

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	30 min
June 27, 2016	Interviewing the Deliberating Juror – the Role of the Attorneys	Matt Gaidos	General

This issue in this week's P&A is based on a scenario recently encountered in one of our courtrooms:

As part of its inquiry whether a deliberating juror is able to perform his or her duties, is it proper for the trial court to invite the attorneys to question the foreperson, other jurors, or the accused juror?

What should a prosecutor do in this situation?

A. Juror's Obligation to Perform His or Her Duties

1. Penal Code section 1089 and Code of Civil Procedure sections 233 and 234 provide for the removal of a juror who, upon a showing of good cause, *is found to be unable to perform his or her duty*.

2. The most common types of situations establishing that a juror is unable to perform his or her duties fall into one of four categories: jurors who intentionally are refusing to deliberate; jurors who are mentally and/or physically unable to deliberate; jurors who refuse to follow the law; and jurors who exhibit bias.¹

3. Reviewing courts frequently use the phrase "juror misconduct" in referring to the categories above (except for some kinds of mental or physical impairments that present at trial.) For ease of discussion, this P&A will use the term "misconduct." Moreover, generally speaking, juror misconduct refers to any conduct by a juror that calls into question the fairness of the jury's verdict. However, this P&A is focused on the categories in #2 above.

¹ Jeff Rubin, The Inquisitive Prosecutor's Guide (IPG) #8, *The Rogue Juror*, p. 10. Jeff's invaluable IPG provides much guidance for the information provided in this P&A.

B. The Trial Court's Decision Whether to Conduct an Inquiry

1. The California Supreme Court has said “not every incident involving a juror’s conduct requires or warrants further investigation. ‘The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.]’ ” (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.)

2. Often, when a trial court has questions as to whether all jurors are participating in deliberations, it is appropriate to reinstruct the jurors regarding their duty to deliberate “and to permit the jury to continue deliberations before making further inquiries that could intrude upon the sanctity of deliberations.” (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 480.)

3. However when reinstruction does not resolve the problem and the court is on notice that there may be grounds to discharge a juror during deliberations, the trial court must conduct whatever inquiry is reasonably necessary to determine whether such grounds exist. (*Ibid.*)

C. The Scope of the Trial Court's Inquiry

1. The decision how to investigate rests within the sound discretion of the court. (*People v. Engleman* (2002) 28 Cal.4th 436, 442)

2. When the inquiry involves questioning jurors, “[c]ourts must exercise care when intruding into the deliberative process to ensure that the secrecy, as well as the sanctity, of the deliberative process is maintained.” (*People v. Russell* (2010) 50 Cal.4th 1228, 1251.) This is particularly true when the juror who potentially may be excused is a lone holdout juror. (*People v. Harrison* (2013) 213 Cal.App.4th 1373, 1382.)

3. “The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations.” *People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) “The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations.” (*Id.* at p. 461.)

4. While questions that call for answers reflecting a juror’s mental processes are not *necessarily* barred when investigating allegations that a juror is unable to deliberate (as they are under Evidence Code section 1150 in a post-verdict challenge to the validity of the verdict), the trial court’s inquiry should be as limited in scope as possible to avoid intruding unnecessarily on the sanctity of the verdict. *People v. Allen* (2011) 53 Cal.4th 60, 72, fn. 10.)

5. If jurors begin disclosing information that unnecessarily reveals the content of the deliberations, the trial judge should remind jurors not to divulge the substance of their deliberations. The court should admonish jurors to avoid inappropriate topics and should intervene if jurors' answers threaten to go too far afield. (See *People v. Lomax* (2010) 49 Cal.4th 530, 592.)

D. The "How To" of the Trial Court's Inquiry

1. When a judge receives a note from the jury that one of the jurors is refusing to deliberate or engaging in other misconduct or does not appear able to deliberate because of an emotional or physical condition, it is common for the judge to begin the inquiry by questioning the jury foreperson. (See e.g. *People v. Russell, supra*, 50 Cal.4th 1228, 1248.) Such questioning may take place outside the presence of other jurors. (*Id.* at p. 1253.)

2. It is advisable for trial courts, before questioning the foreperson or any other juror, to advise the juror that the court is not seeking to intrude upon deliberations and that the court is not interested in the individual juror's votes on guilt or innocence. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1248, 1251.)

3. It is within the discretion of the court to question other jurors in deciding whether there is good cause to find that a juror is unable to perform his or her duties. (See, e.g. *People v. Allen* (2011) 53 Cal.4th 60, 70.) If the court does so, although not every juror need be interviewed, it is improper to limit inquiry only to those jurors claiming misconduct has occurred and not those jurors who are claiming that no misconduct has occurred. (See *People v. Barber* (2002) 102 Cal.App.4th 145, 151-152.)

4. Trial courts are not prevented from interviewing the juror who has been accused of the misconduct at issue. This is often done outside the presence of other jurors. Some circumstances may require an interview of the accused juror. For example, in *People v. Burgener* (1986) 41 Cal.3d 505, the foreperson's statements raised the possibility that the juror was intoxicated during deliberations. The Supreme Court concluded the trial court abused its discretion by questioning only the jury foreman and by not questioning the juror at issue. The Supreme Court said that while it had no reason to doubt the sincerity of the foreperson, it could not conclude on the particular record before it that the foreperson was not mistaken or that the foreperson had not been prompted to act by other jurors motivated by annoyance at this juror rather than concern for the integrity of the deliberative process. (*Id.* at pp. 520-521.)

5. Finally, "the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.)

E. Whether Attorneys Should be Permitted to Question the Jurors

1. The complexity of interviewing deliberating jurors, with its perilous risk of reversal, is a necessary backdrop to the question of whether attorneys should be invited or permitted to ask question of the jury foreperson, other jurors, or the juror accused of misconduct.

2. As stated by the Supreme Court in *People v. Fuiava* (2012) 53 Cal.4th 622, 710, “[a] trial court made aware of the possibility of a juror’s misconduct, and particularly possible misconduct occurring during the jury’s deliberations, is placed on a course that is fraught with the risk of reversible error at each fork in the road.”

3. The Supreme Court in *People v. Cleveland, supra*, 25 Cal.4th at p. 485, stated that “permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted.”

4. Instead, the *Cleveland* court stated: “Of course, the court may allow counsel to suggest areas of inquiry or specific questions *to be posed by the court.*” (*Ibid.*, emphasis added.)

5. In *People v. Barber, supra*, 102 Cal.App.4th 145, the Court of Appeal, relying on *Cleveland*, stated: “Because of the delicate balance between the court’s right to know about misconduct and the privacy of the deliberations, only the court should conduct the inquiry.” (*Id.* at p. 150.)

6. In *Barber*, the Court of Appeal concluded the trial court erred by allowing defense counsel and the prosecutor to question the deliberating jurors. (*Id.* at p. 150.) Moreover, the Court of Appeal concluded the error was compounded by the manner in which the court conducted the hearing. It allowed the prosecutor to question the five jurors who complained about the accused juror, thus allowing the prosecutor to learn that the accused juror was the holdout juror. “The prosecutor knew that her examination could lead to his dismissal. What should have been the court’s sensitive inquiry into alleged juror misconduct was instead an adversarial proceeding with the juror on trial.” (*Id.* at pp. 150-151.)

7. Examples of case in which the prosecutor or defense counsel have been allowed counsel to suggest questions for the *trial court* to ask include *People v. Foster* (2010) 50 Cal.4th 1301, 1340-1341; *People v. Cowan* (2010) 50 Cal.4th 402, 504; *People v. Watson* (2008) 43 Cal.4th 652, 694.),

Takeaway: When the trial court is conducting an inquiry to determine whether a juror may be unable to perform his or her duties, prosecutors and defense attorneys should not question any juror directly. Attorneys should submit their questions to the court.

Following is the checklist that Jeff Rubin prepared as an attachment to his IPG on the *Rogue Juror*:*

QUICK CHECKLIST WHEN CONFRONTED WITH A CLAIM A JUROR IS NOT DELIBERATING OR FOLLOWING THE LAW, IS BIASED, OR IS ENGAGED IN OTHER MISCONDUCT

1. Determine the end goal: is it best if the juror is removed or retained? But keep in mind that what is best is not always whether the juror is in favor of conviction and that the initial goal may change depending on the discovery of new information.
2. Assuming the conduct turns out to be true, determine whether it is a lawful basis for removal of the juror under Penal Code section 1089, which permits discharge of a juror if the juror “becomes ill, or upon other good cause shown to the court is found to be unable to perform *his or her duty*[.]” (See IPG#8, sections F-I at pp. 11-58.)
3. Figure out what duty (e.g., the duty to deliberate, follow the court’s instructions, base the decision only on the evidence presented, be impartial, etc.,) the juror is allegedly unable to perform. (See IPG#8, section C at pp. 7-10.)
4. If conduct is such that, if true, it would provide a lawful basis for removal of the juror, cite the law requiring a court to conduct an inquiry (See IPG #8, section K at p. 61).
5. Generally, ask the court to interview the foreperson outside the presence of the other jurors to help identify exactly what the target juror is doing. If the court is not going to interview the foreperson, ask the court to inquire of defense counsel whether defense counsel wants further inquiry. (See IPG #8, section K-3 at p. 70.)
6. Request the court admonish the foreperson that the court is not seeking to intrude into the deliberative process, that it is not interested in the numerical breakdown or who is voting for guilt or innocence, and that the questions will focus on the alleged misconduct. (See IPG #8, section K-8 at p. 75.)
7. Submit questions you would like the trial court to ask, if any, of the foreperson. If questioning reveals no basis for removal, it is *usually* best to end the inquiry without further intrusion and keep the target juror on the jury.
8. If questioning of the foreperson reveals misconduct, ask the court to interview the target juror outside the presence of the other jurors. The same admonition given to the foreperson (as stated in #6) should be given to the target juror. (See IPG #8, 91, section K-5, at p. 71.) Submit questions you would like the trial court to ask, if any, of the target juror.
9. If there is no dispute regarding the conduct and it does *not* constitute good cause for removing the juror, ask the juror be left on the jury.

10. If there is no dispute regarding the conduct and it *does* constitute good cause for removing the juror, determine whether leaving the juror on the jury is likely to (i) prevent a verdict or (ii) provide the defendant a basis for appeal. If the answer is yes to either question, request removal of the juror and replacement with an alternate. If the answer is no to both questions, then consider asking the court to leave the juror on the jury with instructions to the target jurors or other jurors regarding their duties and the proper manner in which to deliberate. (See IPG#8, sections F-I at pp. 11-58.)

11. If there *is* a dispute regarding what has occurred, ask the judge to interview the other jurors. Request that the court give the same admonition given to the foreperson (as stated in #6) to the each juror before the juror is interviewed. Submit questions you would like the trial court to ask, if any, of the target juror. Request that the court resolve the dispute. If the court finds there is good cause for removing the juror, follow the suggestions provided in #10. If the court find there is *not* good cause for removing the juror, ask for defense counsel to be queried on whether the juror should be retained. Ask the court for any helpful non-coercive follow-up instructions and request the court inform the jury that any follow-up instructions are not directed at any one juror. (See IPG#8, sections K-6 at p. 71 and K-10 at pp. 76-78.)

12. Regardless of whether the court decides to retain or remove the juror, ask the court to state the reasons for its decision. (See IPG #8, section K-16 at p. 81.)

13. If a juror is removed and replaced with an alternate juror, the jury should be instructed that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had. (See IPG#8, section K-18 at p. 81.)

* For those in the Alameda County DA's Office, the *Rogue Juror* IPG is available in our P&A index, or contact Mary Pat for a link. For those in other counties, the IPG is available on the CDAA website or contact Jeff at JRubin@da.sccgov.org

Next Week: No P&A; Happy Fourth of July

July 11 P&A: *In Birchfield v. North Dakota*, the United States Supreme Court hands down new rules for obtaining DUI blood alcohol tests

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist. Atty computer banks.