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From the Chair:

by **Brian A. Sun***

Technological advances have now thrust litigators into the world of fax and computer filings, paperless trials conducted with laptops and instant mass communication via e-mail. With these innovations, bar organizations such as the Litigation Section must continue to adapt to such fast-moving advances in order to provide meaningful benefits to its members. Historically, the Litigation Section has been known for excellent CLE programs and for its role as a voice for litigators on key issues effecting our practice (i.e., trial court unification and fast track.). However, bar organizations, in general, now face the daunting challenge of providing useful services and support for their constituent members if they are to maintain their relevance to the legal community. The more recent downsizing of the State Bar of California remind us of the importance of focusing upon such issues.

The Litigation Section plans to meet these challenges head-on. First, we are exploring ways to make our excellent CLE programs more broadly available to members through our website. We are also seeking to distribute and disseminate greater amounts of information regarding new cases and changes in the law through computer technology. For instance, our Website Committee, spearheaded by Elizabeth Mann and Dean Ziehl, is working to build an e-mail database which will permit us to disseminate important information to our members with the touch of a keystroke. In this way, we will be able to reach out and through the use of technology enhance our ability to provide both services and useful information to our members. Similarly, if technology permits, our Judicial Survey questionnaire, once made available on our website, will allow for attorneys to build up a database of information about our trial judges — with a heavy emphasis on providing answers to common sense questions about how a judge conducts his or her courtroom (and



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contrary to the views of some, not to provide a forum to trash or praise judges). The purpose of making available this type of attorney feedback on the trial courts is to aid many of our members who are likely to find themselves before a judge of our now unified court and with whom the litigator has had little or no prior experience.

On a more traditional front, the Section is continuing its efforts to work with the courts on improving court efficiency and addressing the concerns of litigators. For example, a subcommittee of our Court committee, headed by Chair-Elect Alan Steinbrecher, is working closely with the Superior Court on the latter's development of a panel of judges specializing in complex cases. These endeavors, along with our participation in the AB3820 Committee and our continuing efforts to interface with the administration of the Superior Court in the post-unification era, will give us plenty to do in the coming year.

As we meet these challenges, the Section will continue its commitment to providing informative CLE programs for its members. With Reel Justice III coming up in May and our June program focusing on how lawyers may use technology efficiently and effectively in the courtroom, we continue to develop meaningful and useful programs that make continuing legal education both a pleasure to attend and a benefit to one's litigation practice.

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Jury Misconduct

by Honorable Lawrence Waddington

Although civil litigators value the right to a jury trial, they also realize that improper conduct by individual jurors may jeopardize the integrity of the process. Fact patterns are infinite, but courts have identified three categories of "jury misconduct" which may undermine the corresponding right of the parties to a fair trial. Misconduct can occur either in voir dire examination of jurors prior to trial, violation of a court order during trial, or during jury deliberations. If the alleged misconduct occurs during trial, the court can intervene and conduct an investigation. But the parties frequently do not learn of jury misconduct until after the verdict when jurors are questioned by counsel or interviewed by an investigator. Lawyers who diligently prepare for trial cannot ignore the possibility that a juror will conceal, falsely state, or misstate information on voir dire, engage in legally impermissible conduct during the course of trial, or infect jury deliberations with conduct or discussions prohibited by the court.

If misconduct occurs during trial or jury deliberations, the judge retains the power to excuse a juror if a hearing reveals legally cognizable misconduct and can replace the excused juror in those courts which retain the alternate juror system. A more difficult question arises when jury misconduct surfaces post-verdict. The court, which must balance the tension between finality of the trial against an assurance that the jury panel fairly tried the issues, is reluctant to intrude upon the privacy of the jury deliberative process by subjecting jurors to needless questioning. "Impeaching" a verdict is a serious issue. The California Supreme Court and several Circuit Courts have authorized trial courts to severely restrict personal contact with jurors after the conclusion of trial absent judicial consent.

The majority of juror misconduct allegations emerge in criminal cases but civil litigation is not immune when courts try emotionally charged issues. Most jurisdictions distinguish between statutes applicable to criminal and civil cases on jury misconduct, but case law often ignores those distinctions on appeal. For trial counsel, the crucial element is creation of an adequate record. Appellate courts, as a rule, are not sympathetic ab initio to reversal for juror misconduct, and statutory restrictions on impeaching a verdict are substantial.

Voir Dire

Litigators confirm the value of voir dire, whether selecting a jury panel intuitively or with the assistance of a jury consultant. Although questioning and excus-

Judge Waddington was appointed to the Los Angeles Superior Court in 1981. Before that, he served on the Los Angeles Municipal Court (appointed in 1973) and during that period his service included Supervising Judge in the Criminal Division, Presiding Judge for the Criminal Courts Master Calendar and the Court of Appeal, Second District (pro tem) in 1982 and 1986. During his distinguished career he was Assistant Attorney General, State of California and was a Deputy District Attorney in Los Angeles County from 1957 to 1970. Currently, Judge Waddington is at JAMS Endispute in Santa Monica hearing cases for arbitration, mediation, and court reference work including discovery disputes for pending cases.



Judge
Waddington

ing jurors on Constitutional grounds is constricted by *Batson v. Kentucky*,¹ or limited by local statute, court rule, or trial judge, lawyers nevertheless utilize voir dire to exercise peremptory challenges, or challenges for cause, in an attempt to ensure that a potential juror harbors no impermissible bias for or against a party. "The right to an impartial jury in civil cases is inherent in the Seventh Amendment's preservation of a 'right to trial by jury' and the Fifth Amendment's guarantee that 'no person shall be denied life, liberty or property without due process of law.'"² A juror who conceals, falsely states, or misstates information subverts that fundamental right. No one quarrels with this general proposition, but the question remains: what is the test for "impartiality"?

When the court swears in a panel of prospective jurors, the oath requires each person to truthfully answer questions concerning their qualifications and competency to serve.³ Concealing, falsely stating or misstating information on voir dire violates the oath. In voir dire, counsel is understandably reluctant to closely "cross-examine" jurors, but framing specific questions is essential. For example, asking jurors for assurance they will follow all court instructions does not necessarily include a question whether a juror would refuse to award general damages.⁴ Or, a juror responding to a compound question does not commit perjury by answering only

1. 476 U.S. 79 (1986).

2. See *McCoy v. Goldstone*, 652 F.2d 654, 657 (1981); The California Supreme Court has repeatedly asserted the importance of voir dire to the parties and the court. "Civil litigators, like criminal defendants, have a constitutionally protected right to the complete consideration of their

case by an impartial panel of jurors. See *Hasson v. Ford Motor Co.*, 32 Cal.3d 388 (1982).

3. CAL. CODE OF CIV. PROC. 232(A)

4. See *Moore v. Preventive Medicine Group, Inc.*, 178 Cal.App.3d 728 (1986).

one part of a question but not the other part.⁵ Both of these examples are tenuous, but each emphasizes the need for focused questions although the United States Supreme Court has recognized that jurors are not expected to engage in discrete linguistic analysis.⁶ Jurors, often intimidated or anxious about the court process, may not recall an event in their life when asked questions during voir dire, and failure to answer correctly is not necessarily grounds for challenging the verdict or seeking a mistrial. In civil cases which require a 9-3 verdict, unlike the unanimous verdict required in criminal cases, the absence of "impartiality" may not be as determinative.

In Federal trials, the United States Supreme Court has applied a strict test in evaluating whether an answer to a question posed to a juror during voir dire requires a new trial when its alleged falsity or concealment is discovered post-verdict. In *McDonough Power Equipment Inc. v. Greenwood*,⁷ after commenting on the significant investment of private and social resources incurred by the court and parties participating in the trial process, the Court held,

*"[t]hat to obtain a new trial a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause . . . [O]nly those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."*⁸

Because disclosure of false statements or concealed information by a juror during voir dire frequently emerges after the verdict, counsel is restricted to the grounds identified by *McDonough* when filing a motion for new trial. The *McDonough* holding, and the tenor of the opinion, indicates that an affidavit or declaration from a witness reciting the relevant facts must include evidence sufficient to warrant a challenge for cause.

The *McDonough* rule requires a threefold inquiry: 1) whether the juror failed to answer questions honestly; (2) whether the answer(s) are material to the litigation; and 3) whether the answer(s) are significant enough to constitute a challenge for "cause." Experienced counsel know that the basis to challenge a juror for "cause", developed and recorded in voir dire, is frequently obvious to both parties and the court can often excuse a prospective juror tactfully. But challenges for "cause" during voir dire usually are based on information a juror has disclosed, not facts concealed or falsely stated. In the absence of a sworn statement by the juror conceding misconduct during voir dire, counsel seeking to im-

peach a verdict must file affidavits or declarations reciting hearsay, e.g. statements told to the declarant (usually an investigator) by another juror or third party. Under *McDonough*, the trial judge must make a preliminary assessment as to whether the particular statement

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or concealment of facts would constitute a basis to disqualify a juror for "cause," and if so, determine whether to conduct an inquiry on the merits. If the judge concludes an inquiry is warranted, the juror who allegedly committed the misconduct should be offered an opportunity to be heard.

In *McCoy v. Goldston*,⁹ the court suggested that the trial judge consider the following factors in its inquiry: 1) whether the questions asked during voir dire sufficiently inquired into the subject matter as disclosed by the juror; 2) whether the response of other jurors to the question asked would put a reasonable person on notice that an answer was required; and 3) whether at any time during the trial the juror became aware of a false or misleading answer and failed to notify the court. In some cases, counsel may offer evidence in the course of trial which alerts a juror to a fact not previously recalled during voir dire. If the juror voluntarily reveals that information to the court, the *McDonough* test may not be entirely dispositive. The juror may not have intentionally misstated or concealed facts on voir dire, but recollection during trial may impair the ability to judge "impartially." As noted below, a hearing would probably be required, but the test is different. The new test asks: does the newly disclosed information constitute an "extraneous influence" as outlined in Federal Rule of Evidence (FRE) 606,¹⁰ infra.

"Bright lines" are difficult in this context, but perhaps the ultimate test to determine jury misconduct in voir dire is whether the trial is otherwise "fair" according to the evidence in the specific litigation. Construing abstract words, such as, "fairness" or "impartiality," is possible only in context. For this reason, determining juror misconduct in isolation of the facts of the case is impossible, unless coupled with the nature of the litigation, the witnesses, the evidence, court rulings, and jury instructions. And, most importantly, at least in Federal Court, the juror's statements or misstatements must

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5. See *Cabe v. Sup. Ct.*, 63 Cal.App.4th 732 (1998).

6. See *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984).

7. See *McDonough*, 464 U.S. 548.

8. See *McDonough*, 464 U.S. 548.

9. See *McCoy*, 652 F.2d 654.

10. See *United States v. Herndon*, 156 F.3d 629 (1998).

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qualify as grounds equivalent to a challenge for “cause.”

California courts also review juror failure to answer questions correctly on voir dire but under a different test. Relevant issues include: 1) the strength of the evidence offered at trial; 2) the nature and seriousness of the questions asked and answered, or falsely answered; and 3) the probability that prejudice occurred.¹¹ The California courts have been unable to draw “bright lines” any more clearly than their federal counterparts.¹²

Misconduct during Trial

After counsel has selected a jury panel, the court outlines the duties of jurors and ultimately instructs them to render a verdict “according to the evidence presented to you and to the instructions of the court.”¹³ Among other general instructions, the court informs the jury not to discuss the case among themselves or others and not to form premature opinions. The court may enjoin jurors from visiting the scene of an incident, instruct them to ignore media accounts, and refrain from conducting private experiments. In California courts, disregarding these orders or any others issued during trial may affect the ability of a juror to serve impartially, authorizing a court to discharge a juror under the statutory rubric of “good cause,” *infra*.¹⁴ Counsel who learn of a possible breach of the court rules during trial must immediately inform the trial judge and, absent procedural guidelines, request a hearing. The sensitive nature of this inquiry suggests that court and counsel conduct an in-chambers conference prior to the hearing to discuss the process which will govern the inquiry. Obviously, the court should hold any subsequent hearing out of the presence of jurors, but whether the juror or the witness to the alleged misconduct should be placed under oath is a difficult question. If another juror is the reporting party, the court inquiry itself may affect the deliberative process of the panel in the event the court finds no legally cognizable misconduct. Or, if counsel is the reporting party, the juror questioned is unlikely to retain an impartial view of the evidence.

The absence of statutory guidelines to determine whether to excuse a juror for “good cause” raises questions: 1) should the court or counsel conduct the questioning; 2) is cross examination allowed; 3) should

other witnesses be called; 4) do the rules of evidence apply; 5) what is the legal standard of “good cause” in the relevant jurisdiction; 6) if perjury is a possibility, should the court advise the juror; and 7) has the juror informed other jurors of the nature and extent of the alleged misconduct? Although relevant statutory language between Federal and California courts may vary, the general rule requires the court to find “good cause,” or “just cause,” to excuse a juror for violating a court instruction.

In Federal courts, the applicable standard is Federal Rule of Civil Procedure (FRCP) 47(c): . . . “[t]he court may for good cause excuse a juror from service during trial or deliberation.” The United States Supreme Court has held that in investigating allegations of jury misconduct, the trial court, “should not decide and take final action *ex parte* on information . . . but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.”¹⁵ Although exceptions to this rule requiring a hearing have been permitted, the general rule is preferred as the better practice.¹⁶ But “[w]hether and to what extent a juror should be questioned regarding the circumstances of a need to be excused is within the trial judge’s sound discretion.”¹⁷

The court held that,

*“[t]he test for sufficiency of ‘good cause’ includes sickness, family emergency or juror misconduct that might occasion a mistrial [and] are examples of appropriate grounds for excusing a juror, [but] the judge’s discretion is not limited to those scenarios [and] embraces all kinds of problems-temporary as well as those of long duration-that may befall a juror . . . All that is needed to satisfy a prudent exercise of discretion is to be certain the trial court had sufficient information to make an informed decision”.*¹⁸

Although deferring to the trial court and its exercise of discretion is appropriate, the trial record should nevertheless reflect the factual basis upon which the decision to excuse a juror is based to assure an adequate basis for appeal. Not all appellate courts are necessarily deferential to the trial court.

California Code of Civil Procedure § 233 authorizes the trial court to replace a juror “[I]f, before the jury has returned its verdict . . . a juror . . . becomes sick or, upon

11. *Weathers v. Kaiser Foundation Hospitals*, 5 Cal.3d 98 (1971)

12. *Self v. General Motors Corp.*, 42 Cal.App.3d 1 (1974) (juror concealed prior knowledge of subject matter on trial); *In re Hitchings*, 6 Cal.4th 97 (1993) (juror concealed prior knowledge of case); *People v. Cochran*, 62 Cal.App.4th 826 (1998) (juror knew members of victim’s family); *Smith v. Covell*, 100 Cal.App.3d 947 (1980) (juror concealed evidence of prior injury); *Wiley v. Southern Pacific Transportation Co.*, 220 Cal.App.3d 177 (1990) (juror concealed involvement in similar fact situation as trial); *People v. Jackson*, 6 Cal.4th 1 (1993) (juror concealed prior arrests-under CALIFORNIA PENAL CODE § 1089); *Noll v. Lee*, 221 Cal.App.2d 81 (1963) (false statement that juror would follow law).

13. See CAL. CODE OF CIV. PROC. § 232(b).

14. See *Id.*; The Federal Rule is similar, see text, *infra*.

15. See *Remmer v. United States*, 347 U.S. 227 (1954).

16. See *Harris v. Folk Const. Co.*, 138 F.3d 365 (1998); see also *United States v. Behler*, 14 F.3d 1264 (1994). The California rule is similar. *Peo. v. Hightower*, 77 Cal.App.4th 1123 modified @ 2000 WL 137081 (criminal case).

17. See *United States v. Reese*, 33 F.3d 166.

18. See *id.*, at 173.

other good cause shown to the court, is found to be unable to perform his or her duty . . .” [and the court can replace the discharged juror with an alternate juror].

...the general rule requires the court to find “good cause,” or “just cause,” to excuse a juror for violating a court instruction.

This statute applies to jurors during the course of trial as well as during deliberation. In addition to illness, which authorizes the court to excuse a juror, other “good cause shown” is broad language authorizing the court to inquire and possibly discharge a juror for inability to perform the “duty” of a juror. The phrase “unable to perform his or her duty” is sufficiently broad in excusing a juror for personal injury, death in the family, or other personal considerations, but the phrase also allows the court to excuse a juror for misconduct under the label of “other good cause shown.” The variety of fact situations is infinite, and the cases fall into broad categories.¹⁹

Excusing a juror is not the only remedy the trial court may invoke for jury misconduct. Depending on its nature and extent, the judge may issue a “curative” instruction, admonishing the panel to avoid engaging in specific conduct. Although the language of the instruction may not sufficiently cure the alleged misconduct, excusing a juror will cause the balance of the panel to speculate on the reason for discharge despite an admonition by the court not to do so.

Impeaching the Verdict

At the conclusion of trial, the court routinely informs jurors to base their verdict on the evidence introduced at trial and not from outside sources.²⁰ After retiring to deliberate, the jurors enjoy unsupervised proceedings in arriving at their verdict. The secrecy that shrouds jury deliberations, juror immunity from retribution in the event of an unpopular verdict, and an absence of accountability for their decision is the price society pays for the jury system. Although some jurisdictions foreclose rendition of verdicts by “chance” or “quotient,” the deliberative process is essentially unrestricted.²¹ But legislatures, recognizing that a jury of strangers with different cultural, social, political, and religious backgrounds might stray from an idealistic view of civic virtue, have authorized a limited review of

jury verdicts. Federal Rule of Evidence (FRE) 606 provides, in part, that if the court conducts an inquiry into the validity of a verdict, jurors cannot testify,

“as to any matter or statement occurring during the course of the jury’s deliberations . . . or the effect of anything . . . influencing the juror to assent to or dissent from the verdict . . . or concerning the juror’s mental process . . . except whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror”

Federal Rule of Evidence 606 is not substantive in the conventional sense, but a rule of evidence which disqualifies a juror from filing an affidavit/declaration or testifying to the details of the deliberative process.

Allegations of jury misconduct during deliberations are numerous, but in *Tanner v. United States*,²² a criminal case, the United States Supreme Court severely restricted

...legislatures, recognizing that a jury of strangers with different cultural, social, political, and religious backgrounds might stray from an idealistic view of civic virtue, have authorized a limited review of jury verdicts.

impeachment of verdicts, despite serious allegations of impropriety reported by several jurors. Although the dissent in *Tanner* notes that many alleged violations occurred outside the jury room and not during deliberations, the majority applied the philosophy and public policy of FRE 606 to deny a motion for new trial. The court determined that FRE 606 permits evidence of outside influences which are “objective,” or, extraneous prejudicial information which intrudes upon the deliberative process. Impeachment of the verdict for statements or conduct not within that category is precluded. This distinction, characterized as the “extraneous/internal” analysis, is contingent upon the nature of the alleged misconduct— an easy rule to formulate, but difficult to apply. In *United States v. Herndon*,²³ the court said that an extraneous influence consists of knowledge by a juror about, or a relationship with, either the parties or their witnesses.

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¹⁹ Talking with counsel, a party, a witness, or a court official about the case: CAL. CODE OF CIV. PROC. § 611 (West 1999) (and, by implication, other jurors); *In re Hitchings*, 6 Cal.4th 97; see also *People v. Ryner*, 164 Cal.App.3d 1075 (1985); expressing an opinion about the evidence: CAL. CODE OF CIV. PROC. § 611 (West 1999); see also *City of Pleasant Hill*, 1 Cal.App.3d 384 (1969); viewing the scene (without court order): CAL. CODE OF CIV. PROC. § 651 (West 1999); reading media accounts of the case: *People v. Holloway*, 50 Cal.3d 1098 (1990); see also *Province v. Center for Women’s Helath & Family*

Birth, 20 Cal.App.4th 1673 (1993); conducting an independent investigation of the case or the evidence: *Lankster v. Alpha Beta*, 15 Cal.App.4th 678 (1993); refusal to accept foreign language translation: *People v. Cabrera*, 230 Cal.App.3d 300 (1991); comments about parties: *United States v. McClinton*, 135 F.3d 1198.

²⁰ See CAL. CODE OF CIV. PROC. § 608 (West 1999); by implication.

²¹ See CAL. CODE OF CIV. PROC. § 657

²² 483 U.S. 107 (1987) (a criminal case).

²³ See *United States v. Herndon*, 156 F.3d 629.

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These factors, if established, may taint the fairness of the trial and affect impartiality. Although counsel or the court usually identify the parties and witnesses to the litigation during voir dire, failure to do so caused the court in *United States v. Rigsby*²⁴ to deny a motion for new trial on grounds that counsel failed to inquire whether jurors knew the names of prospective witnesses. More importantly, when the evidence was brought to the court's attention, counsel failed to request an evidentiary hearing.

The Supreme Court in *Tanner* also noted that jury misconduct is not the sole ground for impeaching a verdict. The parties are entitled to a "competent" jury, i.e., jurors unimpaired by mental incapacity that would intrude upon rational decision making.²⁵ Even on those grounds, the Court in *Tanner* insisted on evidence of outside influences to establish impeachment of a verdict. Challenges to a juror's mental faculties usually occur during deliberations in criminal cases when a frustrated majority cannot persuade a dissenting juror to concur in a verdict.²⁶ Mere dissent does not warrant excusing a juror who vocalizes reliance on the absence of evidence.²⁷ The trial judge walks a fine line in attempting to determine the validity of a panel complaint against an individual juror and without trespassing on the sanctity of the deliberative process.

Not all jurisdictions permit post verdict interview with jurors. Or, a local court rule may require the express consent of the trial judge.²⁸ Arguably, an absolute prohibition against post verdict interviews

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impinges on the liberty interest protected by the Due Process Clauses of the Fourteenth Amendment and the Fifth Amendment if the moving party could establish the asserted misconduct egregiously departed from the requirement of a fair trial. But in a pair of recent cases the California Supreme Court has severely criticized the conduct of investigators who interviewed jurors after rendering their verdict and has empowered the trial court to restrict post trial jury contact.²⁹

Absent any restrictions, attempts to impeach a verdict should contain a motion for new trial accompanied by affidavits of jurors, investigator, counsel, or relevant third parties documenting the alleged jury misconduct or incompetence. The motion should also contain a request for an evidentiary hearing in conformity with local practice and include three basic elements in addition to legal points and authorities: 1) an affidavit of the investigator detailing the extent of the investigation and the dates and names of jurors interviewed; 2) the affidavit of the juror(s), eliminating any reference to

An increasing public concern about the performance of juries should alert counsel to vigilance at all times during the trial.

evidence relating to the deliberative process, recounting the facts which support the allegation of misconduct; and 3) an affidavit of the attorney and client that neither one had information of the misconduct until after the verdict. A court is not inclined to grant a motion for new trial if counsel learns of misconduct during the course of the trial and awaits the outcome of the trial to object.³⁰

Counsel opposing the motion must secure affidavits from other jurors, which contradict all essential statements in the moving papers. Failure to object to any one of the grounds asserted in the moving papers may amount to a waiver. Depending on the Federal or State statute or rule, the hearing on the motion may not necessarily require personal presence of a juror. If the statute or rule authorizes the court to hear the case on affidavits, counsel may nevertheless urge the court to hear testimony. In either event, the court must decide misconduct based upon the credibility of the witnesses, but is limited by evidentiary restrictions on the relevance and admissibility of testimony.

Research into the issue of jury misconduct will reflect a variety of attempts by courts of appeal to assist the trial judge in resolving issues of alleged jury misconduct. None is entirely satisfactory, every case painted on a different judicial palette and contingent on an infinite variety of facts. An increasing public concern about the performance of juries should alert counsel to vigilance at all times during the trial. Delay of the trial caused by counsel who immediately alerts the judge to any perceived jury misconduct pales in significance to the time

24. See *United States v. Rigsby*, 45 F.3d 120 (1995).

25. See *Tanner*, 483 U.S. 107; see also *Jordan v. Massachusetts*, 22 U.S. 167 (1912).

26. Competent juror: CAL. CODE OF CIV. PROC. § 203 defines a competent juror as "...one in possession of . . . normal faculties and of ordinary intelligence." For citations to cases on mental competence of jurors see *People v. Millwee*.

27. See *Murray v. Laborers Union Local No. 324, et.al.*, 55 F.3d 1445 (1995).

28. See 94 Colum.L.Rev. 1950 (Oct. 1994); see also 66 N.C.L.Rev. 543 (March 1998). Both articles survey numerous jurisdictions.

29. See *In re Hamilton*, 20 Cal.4th 273 (1999); *Townsel v. Sup. Ct.*, 20 Cal.4th 1084 (1999)

30. See *Weathers v. Kaiser Foundation Hospitals*, 5 Cal.3d 98.

and expense of attempted correction of the verdict after trial.

California courts have also confronted allegations of jury misconduct and verdicts are not entirely immune from judicial review.³¹ California Code of Civil Procedure § 657 permits the court to vacate the verdict and order a new trial, *inter alia*, “for any of the following causes, materially affecting the substantial rights of [a] party: 1.) Irregularity in the proceedings of the . . . jury; 2.) Misconduct of the jury.” The Legislature, in recognizing that secret jury deliberations without oversight are a potential source of jury misconduct is attempting to secure finality to verdicts by requiring procedural and evidentiary conditions for setting aside a verdict.

Cal. Code of Civ. Proc. § 658 requires the moving party to submit affidavits in support of a motion for new trial on grounds of jury misconduct or irregularity in the proceedings. Affidavits must include the affiant’s personal knowledge of the alleged jury misconduct and recite inability of counsel to alert the court at any time prior to verdict.³² This rule prevents counsel from awaiting rendition of the verdict and then determining whether to challenge it. If the jury misconduct occurred during jury deliberations, thereby not affording counsel any opportunity to learn of it until completion of trial, a motion for new trial would not require that affidavit.³³ Jurors are competent witnesses to prove objective facts to impeach the verdict,³⁴ but only by affidavit in civil cases.³⁵

The moving party must file the relevant affidavits within ten days of filing the motion for new trial unless extended upon a showing of good cause but not to exceed twenty days.³⁶ The opposing party has ten days to respond to the moving party’s motion for new trial. After the motion and supporting affidavits have been filed, the court at its discretion may hold a hearing.³⁷ If the court elects to hold a hearing, the issues are:

1. *Is the proffered evidence admissible?* California Evidence Code §1150 (West 1999);
2. *If so, did any legally cognizable misconduct occur?*
3. *If so, a presumption of prejudice arises in civil and criminal cases;* *Hasson v. Ford Motor Co.*, 32 Cal.3d 388;
4. *The presumption may be rebutted by counter affidavits;* *Hasson*, 32 Cal.3d 388; see also *People v. Duran*, 50 Cal. App. 4th 103 (1996).
5. *Cal. Evid. Code § 1150(a) marks the boundaries of evidence admissible at the hearing.*

“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.”³⁸

The appellate court in *Duran* reminded the trial court not to intrude upon the thought processes of the jury while conducting its inquiry of juror misconduct. This distinction, as noted below, is not always understood. The California Supreme Court explained that the statute includes evidence open to sight and hearing, thus subject to corroboration.³⁹ One court held that Cal. Evid. Code § 1150(a) requires “overt conduct, objectively ascertained.”⁴⁰ Affidavits from jurors which recite failure to consider evidence, confusion of jury instructions, weariness, and a bullying juror exemplify the inapplicability of Cal. Evid. Code § 1140(a) requirements.⁴¹ This kind of evidence is inadmissible.⁴²

31. Information derived outside the courtroom: Despite an admonition from the court to confine the deliberative process to evidence received at trial, jurors may receive information unintentionally, or intentionally, from third parties or other sources: Juror inadvertently hears information about the defendant’s reputation: *People v. Nesler*, 16 Cal.4th 561 (1997); information from outside the evidence: *Smith v. Covell*, 100 Cal.App.3d 947 (1980); information from dictionary: *Glage v. Hawes Firearms Co.*, 226 Cal.App.3d 314 (1990); information from newspapers: *Center for Women’s Health*, 20 Cal.App.4th 1673; demonstration outside the courtroom: *Lankster v. Alpha Beta Co.*, 15 Cal.App.4th 678 (1993). Statements made by juror during deliberations: Attorney fees: *Krouse*, 19 Cal.3d 59 (1977); disregard the law: *People v. Perez*, 4 Cal.App.4th 893 (1992); see also *Ford*, 226 Cal.App.3d 300; erroneous legal advice: *In re Stankewitz*, 40 Cal.3d 391 (1985); specialized knowledge of juror: *In re Malone*, 12 Cal.4th 935 (1996) (computation of damages formula); see also *Moore*, 178 Cal.App.3d 728; insurance rates: *Smith v. Covell*, 100 Cal.App.3d 947; prejudging the evidence: *County of Orange*, 130 Cal.App.3d 944 (1982); refusal to follow law: *Lee*, 221 Cal.App.2d 81. Conduct during deliberations: conducting a demonstration: *Smoketree*, 234 Cal.App.3d 1724 (1991); refusal to deliberate: *People v. Thomas*, 26 Cal.App.4th 1328 (1994); see also *People v. Castorena*, 47 Cal.App.4th 1051 (1996); see also *People v. Metters*, 72 Cal.App.4th 1489 (1998); see

also *Perez v. Marshall*, 119 F.3d 1422 (1997); refusal to accept interpreter’s translation; *Cabrera*, 230 Cal.App.3d 300. Absence of deliberation: CAL. CODE OF CIV. PROC. § 613 (West 1999); *Vomaska v. City of San Diego*, 55 Cal.App.4th 905 (1997).
32. See, *Kaiser*
33. See, *Krouse v. Graham*, 19 Cal.3d 59 (1977)
34. See, *Wiley v. Southern Pacific Transportation System*, 220 Cal.App.3d 177 (1990)
35. See, *Peo. v. Hedgecock*, 51 Cal.3d 395 (1996)
36. See CAL. CODE OF CIV. PROC. § 659 (West 1999); see also *Erikson v. Weiner*, 48 Cal.App.4th 1663 (1996); see also *Maple v. Cincinnati*, 163 Cal.App.3d 387 (1985).
37. See *People v. Cabrera*, 230 Cal.App.3d 300 (1991); see also *People v. Millwee*, 19 Cal.4th 96 (1998) (discretionary, in criminal case, to subpoena excused juror).
38. See *People v. Duran*, 50 Cal.App.4th 103 (1996); see also *Smoketree-Lake Murray, Ltd. v. Mills*, 234 Cal.App.3d 1724.
39. See *People v. Hutchinson*, 71 Cal.2d 342 (1969).
40. See *Trammell v. McDonnell Douglas Corp.*, 163 Cal.App.3d 2157 (1984).
41. See *Mescher v. County of San Diego*, 9 Cal.App.4th 1677 (1992); see also *Ford v. Bennack*, 226 Cal.App.3d 330 (1990).
42. See *Continental Dairy Equip. Co. v. Lawrence*, 17 Cal.App.3d 378 (1971).

New Provisions and Procedures for Complex Civil Litigation

by Hon. Valerie Baker

Los Angeles Superior Court

Complex cases are given special attention in new Rules of Court, effective January of this year. Complex cases are also the subject of programs throughout the state. Commencing April 3, 2000, there will be six courts dedicated exclusively to the management and trials of these cases in the Los Angeles Superior Court. There are similar programs already in place in Superior Court departments in Alameda, Contra Costa, Orange, San Francisco and Santa Clara Counties. The new Rules and programs aim to improve the handling of complex litigation in this state.

Rules 1800 through 1812 of the California Rules of Court (CRC) define complex cases and provide for early designation. (See also Rules 1501.1, 2102 and 2105.) Rule 1800(b) states that in deciding whether a case is complex, the court shall consider, among other things, whether the action is likely to involve (1) numerous pretrial motions raising difficult or novel legal issues that will be time-consuming; (2) management of a large number of witnesses or a substantial amount of documentary evidence; (3) management of a large number of separately represented parties; (4) coordination with related actions pending in other courts; or (5) substantial postjudgment judicial supervision.

Subject to contrary designation by the court, cases of the following types are regarded as "provisionally" complex: antitrust or trade regulation claims; mass tort claims; class actions; construction defect claims, securities claims or investment losses and environmental or toxic tort claims which involve many parties; and insurance coverage claims arising out any of the foregoing.

Seeking to ensure efficient resolution of complex litigation, the Rules encourage early recognition and management. The plaintiff may designate an action complex by filing with the initial complaint the *Civil Case Cover Sheet* that is marked to indicate the action is a complex case. See amended Rule 982.2. No later than his or her first appearance, the defendant may file and serve a counter *Civil Case Cover Sheet*, with a noncomplex counterdesignation, or, in the event the Plaintiff failed to so designate, a complex counterdesignation. Alternatively, the defendant may also join the plaintiff in designating an action as complex.

Within 30 days after the filing of the counter *Civil Case Cover Sheet*, the court shall decide, with or without a hearing, whether the action is a complex case. Where a counter designation is not filed, the court is required to decide "as soon as reasonably practicable". The court has continuing power to decide that an action previously declared to be complex is not a complex case. This



Judge Baker was appointed to the Los Angeles Superior Court in 1986 and has had a variety of civil law and motion and trial court assignments. From 1994 through 1998, she was a judge in an individual calendar court in the Civil Courthouse downtown Los Angeles.

She is currently assigned to Civil proceedings in the West District of Santa Monica.

is with or without a hearing, and on the court's own motion or a noticed motion by any party.

In the Los Angeles Superior Court, Judge Harvey Schneider will be overseeing the complex litigation program as well as long cause operations. Judge Schneider and other supervising judges have confirmed that the initial determination of whether a civil case is complex will be made by the individual calendar judge to whom the case is originally assigned. In the district courts where the master calendar system is still in effect, the supervising judge will make the initial decision. If the case is designated complex by the original court, it may be referred to Judge Schneider for a status conference. At this conference, case assignment will be addressed. Given the multitude of complex actions in Los Angeles County, not all complex cases will be assigned to one of the six designated departments. If the complex case is ready for trial and if the trial would last twenty days or more, that case could be tried in one of several departments dedicated to "long cause" trials. Other complex cases, particularly those not ready for trial, could be returned to the original court or assigned to one of the six courts in the complex litigation program.

The Los Angeles Superior Court Judges assigned to hear complex civil actions exclusively include Carolyn Kuhl, Ann Kough, Victoria Chaney, Charles McCoy, Peter Lichtman and Wendell Mortimer Jr. Judges currently assigned to the long cause trials include Judith Chirlin and Frederick Lower, and retired judges sitting on assignment.

In addition to the new or revised Rules, Section 19 of the Judicial Administrative Standards provides guidelines for the management of complex litigation. These provisions and the complex litigation programs throughout the state are the result of efforts by the California Judicial Council and its Complex Litigation Task Force.

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Federal Court Focus

Suits Against the Federal Government: Juries and Damages

by Donna J. Everett Ford*

Assistant United States Attorney, Central District of California

Most attorneys probably haven't thought about the doctrine of Sovereign Immunity since law school. However, sovereign immunity controls every case brought against the United States, which includes its agencies and employees. Specifically, the doctrine controls not only who you may sue, but the right to a jury trial and limitations on the damages award. If you are not careful, you could find yourself facing criminal penalties for charging your client too much in attorney's fees in a simple tort case.

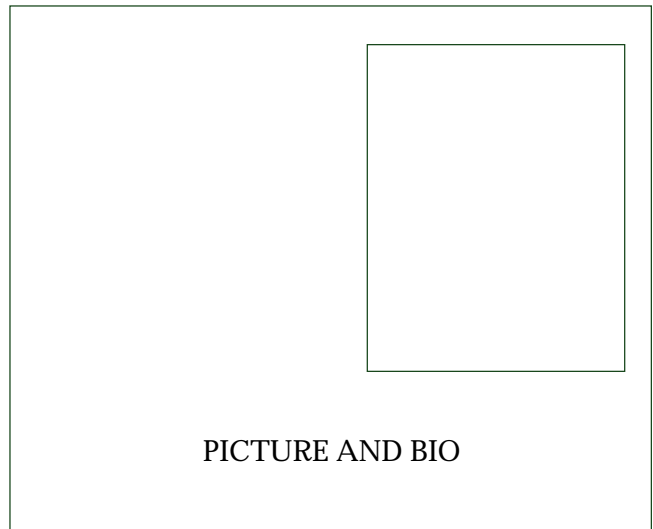
Doctrine of Sovereign Immunity

The doctrine of sovereign immunity is basically that you cannot sue the United States unless a statute specifically allows the claim. *United States v. Testan*, 424 U.S. 392, 399 (1976). The waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quotation omitted). The plaintiff bears the burden of pointing to an unequivocal waiver of sovereign immunity as a basis for the claim. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983). Because federal courts are courts of limited jurisdiction, "the presumption is they are without power to act unless the contrary affirmatively appears." *General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 970 (9th Cir.), cert. denied, 455 U.S. 948 (1981), reh. denied, 456 U.S. 939 (1982).

Assuming that the statute waives federal sovereign immunity, the Congress will also fix the terms of that waiver, including whether a plaintiff is entitled to a jury trial and the type and amount of damages, against the sovereign. *United States v. Testan*, 424 U.S. at 399. The limitations and conditions of suit are strictly construed and "exceptions are not to be implied." *Soriano v. United States*, 352 U.S. 270, 276 (1957). If there are any doubts concerning a waiver of sovereign immunity or jurisdiction of the court, they are resolved in favor of the United States. *Shinaberry v. United States*, 142 F.Supp. 413,414 (W.D. Mich. 1956), aff'd 242 F.2d 758 (6th Cir. 1957), cert. denied, 353 U.S. 976 (1957).

Tort Claims

You can bring a suit based on tort claims against the United States only pursuant to the provisions of the Federal Tort Claims Act (FTCA). 28 U.S.C. 1346(b). There are many limitations to a suit under the FTCA. The FTCA provides that the United States is the sole



party which may be sued for injuries arising out of the negligence of its employees "while acting within the scope of his office or employment." 28 U.S.C. §1346(b). Any actions brought against an individual employee, or the agency, will be dismissed. 28 U.S.C. §§2674, 2679(a); *Allen v. Veterans Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984); Fed.R.Civ.P. 12(b). Additionally, you must file the tort actions in the United States District Court, which has exclusive jurisdiction for tort actions against the United States. 28 U.S.C. 1346(b).

There is no right to a jury trial in a tort action against the United States. 28 U.S.C. 2402. All FTCA cases are decided by the United States District Court. 28 U.S.C. 1346(b). The district court makes all findings of fact and, if necessary, determines the amount of the damage award to plaintiff. Fed.R.Civ.P. 52.

With few exceptions, any recovery of damages is limited to the amount requested in the administrative claim. 28 U.S.C. 2675(b). The FTCA also prohibits the award of punitive damages. 28 U.S.C. 2674. The "No Interest Rule" prohibits pre-judgment interest, 28 U.S.C. 2674, and post-judgment interest except as provided in 31 U.S.C. 1304(b)(1)(A). Section 1961 governs the rate of any allowable post-judgment interest. 28 U.S.C. 1961.

Also, the Court cannot award attorneys fees in FTCA suits against the government. 28 U.S.C.

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*Donna J. Everett Ford is an Assistant United States Attorney for the Central District of California. Any views expressed do not reflect the official position of the Department of Justice or the United States Attorney's Office.

Procedures for Complex Litigation

(Continued from pg. 8)

In August 1997, the Judicial Council established the 28-member Task Force of judges, court administrators,

Seeking to ensure efficient resolution of complex litigation, the Rules encourage early recognition and management.

law professors and experienced attorneys, all with experience in complex litigation. With the assistance of the Administrative Office of the Courts, this Task Force, chaired by Justice Richard Aldrich, drafted the new provisions and recommended actions pertaining to the management of complex litigation in this state. The Task Force also caused a *Deskbook on the Management of Complex Civil Litigation* to be prepared. The *Deskbook*

should be published and distributed to all judges in this state by late April. At about the same time, it is anticipated that the *Deskbook* will also be made generally available to attorneys and other interested persons through Matthew Bender. The Task Force also worked to develop with the Center for Judicial Education and Research (CJER) specialized judicial education curriculum devoted to teaching the management of complex litigation as well as substantive law in areas that frequently arise in complex cases.

Efforts to improve the handling of complex litigation are ongoing. The Judicial Council and its committee will continue to monitor the complex litigation programs in this state with a view to realizing the ultimate goal of making the legal "process more fair and equitable for the litigants who use the courts of California." (The Introduction to the *Deskbook* by Justice Richard Aldrich.)

Suits Against the Federal Government

(Continued from pg. 9)

2412(d)(1)(A). The Congress has even limited what an attorney may charge a client/plaintiff in a contingency agreement to 25% of any judgment or settlement in district court, regardless of when the case is resolved. Prior to filing a complaint in district court, the attorney can only receive 20% of the amount of any administrative settlement. 28 U.S.C. 2678. *Be very careful here, violations of the attorney fees statute include penalties of up to \$2,000 and imprisonment of up to one year.*

Employment Discrimination

The Civil Rights Act of 1991, 42 U.S.C. 2000e, provides for the right to a jury trial and compensatory damages for alleged discriminatory acts occurring after November 21, 1991. *Landgraf v. USI Film Products, et al.*, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). A plaintiff is entitled to a jury trial only if seeking compensatory damages. 42 U.S.C. 1981a(c). And the head of the agency is the only proper defendant. 42 U.S.C. 2000e-16(c).

An important rule in employment discrimination actions against the federal government is that the plaintiff is not entitled to an award of punitive damages. 42 U.S.C. 1981a(b)(1). A plaintiff is entitled to a limited award of compensatory damages, up to \$300,000.00, against the federal government. 42 U.S.C. 1981a(b)(3)(D). Additionally, expert fees can be recovered as costs. 42 U.S.C. 2000e-16(d), 2000e-5(k).

Actions against the federal government based on the Age Discrimination in Employment Act (ADEA) have different rules because the 1991 Civil Rights Act is not applicable to those claims. 29 U.S.C. 633a(a). A

plaintiff is not entitled to a jury trial or compensatory damages under the ADEA. *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981); *Naton v. Bank of Calif.*, 649 F.2d 691, 698-99 (9th Cir. 1981). *And you should note that you cannot recover attorney fees for work you do during the EEO administrative process.* 29 C.F.R. 1614.501(e).

Contract Claims

All contract claims must be brought pursuant to the provisions of the Tucker Act. 28 U.S.C. 1346(a)(2). You have no right to a jury trial for contract actions brought against the United States. 28 U.S.C. 2402. And once again, the United States is the only proper defendant in actions based on contract claims. 28 U.S.C. 1346(a).

Moreover, you can't file an action based on a contract claim in United States District Court, except for what amounts to small claims. The Tucker Act provides that all claims based on a contractual relationship with the United States in excess of \$10,000 must be brought in the United States Court of Federal Claims in Washington, D.C. 28 U.S.C. 1346(a). A district court, however, has exclusive jurisdiction for any contract "claim against the United States, not exceeding \$10,000 in amount..." 28 U.S.C. 1346 (a)(2).

This is not an exhaustive list of what is allowed in suits against the United States, but it is a good start on the basic limitations of suits brought under the FTCA, Title VII and the Tucker Act.

Calendar of Events / Litigation Section

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