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Toeing the line

Considerations for drafting admissible juror declarations of misconduct

The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution. (*Lombardi v. California Street Cable R. Co.* (1899) 124 Cal. 311, 317.) Juror misconduct, therefore, is one of the specified grounds for granting a new trial. (Civ. Code, § 657, subd. 2.) To prove juror misconduct, a juror's declaration or affidavit may be used, subject to certain restrictions. (*People v. Hutchinson* (1969) 71 Cal.2d 342, Evid. Code, § 1150.) Live testimony from jurors at a new-trial hearing in a civil case is impermissible. Therefore, drafting potent, *admissible* declarations is essential. This article offers suggestions for how to do so.

Identifying misconduct

Before drafting juror declarations, it is first necessary to identify whether the jury engaged in misconduct. Certain kinds of misconduct are blatant and easily identifiable. For example, courts have considered the following acts and statements misconduct:

- Independent visits by a juror to the scene of events (*Anderson v. Pacific Gas & Elec. Co.* (1963) 218 Cal.App.2d 276, 280);
- Discussion during deliberations about a party's insurance coverage (or lack thereof) (*Tapia v. Barker* (1984) 160 Cal.App.3d 761, 766);
- Explicit or implicit agreement to violate a court's instruction (*People v. Perez* (1992) 4 Cal.App.4th 893, 908);
- Discussion regarding the court's authority to reduce an excessive jury award (*DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1238);
- Discussion indicating disregard of trial court's admonition not to draw any inference of liability from a party's out-of-court settlement (*Moore v. Preventive*

Medicine Medical Group, Inc. (1986) 178 Cal.App.3d 728, 740, fn. 8, 742-743);

- Comments during deliberations regarding effect of attorneys fees and income taxes on damage award (evidencing an implied agreement to inflate verdict in compensation) (*Franell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 172-173);
- Discussion during deliberations of extraneous law (i.e., a statement of law not given to the jury in the instructions of the court) (*In re Stankewitz, supra*, 40 Cal.3d at 397).

But sometimes, identifying misconduct is not as straightforward. For illustration, consider a juror who discusses her own back injury and tells the jurors that, based on her experience, the treatment plaintiff sought was exaggerated and unnecessary. On one hand, information other than that received in the evidence at trial cannot be a part of the jury's deliberations. (*People v. Sutter* (1982) 134 Cal.App.3d 806, 820.) "Jurors are not supposed to receive or communicate to fellow jurors information from sources outside the evidence presented in court. [Citation.] If they do, they are guilty of misconduct." (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 682.)

On the other hand, "[j]urors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself. Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 741-742.)

Further complicating the issue of whether bringing in "outside" information constitutes misconduct is when jurors have special expertise on a technical topic, or matter at issue. "Jurors' views of the evidence...are necessarily

informed by their life experiences, including their education and professional work." (*In re Malone* (1996) 12 Cal.4th 935, 963.) Technically, juror "life experiences" constitute "outside" material. The real inquiry, therefore, is not simply whether "outside" material is considered; rather, the injury must also consider whether the juror's opinion is based on the evidence at trial or on specialized information obtained from outside sources, as well as whether the information is a matter of common experience. (*People v. Steele* (2002) 27 Cal.4th 1230, 1266.) "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial." (*In re Malone, supra*, 12 Cal.4th at 963, emphasis added.) Therefore, in *McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 263-264, the court found information introduced during deliberations concerning railroad crossing gate sensors was not within common experience, and therefore constituted improper "outside matters."

Rules delineating admissible juror statements

Under Code of Civil Procedure (herein C.C.P.) section 2015.5, a declaration has the same "force and effect" as an affidavit, and therefore, when drafting juror declarations (in lieu of affidavits), it is essential to comply with section 2015.5's requirements. (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1470.) This means the declaration must be signed, dated, and certified as true under penalty of perjury. (*Ibid.*) Furthermore, the declaration must either reveal its place of execution within California, or, recite that it is made "under the laws of the State of California." (*Ibid.*) In lieu of

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any of these requirements, a juror's written statement is inadmissible to attack a jury verdict for misconduct. (*Id.* at p. 1470-1471.)

Evidence Code section 1150, subdivision (a) sets forth the substantive guidelines for juror declarations:

Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

In other words, only evidence of "overt acts, objectively ascertainable," may be admitted, whereas "proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved," may not. (*Hutchinson, supra*, 71 Cal.2d at 349.)

This distinction is clearly stated, but its application has proven challenging for many litigants. For example, consider the following two statements: (1) "Juror B found Officer Smith's testimony unpersuasive because Officer Smith is a female" and (2) "Juror B stated during deliberations that he found Officer Smith's testimony unpersuasive because Officer Smith is a female." Both of these statements describe what Juror B found unpersuasive, i.e., Officer Smith's testimony. But the first statement would be inadmissible because it purports to describe Juror B's thoughts or mental process, whereas the second statement would be admissible because it describes what Juror B actually stated during deliberations.

Of course, it would be fiction to pretend that only one of the above statements described Juror B's mental processes. Both sentences convey the same underlying message – why Juror B found Officers Smith's testimony unpersuasive. Therefore, what distinguishes

inadmissible and admissible juror affidavits is largely *how* the statements contained within the affidavits are phrased. Every statement in the affidavit must be externally verifiable. In other words, rather than discussing what a juror thought (which is improper as unverifiable), an admissible affidavit would instead include what the jurors *said* (which is verifiable and therefore proper).

The Court of Appeal explained this distinction in *People v. Engstrom* (2011) 201 Cal.App.4th 174, 184: "Although some of the affidavit is related to the jurors' thought process, it is nonetheless based on external, verifiable conduct and statements rather than a juror's internal thoughts left unexpressed until a motion for new trial." Thus, when drafting juror declarations, be sure not to paraphrase or summarize, but rather, include the actual statements made during deliberations (even if they discuss or reveal a juror's thought process).

Avoiding hearsay

Juror declarations must be given from personal knowledge, and cannot contain hearsay. (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 105.) Because juror declarations must include objectively verifiable evidence, including out-of-court statements made by other jurors, attorneys often object to such statements as inadmissible hearsay. However, the Evidence Code defines hearsay as an out-of-court statement, "offered to prove the truth of the matter stated." (Evid. Code, § 1200(a).) In the juror misconduct context, often the out-of-court statements are introduced not for the truth of the matter asserted, but as the misconduct itself (e.g., as evidence of the speaker's bias). (*Weathers, supra*, 5 Cal.3d at 110.) In the example above, for instance, the statement was not being offered to show whether Officer Smith's testimony was actually persuasive. Rather, it showed Juror B's purported bias towards Officer Smith.

Because juror statements made during deliberations may be introduced as alleged misconduct, such statements have "a greater tendency than nonverbal acts

to implicate the reasoning processes of jurors – e.g., what the juror making the statement meant and what the juror hearing it understood. They are therefore more apt to be misused by counsel in an effort to improperly open such processes to scrutiny. But no such misuse is threatened when ... the very making of the statement sought to be admitted would itself constitute misconduct. Such an act is as much an objective fact as a juror's reading of a novel during the taking of testimony [citation], or a juror's consultation with an outside attorney for advice on the law applicable to the case [citation]." (*In re Stankewitz* (1985) 40 Cal.3d 391, 398.)

Avoiding partially inadmissible statements

Often, juror declarations intertwine admissible and inadmissible statements. In such a case, the court may consider the admissible portions, and strike the inadmissible portions, to the extent that the statements are severable. (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 681, fn. 1.) A recent, unpublished opinion in the Second Appellate District, Division 7, illustrates the challenges in doing so. The court considered the following statement contained in a juror's declaration: "[A]t least one juror, no. 10, kept declaring that, because the case involved significant sums of money, he would demand 100 percent proof as cause, rather than more than 50 percent, which was what I understood to be the instructions given us. Other jurors agreed that, as far as they were concerned, the amount of money sought increased the plaintiff's burden of proof above the 'more than 50 percent' standard." (*Arakelian v. Tufenkchian* (Cal.Ct.App., Sept. 17, 2014, B245472) 2014 WL 4631597, at *8, as modified on denial of *reh'g* (Oct. 6, 2014).) The Court of Appeal criticized the trial court's exclusion of the entire statement.

Nevertheless, the Court of Appeal agreed, "which was what I understood to be the instructions given us..." was inadmissible because it described the juror's

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understanding of the instructions. (*Ibid.*) However, the court determined the remaining content concerned overt acts and should have been admitted. Specifically, the statement showed another juror's statement that he would not follow the instructions given to the jury regarding the burden of proof on causation, and an agreement by jurors to impose a higher standard of proof in light of the amount of damages sought in this action. (*Ibid.*) The court reasoned, "[e]vidence of a jury's explicit or implicit agreement to violate a court's instruction does not touch upon the jurors' subjective reasoning processes, since as in [*In re*] *Stankewitz*, such agreement in and of itself constitutes misconduct...." (*Ibid.*)

Evidence of mental processes versus overt misconduct

As previously discussed, the line between a statement that reveals a juror's mental processes and a statement that, itself, constitutes misconduct, is not always clear. In *Arakelian, supra*, the Court of Appeal determined the trial court erred in excluding the portion of a juror declaration stating that another juror said that she would not award damages against one of the defendants because it was not clear if there was insurance. The Court explained the statement was inadmissible for the purpose of demonstrating the actual effect of the consideration of the issue of insurance on this or any other juror's mental process. However, it permitted consideration of the statement for the limited purpose of showing that "a juror injected the consideration of insurance into the deliberations, contrary to the express instructions of the trial court. Juror discussion about a party's insurance coverage is a quintessential example of misconduct." (*Arakelian, supra*, at *9.)

The *Arakelian* Court also found the trial court improperly excluded evidence of a juror (a nurse) who brought outside information into the deliberations concerning the issue of whether the plaintiff was damaged by the subject collision. The Court noted that, interspersed among inadmissible statements in a

juror's declaration, is her statement that another juror said that "what she knows from her outside medical knowledge informed her that no injury could have resulted from her accident, regardless of the evidence presented at trial. She said, in words to the effect, that the 'injury could not happen based on her own experience.'" (*Arakelian, supra*, at *9.) The Court criticized the trial court's conclusion that such evidence was inadmissible as a verbal reflection of the juror's mental processes, and instead, found the statement to constitute prima facie evidence raising the question of whether outside information was introduced into deliberations. (*Ibid.*)

Timing matters

Other Advocate articles have discussed motions for new trial and the procedural traps for the unwary contained within the governing statutes. Whenever counsel seeks a new trial, it is essential to conduct careful review of the applicable statutes. (See C.C.P., §§ 657 et seq.) Nevertheless, this article highlights a few of the provisions applicable to juror misconduct claims as a reminder of the strict, applicable time limitations.

To challenge juror misconduct, make sure to list juror misconduct as one of the grounds for new trial in your Notice of Intention to Move for New Trial. Your juror affidavits (or declarations) must be filed within 10 days after your timely filed Notice of Intention to Move for New Trial. (C.C.P., §§ 657, 658, 659, 659a.) Counter-declarations or counter-affidavits are due 10 days after service of the moving party's declarations/affidavits, and the moving party has five days after that service to file any reply brief and accompanying documents. (C.C.P., § 659a.)

The deadline to file the affidavits (or declarations) may, for good cause shown by affidavit or written stipulation by the parties, be extended by any judge for an additional period not to exceed 10 days. (C.C.P., § 659a.) However, seeking additional time may not be in your best interest as the party moving for a new trial because of the 60-day jurisdictional time

limit in which the court must rule on the motion (or the motion will be denied by operation of law). (See C.C.P., § 660.)

Therefore, if you suspect juror misconduct negatively affected the outcome at trial, make sure to contact jurors *as early as permissible* to secure their necessary declarations or affidavits, and to file your moving papers sufficiently promptly, to ensure the court has sufficient time to consider your motion before the court loses jurisdiction to grant a new trial.

Special considerations for counter-declarations

Proper juror affidavits (or declarations) in support of a new trial are evidence of the matters stated therein, and will be "deemed admitted" in the absence of counter-affidavits or counter-declarations. (*Tapia, supra*, 160 Cal.App.3d at 766.) When drafting counter-affidavits, or challenging their admissibility, remember the same rules that govern the admissibility of juror affidavits also govern the admissibility of counter-affidavits. (Evid. Code §§ 1150(a), 1200; C.C.P., § 2015.5.)

When reviewing counter-affidavits, look for language attempting to explain what a juror meant when he or she made a statement during deliberations. These explanations are common when a juror cannot deny making a particular statement, but nevertheless attempts to negate the accusation of misconduct.

For illustration, in *In re Stankewitz, supra*, 40 Cal.3d at 400, the California Supreme Court considered the admissibility of the following juror's statement: "I was not trying to state by the matter included [in my original declaration], conclusively whether Mr. Knapp was either including or discarding the element of intent when he made those statements to the rest of the jury." The Court found, "[t]o the extent this ambiguous statement has any meaning at all, it apparently goes to what Knapp may have meant by his statements – certainly not to their contents; it is not inconsistent with, and hence does not affect, the clear testimony in each of the original declarations

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regarding what Knapp actually *said* to the other jurors. Moreover, insofar as it implicates “the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved...it is inadmissible under Evidence Code section 1150, subdivision (a).” (*Ibid.*)

Therefore, look for counter-declarations that purport to explain – but fail to deny – making alleged inappropriate statements. Substantively, such evidence may not contradict the otherwise admissible statements contained in other juror declarations, and procedurally, such evidence may be inadmissible under the Evidence Code.

Showing prejudice

Proving misconduct is insufficient to warrant a new trial. The misconduct must also have been prejudicial. However, “[m]isconduct by a juror, or a nonjuror’s tampering contact or communication with a sitting juror, usually raises a rebuttable ‘presumption’ of prejudice. (*In re Hamilton, supra*, 20 Cal.4th at 295.) “This presumption aids parties who are barred by statute from establishing the actual prejudicial effect of the incident

under scrutiny [citations] and accommodates the fact that the external circumstances of the incident are often themselves reliable indicators of underlying bias [citation].” (*Ibid.*)

Such presumption makes sense. After all, it is improper (and inadmissible) for a declaration to explicitly show the effect of the misconduct on the jurors’ deliberations. Instead, the declaration must present evidence of such a character as to *likely* have influenced the verdict improperly, but may not present evidence that it actually did. (Evid. Code § 1150(a).)

Whether an individual verdict must be overturned for jury misconduct or irregularity is governed by the “substantial likelihood” standard of prejudice. Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant.” (*In re Carpenter* (1995) 9 Cal.4th 634, 653.)

Conclusion

Because of the presumption of prejudice, and the Constitutional right to a trial before unbiased and unprejudiced jurors, juror misconduct is a potent ground warranting a new trial. However, the right is not self-executing. Unless your juror affidavits or declarations comply with the governing statutory authority, you will be unable to obtain the opportunity for a new, fair, jury trial for your client. When drafting – *and/or challenging* – juror declarations, remember to carefully review each statement for compliance with Evidence Code sections 1150, 1200, and C.C.P. section 2015.5.

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