

TALKING TO THE JURORS

Did you talk to the jury?

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If you've just tried a case in State court, the answer to that question is one of the first things your colleagues will want to know. Seasoned litigators will tell you that, after a verdict has been rendered, talking with jurors is the best way for an attorney to improve his or her litigation skills. This is true regardless of the verdict.

The first step to a successful post-verdict interview is to understand the rules regarding communication with a juror in the venue where you are trying the case. In Arizona District Court, the rules are strict. Local rule LRCiv 39.2(b) provides interviews with jurors in Federal Court after trial by parties involved in the trial are prohibited, with certain exceptions. Federal Court allows interviews "on the condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. See Federal Rules of Evidence, Rule 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories."

In Arizona State courts, Ariz. R. Sup. Ct. 42, ER 3.5 governs juror communication: *A lawyer shall not... (c) communicate with a juror... after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has*

made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment.

Ariz. R. Sup. Ct. 42, ER 3.5, Comment 3 is even more specific. It states:

A lawyer may on occasion want to communicate with a 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.

Usually in State court, there is no prohibition. Jurors are typically free to discuss the deliberation process and sometimes judges encourage it. The majority of judges thank jurors for their service and advise them that if they wish to do so, they may speak with the attorneys about the case. The judge also explains that the jurors are not required to speak with anyone. You may consider letting the judge know in advance that you want to speak to the jurors, and the judge may encourage that.

When jurors do talk, however, it is a gift. It is probably the most instructive method available for us to learn about our case presentation and our system of justice. Talking to jurors helps us to understand what worked and what did not, whether that be an argument, an exhibit, or a witness.

You will get more useful information without the other side present. If the defense insists on being part of your post-verdict juror conversation, try to get phone numbers and

call the jurors later. Jurors probably will not be as honest and open with you if the defense attorney is standing there.

It is always good to reassure jurors up front by telling them right away that you want them to be honest, and nothing they can say will hurt your feelings. You want their honesty. And most jurors turn out to be human when we speak with them in person. Ask jurors what they found useful and not useful about the process. When jurors give feedback on expert witnesses, it helps determine for future cases what expert to use as well as future trial strategies.

If you are able to speak with the jurors post-verdict, do so with an open mind and a neutral voice. You are not there to argue, rather your job now is to listen and learn. Pay attention to your own body language. Do not stand there with arms crossed and frowning. You do not need to smile, but allow yourself to be in the moment and truly listen. Be curious, not confrontational. Ask open-ended questions so that jurors have a chance to give you an earful if they wish. For example:

Considering everything you saw and heard in the case, what affected you the most?

What was the most important piece of evidence in reaching a verdict?

What did you spend most of your time thinking about?

Is there anything I did in trial that I should never do again?

What did you think of the Powerpoint/ Animation/ Posterboard?

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Consider process questions, too:

How did you start off your deliberations?

What did you spend most of your time talking about?

When did you develop a solid leaning in favor of this verdict?

What were the main disagreements?

How did you get past them?

When did you think you all made up your minds?

How did you arrive at a verdict?

Be clear that your goal in having these discussions with jurors is educational. Learning for the future should be your focus and should govern your tone as you ask questions. Be an interviewer, rather than an advocate. Remember it is a conversation, not a deposition. Once the former jurors understand that your interest is to learn, the discussion will become more meaningful to them. It feels good to provide helpful pointers, and for jurors, it can be a way of getting additional value from their investment of time in the case.

Another good area of questions has to do with the Arizona rule that jurors may discuss the case if they are all together in the jury room.

Did the jury talk about the case (deliberate) during the trial?

What sorts of questions were there during the trial?

Was there information you wished you would have had sooner?

And do not ignore the fact that most of the time, jurors are appreciative and enjoy the opportunity to talk about their experience. After all, they could not talk the whole trial – and there is a good chance they felt the lawyers talked too much! Talking to jurors confirms for them that their responses are valuable and significant to us, and an important part of our system of justice.

You may think that if you won the case you should not talk to the jurors. Many attorneys shy away from juror interviews when the verdict is in their favor, fearing the interview will reveal details that could lead to the verdict being overturned. That is uncommon, however. The general rule is against admission of a juror's testimony to impeach a verdict. *Tanner v. United States*, 483 U.S. 107, 119, 107 S.Ct. 2739 2747, 97 L.Ed.2d 90, 105 (1987). Policy considerations for precluding inquiry into jury deliberations are meant to discourage harassment of jurors,

to encourage free and open discussion in the jury room, to remove incentives for jury tampering, to promote finality and to promote respect for the institution of the jury as fact finder. *Brooks v. Zahn*, 170 Ariz. 545, 826 P.2d 1171 (Ariz. App. 1991)

While most jurors do not violate the judge's instructions, some do, and Rule 59(B), Arizona Rules of Civil Procedure, permits an aggrieved party to move for a new trial on the ground of juror misconduct. To obtain a new trial based on a juror's failure to answer honestly a question on *voir dire*, a party must show misconduct occurred and that this misconduct resulted in probable prejudice. *Catchings v. City of Glendale*, 154 Ariz. 420, 422, 743 P.2d 400, 402 (App.1987). For extraneous information to get you a new trial, it needs to be relevant to the disputed facts and issues in the case. Such things might include visiting the scene without court permission, or Googling specific information on the Internet. *See, Am. Power Prods., Inc. v. CSK Auto, Inc.*, 235 Ariz. 509, 334 P.3d 199 (Ariz. App. 2014)

Rule 606(b), Arizona Rules of Evidence, sets out the rule against probing the minds of jurors after they have deliberated to reach a verdict.¹ Essentially, Courts considering whether to overturn a jury verdict may not hear live testimony from a juror, nor receive a juror's affidavit or any other evidence of a juror's statements, on anything that was said or done during jury deliberations. There are a few exceptions, such as when a juror testifies that information that was not in evidence was given to the jury. For example, Henry Fonda pulling out the second knife in *12 Angry Men* would likely be a problem. But other than in extreme circumstances, what happens during deliberations will not overturn the verdict.

If you lost your case and a juror reveals information about extraneous prejudicial information that could require a reversal, you are going to need someone other than yourself, such as a private investigator, to get affidavits from jurors. Rule 606(b) does not prohibit all affidavits related to jury verdicts. A juror's affidavit is admissible under Rule 606(b) to show an error in the judgment as not conforming to the jury's findings, improper acts by third parties, or failure by the juror submitting the affidavit to disclose his or her bias and prejudice upon inquiry in *voir dire*. *Kirby v. Rosell*, 133 Ariz. 42, 648 P.2d 1048 (Ariz. App. 1982) (Juror had relied on a business law textbook and had read to the jury certain legal definitions from the textbook.) *See also, Sonanes v. Core Constr. Serv. of Arizona, Inc.* (Ariz. App. 2011)

In the fairly recent criminal case of *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855,

197 L.Ed.2d 107 (2017), the attorney for the defendant entered the jury room post-verdict to discuss the trial with the jurors. As the room was emptying, two jurors remained. They revealed that, during deliberations, another juror had repeatedly expressed racial bias toward the defendant. Counsel reported this to the court and obtained sworn affidavits from the two jurors. With Justice Kennedy writing for the majority, the United States Supreme Court overturned a Colorado's Supreme Court and held that where a juror makes a clear statement indicating that he or she relied on racial stereotypes to convict, the Sixth Amendment requires that the standard of Rule 606(b) give way. Whether this rationale might extend to civil cases is unknown, but is something to consider.

Every case is different, of course, but if a juror tells you something along those lines, you may want to contact a private investigator, and do some legal research based on your specific facts to determine how to proceed. And if a juror tells you something that casts doubt on a favorable verdict you just obtained, something that might result in a new trial if the other side requested it, you may need to consult with ethics counsel about your obligations.

But those things are rare. Do not let those fears of what might go wrong stop you from learning from your jury. They can be your best teachers. And do not believe anyone who says if you win, there's no need to talk to the jurors. You may have won for different reasons than you think, and if so, that is something you want to know. Same thing with losing. In fact, a prominent Tucson plaintiff's attorney got a defense verdict and took the entire jury to lunch afterwards, talking with the jurors for three hours. The next trial that lawyer had resulted in a multi-million dollar recovery for her clients. You just never know what the jury was thinking unless you talk to them, post-verdict. ■

Endnotes

- 1 Inquiry into validity of verdict in civil action. Upon an inquiry into the validity of a verdict in a civil action, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror. Nor may a juror's affidavit or evidence or any statement by the juror, concerning a matter about which the juror would be precluded from testifying, be received for these purposes.