawyer shall not ask questions of or make comments to a member of that jury that are intended only to harass or embarrass the juror or to influence his or her actions in future jury service. In no circumstances shall such a lawyer inquire of a juror concerning the jury’s deliberation processes.

88. See, e.g., *id.*

89. See, e.g., ARK. RULES OF PROF’L CONDUCT R. 3.5(b) (2005) (“A lawyer shall not . . . communicate ex parte with such a person on the merits of the cause except as permitted by law . . .”).

90. See, e.g., TENN. RULES OF PROF’L CONDUCT R. 3.5(c) (2004), available at http://www.tba.org/ethics/tscrules_04_01_2004.pdf (“A lawyer shall not . . . communicate with a juror after completion of the juror’s term of service if the communication is prohibited by law, or is calculated merely to harass or embarrass the juror or to influence the juror’s actions in future jury service . . .”).

tional standard. There is no federal statute, and the federal rules of civil and criminal procedure do not address post-trial juror contact. Indeed, the issue is left to local district court rules. Most federal district courts, however, generally operate under the same or similar court rules pertaining to post-trial contact:⁹¹ they typically allow communication, but only when the court gives permission for “good cause” shown.⁹² This rule essentially leaves contact to the discretion of the presiding judge. A few federal districts’ rules allow any otherwise ethical communication with the juror after that juror has been dismissed.⁹³

At the state level, rules of procedure or other court rules may address post-trial communication with jurors. These set forth myriad proscriptions and circumscriptions of when and where contact is appropriate. For example, California, where a criminal defense attorney recently attracted press coverage by hiring a former juror, has an especially thorough state rule governing post-trial communication. California Civil Procedure Code § 206 provides:

(a) Prior to discharging the jury from the case, the judge in a criminal action shall inform the jurors that they have an absolute right to discuss or not to discuss the deliberation or verdict with anyone. The judge shall also inform the jurors of the provisions set forth in subdivisions (b), (d), and (e).

(b) Following the discharge of the jury in a criminal case, the defendant, or his or her attorney or representative, or the prosecutor, or his or her representative, may discuss the jury deliberation or verdict with a member of the jury, provided that the juror consents to the discussion and that the discussion takes place at a reasonable time and place.

91. Karlene S. Dunn, Comment, *When Can an Attorney Ask: “What Were You Thinking?”—Regulation of Attorney Post-Trial Communication with Jurors After Commission for Lawyer Discipline v. Benton*, 40 S. TEX. L. REV. 1069, 1087 (1999).

92. For example, U.S. DIST. CT. RULES, D. CONN. L.R. 83.5-1 provides:

No party, and no attorney, employee, representative or agent of any party or attorney, shall contact, communicate with or interview any grand or petit juror, or any relative, friend or associate of any grand or petit juror concerning the deliberations or verdict of the jury or of any individual juror in any action before, during or after trial, except upon leave of Court, which shall be granted only upon the showing of good cause. No juror shall respond to any inquiry as to the deliberations or vote of the jury or of any other individual juror, except on leave of Court which shall be granted only upon the showing of good cause. No person may make repeated requests for interviews of a juror after the juror has expressed a desire not to be interviewed. This rule contemplates that the Court shall have continuing supervision over communications with jurors, even after a trial has been completed. A violation of this rule may be treated as a contempt of Court, and may be punished accordingly.

93. For example, U.S. DIST. CT. RULES, N.D. ALA. L.R. 47.1 provides:

Communications with a juror concerning a case on which such person has served as a juror or alternate juror shall not, without prior express approval of a judge of this court, be initiated by any attorney, party, or representative of either, prior to the day following such person’s release from jury service for such term of court.

(c) If a discussion of the jury deliberation or verdict with a member of the jury pursuant to subdivision (b) occurs at any time more than 24 hours after the verdict, prior to discussing the jury deliberation or verdict with a member of a jury pursuant to subdivision (b), the defendant or his or her attorney or representative, or the prosecutor or his or her representative, shall inform the juror of the identity of the case, the party in that case which the person represents, the subject of the interview, the absolute right of the juror to discuss or not discuss the deliberations or verdict in the case with the person, and the juror's right to review and have a copy of any declaration filed with the court.

(d) Any unreasonable contact with a juror by the defendant, or his or her attorney or representative, or by the prosecutor, or his or her representative, without the juror's consent shall be immediately reported to the trial judge.

(e) Any violation of this section shall be considered a violation of a lawful court order and shall be subject to reasonable monetary sanctions in accordance with Section 177.5 of the Code of Civil Procedure.

(f) Nothing in the section shall prohibit a peace officer from investigating an allegation of criminal conduct.

(g) Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237.⁹⁴

According to the applicable rules of procedure, the attorney in that case satisfied all of the requirements for consulting a former juror.⁹⁵ Even where specific restrictions are numerous, contact with jurors may still be obtained as long as all hoops are cleared.

By comparison, in Connecticut, where lawyers questioned the practice twenty years ago, the current rules of procedure are more terse. The Connecticut Rules for the Superior Court in Criminal Matters § 42-8 provides:

94. CAL. CIV. PROC. CODE § 206 (Supp. 2005).

95. See Post, *supra* note 7, at 6.

[N]o attorney . . . shall contact, communicate with or interview any juror or alternate juror, or any relative, friend or associate of any juror or alternate juror concerning the deliberations or verdict of the jury or of any individual juror or alternate juror in any action during trial until the jury has returned a verdict and/or the jury has been dismissed by the judicial authority, except upon leave of the judicial authority, which shall be granted only upon the showing of good cause.⁹⁶

Even under Connecticut's current revisions of its rules of procedure, the defense attorney's actions in 1983 complied with the applicable requirements.⁹⁷ After clearing the procedural hurdles, many states generally allow contact.

In some courts at the state level (as at the local federal level), judges are vested with discretionary authority to permit or disallow contact with jurors. Moreover, judges have discretion to control what jurors themselves may say, regardless of whether they are contacted by an attorney. Indeed, judges have been known to impose gag orders on jurors.⁹⁸ From general permissiveness to tight judicial supervision, from proscriptions on attorneys to those on the jurors themselves, state and local court rules run the gamut concerning juror contact.

Overall, very few jurisdictions have per se prohibitions against juror contact. Most either have broad limits or leave the permissibility of contact to judicial discretion. So why does such practice take "guts" as the defense attorney in the California case contends?⁹⁹ First, as the history of both evidentiary and ethical rules demonstrates, people characterize the relative values of the public's interests vis-à-vis the attorney's interests differently. Add to this the inconsistent circumscription of contact across jurisdictions, and a general sense of uneasiness accompanies the issue, as happens with most unsettled points of law. Furthermore, even where permitted, contact with former jurors outside of the courtroom is widely disparaged.¹⁰⁰ Thus, an attorney does, indeed, step out on a limb in the perception of the legal community when he utilizes this tactic.

96. CONN. R. SUP. CT., CRIM. § 42-8 (West 2006). The rule applicable to civil matters is identical. CONN. R. SUP. CT., CIV. § 16-14 (West 2006).

97. See Gombossy, *supra* note 1, at 3.

98. For example, a Texas judge forbade all post-verdict juror interviews after a murder trial. Lisa Teachey, *Court Orders Alarm Media Legal Experts*, HOUSTON CHRON., Nov. 20, 2002, at 27.

99. Stephanie Francis Ward, *Former Jurors to Be Consultants: Defense Is Hiring Them for Help in Gang-Rape Retrial*, A.B.A. J. E-REPORT ¶ 18, July 30, 2004, available at Westlaw, 3 No. 30 ABAJEREP 2.

100. See *id.* ¶ 7; Gombossy, *supra* note 1; Post, *supra* note 7.

A UNIQUE CONTEXT: RETRIAL

The rationales and concerns discussed in Parts I and II apply generally to post-trial communication with jurors. The cases receiving press coverage in Connecticut and California, however, present a special circumstance—retrial. Though the law and policies concerning juror contact arose in a different context, their principles still apply. But before exploring their application to this special context, the significance of a retrial merits elaboration.

Jury trials themselves are rare in criminal cases because most do not reach that stage of prosecution.¹⁰¹ Confronted with the possibility of an unpredictable jury and harsher punishment if convicted, defendants accused of felonies often plead guilty or plea bargain for lighter treatment.¹⁰² Nationally, approximately 5% of felony cases are tried before a jury.¹⁰³ On the civil side, jury trials are even rarer, with less than 2% of all suits filed being heard by a jury.¹⁰⁴ Civil defendants as well as plaintiffs often prefer to settle rather than face the uncertainty of the jury process.¹⁰⁵ But at the end of the day, the absolute number of jury trials—approximately 300,000 per year¹⁰⁶—means that jury trials, and therefore the policies protecting them, are still significant.

Cases that see retrial are only a small subset of those that are originally tried before a jury. Studies indicate that 1-2% of all federal cases tried end in deadlock.¹⁰⁷ Broken out according to criminal and civil cases, about 3% and less than 1% hang, respectively.¹⁰⁸ In state courts, studies show that 6.2% hang.¹⁰⁹ Comparatively, 4% of jury trials typically result in “a mistrial for a reason other than jury deadlock.”¹¹⁰ All considered, conventional wisdom realizes that about one in twenty cases tried before a jury hangs.¹¹¹ Of these, less than a third is actually retried to a new jury.¹¹² So, out of 300,000 cases originally tried, approximately 5,000 are retried.

To this number we may also add cases where an appellate court remands for further factual determinations. Considering courts’ extreme deference to original findings of fact, though, such cases are exceptionally rare

101. JAMES P. LEVINE, JURIES AND POLITICS 34 (1992).

102. *Id.*

103. *Id.*

104. *See id.* at 34-35.

105. *Id.* at 35.

106. *Id.* at 36 (citing Interview with Tom Munsterman, Ctr. for Jury Studies (Apr. 3, 1986)).

107. PAULA L. HANNAFORD-AGOR ET AL., NAT’L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? 22 (2004), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf.

108. *Id.*

109. *Id.* at 25. Hannaford-Agor et al. note that sampling errors may inflate the reported 6.2% hung-jury rate. *Id.* They point out that the rates likely fluctuate between courts and that not all courts keep records identifying the specific number of hung juries. *See id.* (compared to a 5.5% rate found in HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 56 (1966)).

110. *Id.* at 27.

111. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 201 (1994).

112. HANNAFORD-AGOR ET AL., *supra* note 107, at 26.

and few in number. Moreover, many of the attorney's interests in the merits of the case, discussed *infra*, are rendered moot on remand because the first jury made no findings of fact as to the issues remanded. But to those select few cases where the attorney possesses sufficient interest in consulting former jurors, this Comment applies.¹¹³ Thus, the remainder of this Comment will focus on retrials after hung juries.

In short, since the case will be tried again regardless of a lawyer's or anyone else's conduct, many of the public and administrative concerns are no longer pertinent. First, worries over a losing attorney going on a fishing expedition for verdict impeachment¹¹⁴ are now meaningless. A lawyer need not waste her time drumming up grounds for impeachment when the court has already docketed the case for trial before a new jury. Second, fear of counsel harassing a former juror or subjecting that person to duress¹¹⁵ is greatly lessened. During preparations for retrial, a lawyer holds a more congenial attitude toward a juror because a member of a hung jury possibly holds the key to a favorable verdict in the retrial. Outside of a retrial, a juror who has returned a verdict against a party possesses, at best, information constituting grounds for impeachment. In this circumstance, a juror may simply provide a sounding board for counsel to vent frustrations as she makes a last-ditch effort to achieve a favorable outcome in the case. But in the former situation, though counsel may be frustrated by the continuance of the case, the feelings toward the juror as a person are likely to be more tempered because of the continuing nature of the case.

Furthermore, in the approximately 5,000 cases where the first jury deadlocked, other interests rise in significance. An attorney can potentially learn a great deal from a former juror. The interests in learning stylistic critiques remain germane. In preparation for retrial, however, the consultation becomes more focused on the merits of the case. Since the particular facts of the instant case remain relevant for the retrial, the lawyer's style and presentation matters not only in terms of its general effectiveness, but also in terms of its effectiveness as applied to the circumstances of the case.

The very foundation on which our jury system rests is the belief that a group of reasonable people, after deliberation, can reach an agreement as to the facts of a case.¹¹⁶ But occasionally a jury hangs. Why, then, could not *this* group of presumably reasonable people, who were examined during voir dire for the specific purpose of weeding out "unreasonable" candidates

113. Similarly, though former jurors involved in a mistrial may be able to provide an attorney retrying the case with information relevant to the merits, the mistrial usually occurs because something has prejudiced the jury to such an extent that its deliberations have been rendered irrelevant. *See infra* text accompanying note 110. Thus, when preparing for retrial, a lawyer's interest in understanding how that jury reacted to the evidence presented may be diminished. Add to this the fact that only a fraction of mistrials are retried before a new jury, *see infra* text accompanying note 112, and the absolute number of cases is small. Yet, this Comment also applies to that small number.

114. *See infra* note 69 and accompanying text.

115. *See infra* text accompanying note 84.

116. *See* ABRAMSON, *supra* note 111, at 191-96 (discussing the importance of and debate on unanimous verdicts).

for jury service,¹¹⁷ come to an agreement *on these facts*? A dismissive answer is that this flaw in the system stems from the basic nature of the humans that comprise it. But when considered in light of the fact that, when tried before another jury, the second panel returns a verdict 92% of the time,¹¹⁸ the question becomes even more imperative. A good policy reason for the question exists, as well, because, after a hung jury trial, justice remains undone, and the purpose of the entire system has been temporarily thwarted. Elucidation of the specific question of why *this* jury hung is the most valuable knowledge that an attorney can possess when preparing for retrial.

A jury verdict is supposed to embody the “conscience of the community”¹¹⁹ rendered via collective wisdom.¹²⁰ Requiring unanimity in the verdict forces jurors to each argue his or her position, to persuade and to be persuaded, not merely until the majority prevails, but until the entire group in consensus shares a sense of justice.¹²¹ Unanimity also alerts jurors to the fact that deadlock resulting from disagreement is discouraged; instead, a “disposition to harmonize’ or compromise among jury members” is encouraged by the system.¹²² Admittedly, just one contrary opinion has the power to paralyze an entire panel aligned against it,¹²³ but such strong beliefs held even in the face of an overwhelming majority are not to be taken lightly.¹²⁴ Our system allows hung juries in those extreme events. Moreover, evidence corroborates the fact that where “one or two persons manage to hold out in the end, they probably had company in the beginning.”¹²⁵ Actually, studies have shown that a hung jury likely requires four or five dissenting jurors initially.¹²⁶ Such a split in the beginning indicates that the case truly was ambiguous in the collective mind of the jury.¹²⁷ Even though only one juror may hold out in the end, it is important to note that the case itself, not a contrarian juror, probably precipitated the deadlock.

In ambiguous cases, the system is designed to recognize and support the validity of the sole dissenting voice that hangs the jury.¹²⁸ Accordingly, it will not convict a criminal unless all can agree. But neither will it acquit based on that sole dissenter. Herein lies the policy interest in learning why a certain jury hung. Since the system forces ambiguous cases to be reheard,¹²⁹

117. See LEVINE, *supra* note 101, at 46-50 (explaining the voir dire process and its limitations).

118. HANNAFORD-AGOR ET AL., *supra* note 107, at 27 (including the 4% of mistrials for reasons other than deadlock).

119. ABRAMSON, *supra* note 111, at 183.

120. *Id.* at 195-96.

121. *See id.* at 183.

122. *Id.* at 184.

123. *See id.* at 184-85.

124. *See id.* at 201 (treating hung juries as a mechanism for representing minority viewpoints).

125. *Id.* at 202.

126. *Id.* (citing KALVEN & ZEISEL, *supra* note 109, at 462).

127. *Id.* (citing KALVEN & ZEISEL, *supra* note 109, at 462).

128. *Id.* at 201, 204-05.

129. Retrial by jury is ordered in roughly one-third of mistrials caused by hung juries, while another 2.5% are reheard in bench trials. *See infra* note 112 and accompanying text.

it impliedly favors resolution to simple dismissal,¹³⁰ even when only one juror disagrees. Justice must be done. So why not allow the attorneys to learn more about what caused the jury to hang, so that the ambiguities brought to light in the first trial need not be revisited in the second? Absolute factual truth—whether knowable or not—underlies the evidence presented at trial. Therefore, the ambiguities that do arise necessarily stem from the presentation of the evidence or from some extrinsic factor. The attorneys on both sides can be better advocates of their parties' interests in the second trial by knowing where, exactly, the ambiguity lies. Likewise, the removal, or at least the mitigation, of the ambiguity that caused the first jury to hang serves both the system and the public whose joint interest is seeing justice done based on, ideally, the truth. Consultation on the merits in the circumstance of retrial offers a legitimate, policy-backed argument.

Though potential advantages might be gleaned from the consultation of a former juror, any lawyer employing this tactic would be well advised to—and generally does—take the juror's statements “with a grain of salt.”¹³¹ It is no secret that juries can be unpredictable.¹³² Let four panels observe the exact same trial, and each may return drastically different verdicts.¹³³ Thus, the advantages are far from absolute. But the consultation may prove instructive even so. Unpredictability itself may yield a decisive boon, for the juror may impart to a lawyer an angle on the facts that counsel had hitherto not considered. In spite of its limitations, consultation for retrial affords large benefits precisely because of its focus on the merits.

While counsel's interest in consulting with jurors increases in the context of a slated retrial, the individual juror need not sacrifice her valid privacy interests as a result. In fact, existing rules already provide adequate protections. First, a juror can simply refuse to talk with an attorney. If a lawyer solicits her consultation, and she refuses, the lawyer stands in jeopardy of facing disciplinary action if he continues to harass her.¹³⁴ Second, the fear of effectively chilling deliberations by disclosing them to the public after-the-fact is inapposite in the context of a post-trial interview by an attorney. Though the Supreme Court of the United States has not addressed whether the media has a First Amendment right to interview jurors,¹³⁵ press interviews commonly occur. An interview by the media implies disclosure

130. Dismissals are granted after approximately 20% of hung juries. HANNAFORD-AGOR ET AL., *supra* note 107, at 27.

131. MACCOUN, *supra* note 61, at 9. Cf. Gombossy, *supra* note 1, at 6 (“[Multiple interviewees] questioned the value of a former juror's comments . . .”).

132. See Gombossy, *supra* note 1, at 6 (“[D]ifferent juries tend to react differently to the same evidence.”).

133. The author was personally involved in a mock trial as a first-year law student in which multiple defendants were tried under multiple criminal charges. Four jury panels, comprised of a mix of first-year law students and high school students, sat in the same mock courtroom and observed the same trial proceedings. One jury returned a verdict convicting the defendants on most charges, one returned a nearly full acquittal, and the other two returned split convictions and acquittals.

134. See MODEL RULES OF PROF'L CONDUCT R. 3.5(c) (2005).

135. Christine J. Iversen, Comment, *Post-Verdict Interviews: The Key to Understanding the Decision Behind the Verdict*, 30 J. MARSHALL L. REV. 507, 509 (1997).

to the general public,¹³⁶ and it is the public that truly threatens chilling effects by second-guessing a jury's deliberations.¹³⁷ To deny a party's counsel an opportunity equal to that of the media to speak with former jurors who are presumably willing makes little sense.

Moreover, an attorney interview—as opposed to a media interview—better preserves the privacy of both the individual juror and the jury as a group. As for the individual who may not want her name emblazoned under a headline, an interview with a party's counsel does not subject her to broad, public exposure and to the consequent scrutiny of her actions in the case. As for the group, litigators, theoretically, better understand the limitations inherent in the deliberative process of a jury that supposedly represents the community at large than the public ever could.¹³⁸ Lawyers well know that there is no accounting for jury predictability.¹³⁹ Thus, attorneys are less apt to attribute a single juror's statement to the entire panel, or to place undue reliance on one juror's recollection or speculation of another juror's deliberation.¹⁴⁰ These preconceptions indirectly provide for the privacy of the panel members not interviewed. Admittedly, talking with a juror about anything other than the final verdict necessarily implies intrusion into the deliberative process—anything more than asking “What?” reaches to asking “Why?” But when only lawyers are privy to the discussion, the chance of adverse consequences to the individual, or to the jury system itself, are greatly diminished.

In sum, consultation of former jurors for the purpose of retrial preparation affords adequate protection of the general concerns for the juror's privacy and freedom from harassment. Conversely, an attorney's interest in talking with a particular juror increases after a panel hangs, as does the public's interest in seeing justice done, and done efficiently, in the second trial. Finally, the ultimate concern of the jury system, the integrity of the verdict, finds protection in circumstance itself: with retrial already docketed, the jury process faces no attack. In the eyes of the public, the process merely failed in the first trial. This provides even greater motivation to assure that it works in the second. There is much benefit to be gained from allowing consultation with little real detriment to the jury system resulting.

136. See Marc O. Litt, “*Citizen-Soldiers*” or *Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 372-73 (1992) (citing *United States v. Doherty*, 675 F. Supp. 719, 722 (D. Mass. 1987)).

137. *Id.* at 409.

138. See ABRAMSON, *supra* note 111, at 99-141 (describing the cross-sectional make-up of the current jury system).

139. See *supra* notes 131-32.

140. See MACCOUN, *supra* note 61, at 9 (stating that, in order to get an accurate account of jury deliberations, multiple jurors should be interviewed).

THE REAL PROBLEM: *PAYING FORMER JURORS*

Though juror consultation presents many advantages, the reservations expressed twenty years ago by former Chief State's Attorney John J. Kelly¹⁴¹ and echoed last year by reporter Leonard Post¹⁴² are not without reason. Paul Gerowitz, Executive Director of the California Attorneys for Criminal Justice, summed up the especially prickly factor present in both cases discussed in the introductory news articles: "It's a well-accepted proposition that attorneys for both sides have the right to talk to jurors after a case to help them on retrial The only difference here is the retention of one or more of the jurors as *paid* consultants."¹⁴³

As the reporter who interviewed Mr. Gerowitz noted, "[s]everal lawyers interviewed for this story say they are unaware of any cases in which jurors from a mistrial were *hired* as consultants for the next case."¹⁴⁴ Indeed, Mr. Gerowitz's "well-accepted proposition"¹⁴⁵ has apparently been enabled by the generosity of former jurors. Contrary to cynical predictions concerning how these citizens, having already rendered services to society, will react to further solicitation to aid the legal system, many former jurors volunteer their time. In fact, in the California case, eight of nine jurors who agreed to consult offered to do so for free.¹⁴⁶ Without the magnanimity of former jurors, such consultations would not have flown under the radar for as long as they have.

As evidenced by these news articles, though, a lawyer need only pay the consulted juror a few dollars for her time, and critics will quickly and publicly chastise the practice. Rightly so, too, because, as stated in the 1985 article concerning the Connecticut case, "The jury system depends upon jurors having no potential interest in the outcome of the case . . ."¹⁴⁷ An impartial jury requires objectivity from its constituent jurors. Objectivity, as it applies to the jury, means that jurors should consider only the facts of the case as they have been presented in the court room. A pecuniary motivation to decide one way or another lies outside of those facts and, accordingly, should not be allowed.

Paying for the consultation of former jurors threatens to provide such motivation. While many would abide by their ethical obligation as jurors, it is not difficult to imagine a situation where, if the possibility of consultation after the fact were known to the jury, a juror could be persuaded to change his mind in return for compensation. Where the amount of money offered is as significant as the amount contemplated by the attorney in the reported California case, the temptation increases. There, counsel for the defendant

141. See *supra* text accompanying note 5.

142. See *supra* text accompanying note 11.

143. Ward, *supra* note 99, at ¶ 11 (emphasis added).

144. *Id.* ¶ 5 (emphasis added).

145. *Id.* ¶ 11.

146. Post, *supra* note 7, at 6.

147. Gombossy, *supra* note 1, at 6 (internal quotations omitted).

wanted to offer \$50 *an hour*.¹⁴⁸ In the attorney's words, \$50 an hour "seems to be a reasonable amount."¹⁴⁹ While the defendant's lawyer may be accustomed to earning that kind of fee, \$50 an hour is far more than the average person, and thus the average juror, earns.¹⁵⁰ The potential of earning such a considerable sum could conceivably exert influence on a juror's deliberations. Even with a lesser sum being offered, such as the equivalent of a day's wages given to the waitress who was consulted in the Connecticut case,¹⁵¹ the mere option to take a day away from the job without losing that day's pay could affect a juror's deliberations.

The thought of potentially being paid to consult might cause a juror to change her opinion,¹⁵² or, even more likely, to hold out against fairly good persuasion to which she otherwise might have acceded. A juror may hold on to her lone contrary opinion when she would have otherwise yielded to persuasion, simply because the prospect of payment as a consultant allows her to withstand the pressures of the remaining jurors. From the subtle encouragement to hold out, to the blatant incentive to intentionally hang the jury to reap the lucrative benefits of consulting fees, the threat posed by paying former jurors proves too much.

In addition, the practice could negatively impact public perception about the justice system. Though none claim that the practice is yet common, the few news clippings that have been written on the subject of jury consultation may suffice to give the impression of its widespread use.¹⁵³ Moreover, prejudice is even more likely if the public thinks that hiring former jurors after hung-jury mistrials is common.

Finally, paying jurors could lead to inequalities based on clients' unequal abilities to pay for consultation of jurors. Some discrepancies due to differences in financial wherewithal are inevitable. Wealthier clients are naturally better able to afford esteemed, more expensive representation, but such ability should not spill over into the jury box.¹⁵⁴ Compensation for consultation, however, opens up an avenue by which a wealthy party can make his money matter. In the recent California case, the defendant was the son of a wealthy Orange County businessman.¹⁵⁵ As the district attorney

148. Post, *supra* note 7, at 6.

149. *Id.*

150. Assuming that the average juror makes the same amount as the average person, an average juror's household income was \$44,389 in 2004. Press Release, U.S. Census Bureau News, U.S. Dep't of Comm., Income Stable, Poverty Rate Increases, Percentage of Americans Without Health Insurance Unchanged (Aug. 30, 2005), http://www.census.gov/Press-Release/www/releases/archives/income_wealth/005647.html. Since a person working thirty-five hours a week for fifty weeks at \$50 an hour would earn a gross income of \$87,500, the average juror would make significantly less than a well-paid consulting juror.

151. Gombossy, *supra* note 1, at 6.

152. *See id.* at 3.

153. The title of the Post article—*Hiring Former Jurors As Trial Consultants Catches On*—implies that the tactic will soon be common, if it is not already. Post, *supra* note 7.

154. Cf. KRESSEL & KRESSEL, *supra* note 58, at 15 ("Now, [detractors of professional jury consultants] reason, those who can afford the best lawyers can also purchase the best juries.").

155. Ward, *supra* note 99.

asserted, “‘I don’t agree that [counsel for the defendant] hired [jurors] for the purpose of learning about the issues of the trial or for their expertise’ ‘I think the reason they’re doing it is that they want to signal to the next jury that if you vote in favor of [the defendant], you can get on the [defendant’s] payroll.’”¹⁵⁶ What that particular attorney’s motives actually were, we do not know. But, without doubt, when consultation merely serves as a cover for buying a verdict—whether in fact, or by implication—it should be disallowed.

Those who advocate monetary remuneration for consulting argue that jurors deserve to be paid.¹⁵⁷ First and foremost, the juror’s time and effort is worth compensating.¹⁵⁸ Second, attorneys are usually willing to pay them. Even when the client is not wealthy, the lawyer himself may feel an obligation to offer compensation because the consultation provides him a good amount of personal feedback—as such, it is a form of continuing legal education.¹⁵⁹ Because most other personal instruction costs money, so should this. For the reasons discussed above, though, the dangers of compensating jurors for consultation far outweigh the interests in paying them. Further, the fact that they will not be paid apparently does not deter jurors’ willingness to help. There are enough civic-minded jurors such that consultation will continue—just look at the eight jurors who offered their services gratis.¹⁶⁰

If compensation is to be allowed, however, a limit should be set. As one professional legal consultant stated, “We would not over-incentivize or competitively bid for [a juror’s] services.”¹⁶¹ A nominal amount would satisfy the concern that jurors get cheated if disallowed from receiving compensation, while still curbing the potential of undue influence. In no event should compensation be tied to the outcome of the case.¹⁶² A token amount up to an amount comparable to the jurisdiction’s jury duty pay¹⁶³ would be adequate for the purpose without over-incentivizing consultation.

Lawyers are already precluded from exerting any undue influence on jurors.¹⁶⁴ The prejudicial aspect of a bribe given to a juror before or during a trial—obviously unethical and explicitly prohibited by the *Model Rules of*

156. *Id.*

157. *See Post, supra note 7, at 6.*

158. *Id.*

159. *Id.*

160. *See supra* text accompanying note 146.

161. *Post, supra note 7, at 6.*

162. *See Gombossy, supra note 1, at 6* (Payment to the juror-consultant in that article “‘certainly was not contingent on the outcome’ of the trial.”). That “‘jurors [should] hav[e] no potential interest in’ the outcome of the case,” *id.* (internal citations omitted), accords with the sentiment of the MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. [3], which prohibits the payment of a contingent fee to an expert witness.

163. For a discussion of compensation standards for jury duty, see Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 289 (2002).

164. *See MODEL RULES OF PROF’L CONDUCT R. 3.5(a)* (2004) (“A lawyer shall not . . . seek to influence a . . . juror . . . by means prohibited by law . . .”).

*Professional Conduct*¹⁶⁵ and criminal law¹⁶⁶—is not substantively distinguishable in its effect on the deliberation of a juror from payment for consulting services afterwards. Regardless of whether money is the root of all evil, it can, undoubtedly, prejudice justice. Accordingly, compensation of former jurors, if allowed at all, should be no more than a nominal amount.

CONCLUSION

The unique context of a retrial affords protections against the policy concerns that might otherwise justify prohibitions on contact between lawyers and jurors. Pre-retrial consultation of former jurors should be permitted, but with different limitations addressed to the payment of jurors. Now, before leaving this topic, a consideration of how to practically allow, yet limit, consultation of former jurors is in order. All of these recommendations could be easily incorporated into rules of professional conduct or local court rules of procedure. Or they may simply inform a general policy debate on the issue of hiring former jurors for retrial.

First, a reminder by the judge that a juror may talk to a party's counsel, but that a juror is by no means required to talk,¹⁶⁷ would alert jurors to the fact that discussion is, indeed, the juror's choice. Emphasis on such choice properly highlights a juror's right to privacy. It also lets a juror know that her civic duty as a juror is complete at the time of her discharge—no further responsibilities are required of her. Many jurisdictions that allow post-trial contact already include this information in the discharge statement that the judge reads to the jurors.¹⁶⁸ Some discharge statements also alert the jurors to the fact that what other members of the jury said during deliberations was offered under the assumption that it would remain private.¹⁶⁹ Though the

165. *Id.* at R. 3.5 cmt. [1] (“Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.”).

166. *See, e.g.*, 18 U.S.C. § 1503 (2000) (criminalizing corrupt endeavors to influence jurors).

167. *See* Crystal, *supra* note 66, at 693.

168. The American Bar Association's Judicial Administration Division Committee on Jury Standards recommends the following discharge statement:

Ladies and Gentlemen:

Now that the case has been concluded, some of you may have questions about the confidentiality of the proceedings. Many times jurors ask if they are now at liberty to discuss the case with anyone. Now that the case is over, you are of course free to discuss it with any person you choose. You are, however, advised that you are under no obligation whatsoever to discuss this case with any person. If you do decide to discuss the case it is suggested that you treat such discussion with a degree of solemnity such that whatever you do decide to say you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of all the parties. Also always bear in mind if you do decide to discuss this case, that your fellow jurors fully and freely stated their opinions with the understanding they were being expressed in confidence. Please respect the privacy of the views of your fellow jurors.

JUDICIAL ADMIN. DIV. COMM. ON JURY STANDARDS, AM. BAR ASS'N, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 152 (1993) (citing JURY MGMT. & UTILIZATION COMM. OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES (1990)).

169. *See id.* (discharge statement text).

context of a retrial mitigates this privacy concern,¹⁷⁰ a reminder to each juror to be respectful of the other jurors serves the interests of both the individuals and the system. Knowledge of all of these factors enables the juror herself to appreciate her rights as well as the interests of others involved.

Second, if a lawyer solicits a juror's consultation, he should disclaim any notion that the juror is required to talk to him.¹⁷¹ Again, such a comment would alert the juror to her choice in the matter so that she does not feel unduly compelled to comply. Of course, if the juror denies the attorney's request, the harassment prohibition in the Model Rules prevents him from repeatedly soliciting that same juror.¹⁷² At the time of solicitation, it would also be appropriate for the lawyer to state either that payment for the juror's time is prohibited by the jurisdiction, or that the compensation will be whatever is allowed by the jurisdiction. This information, by being presented up front, relieves any expectation interest that the juror may hold. Simply put, an informed juror can make the best decision for herself.

Third, a confidentiality requirement could be imposed on consultations. Already, a confidentiality requirement exists with respect to the client;¹⁷³ a confidentiality provision with respect to the juror would serve as a fall-back. If a juror is willing to help the parties and the system, but is unwilling to expose herself to media attention for her actions in the jury room, a confidentiality protection would appropriately safeguard her while allowing her to benefit those involved in the litigation. Such a rule may be especially important in the context of a retrial because a lone juror who deadlocked the jury may fear having to defend her rationale to the public; simultaneously, she may also believe so strongly in her position that she wants to see her understanding of the facts prevail at the second trial. Confidentiality would serve these otherwise competing interests.

In the interest of equal opportunity to parties and their respective counsels, a jurisdiction could require that both sides be afforded the opportunity to be present to hear the consultation of a former juror.¹⁷⁴ The benefit of requiring this invitation to opposing counsel is twofold. First, it seeks to dispel the ambiguities of the case itself and those caused by the presentation of the evidence.¹⁷⁵ This is better accomplished when both sides have access to the knowledge of what those ambiguities were. Second, it equalizes the playing field between counsels. Justice is the end sought; while the relative

170. See *supra* Part IV.

171. CAL. CIV. PROC. CODE § 206 mandates that parties wishing to discuss a verdict must disclose juror rights. (West Supp. 2005).

172. MODEL RULES OF PROF'L CONDUCT R. 3.5(c)(3) (2003); see also *id.* at R. 3.5(c) (2003) ("A lawyer shall not . . . communicate with a juror . . . if . . . (2) the juror has made known to the lawyer a desire not to communicate . . ."); *id.* at R. 3.5 cmt. [3] ("The lawyer . . . must respect the desire of the juror not to talk with the lawyer.")

173. See *id.* at R. 1.6(a).

174. The Hawaii Supreme Court, for example, has held that HAWAIIAN RULE OF PROF'L CONDUCT 3.5 allows attorneys to communicate with jurors about a trial only when both parties are present. See *State v. Furutani*, 873 P.2d 51, 56 n.8 (Haw. 1994).

175. See *supra* Part IV.

likableness of lawyers cannot be completely eradicated from the jury deliberations, it can be better controlled outside of the jury room. Other constraints, too, may effect a balancing of the interests surrounding retrial consultations.

Though the number of retrials is comparatively few, it is still significant. The interest in understanding why a jury hung in a particular case is likewise significant. With a few reasonable—and, for the most part, already-existing—constraints in place, the American legal system will better effectuate justice on the whole and for the individual by allowing lawyers to consult former jurors when preparing for retrial.

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