WHAT HAPPENS IN THE JURY ROOM STAYS IN THE JURY ROOM . . .

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Our justice system is based on the idea that parties should have their cases decided by a fair and impartial judge or jury. During *voir dire*, a judge (sometimes the parties as well) asks potential jurors questions in order to screen them for bias before picking a jury. Even after a jury trial, a judge may order a new trial if a party proves a juror lied during *voir dire* and hid something that would have kept him or her off the jury. But a party cannot use evidence from a juror about jury deliberations to question a verdict, because a jury should not be called upon to invalidate its own verdict and we want members of a jury to be able to speak openly and honestly in pursuit of justice without fear of having to testify against one another. This invites the question: can a party use juror testimony about deliberations to prove a juror lied during *voir dire* in a motion for a new trial? The answer is usually not. The U.S. Supreme Court recently addressed this in *Warger v. Shauers*, 135 S.Ct. 521, 525 (Dec. 9, 2014).

Gregory Warger was riding his motorcycle when a truck driven by Randy Shauers hit him from behind. Warger's leg was amputated as a result of the accident, and Warger sued Shauers. During *voir dire*, Warger's attorney asked prospective jurors if they would be unable to award damages for pain and suffering or future medical expenses, or could not be fair and impartial. Regina Whipple answered no to each of these questions. After the trial, the jury returned a verdict

for Shauers. But one of the jurors contacted Warger's attorney to complain about Whipple's conduct in the jury room. Whipple had been the foreperson. According to the complaining juror's affidavit, during deliberations, Whipple said her daughter had been at fault in a traffic accident in which a man died, and if her daughter had been sued, it would have ruined her daughter's life. Relying on this affidavit, Warger moved for a new trial.

The district court refused to grant a new trial on the ground that the only evidence supporting it was inadmissible under Federal Rule of Evidence 606(b), which provides: "[d]uring an inquiry into the validity of a verdict . . . a juror may not testify about any statement made or incident that occurred during the jury's deliberations. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters." Fed. R. Evid. 606(b)(1). Rule 606(b) contains three exceptions, "[a] juror may testify about whether (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." Fed. R. Evid. 606(b)(2). But the district court found none of them applicable.

The Eighth Circuit affirmed. The court acknowledged a split of authority among the federal courts of appeal on whether Rule 606(b) applies to a proceeding to show a juror lied during *voir dire*. But the Eighth Circuit joined the courts that have held that Rule 606(b) applies to any proceeding in which a jury's verdict might be invalidated.

The U.S. Supreme Court affirmed.

Juror evidence about deliberations generally is inadmissible in a new trial motion even to prove a juror lied during *voir dire*

The Supreme Court held that Rule 606(b) "applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during *voir dire*." 135 S.Ct. at 525. Writing for a unanimous Court, Justice Sonia Sotomayor explained that its holding simply accords Rule 606(b)'s

terms with their plain meaning. Rule 606(b) applies to any "inquiry into the validity of a verdict." Fed. R. Evid. 606(b)(1). "Whether or not a juror's alleged misconduct during *voir dire* had a direct effect on the jury's verdict, the motion for a new trial requires a court to determine whether the verdict can stand." 135 S.Ct. at 528. The Court further explained that Congress rejected a version of Rule 606(b) that would have permitted juror evidence about deliberations to show dishonesty during *voir dire*. Congress's enactment of Rule 606(b) as is "was premised on the concerns that the use of deliberations evidence to challenge verdicts would represent a threat to both jurors and finality in those circumstances not covered by Rule 606(b)'s express exceptions." *Id.*

A juror's statement about a past experience made during deliberations is not "extraneous prejudicial information . . . improperly brought to the jury's attention"

The Supreme Court held that a juror's statement about a past experience is not extraneous information. The Court explained that information is "extraneous" if it is from a source "external" to the jury. *Id.* at 529. "'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room." *Id.*

The Court also explained that the determination of whether information is external and extraneous or internal is made irrespective of whether a juror should have been struck for bias. To hold otherwise would allow the exception for "extraneous prejudicial information" to swallow the rule regarding inadmissibility of juror evidence on deliberations.

Exclusion of juror evidence about deliberations from a new trial motion normally does not affect a party's constitutional right to an impartial jury

The Supreme Court found a party's right to an impartial jury is sufficiently protected by *voir dire*, observations by court and counsel during trial, and use of nonjuror evidence of misconduct. The Court explained even if a juror lies in *voir dire* to conceal his or her bias, juror impartiality is usually adequately assured by the parties' ability to use any evidence of bias before the verdict is rendered and nonjuror evidence after the verdict is rendered. However, the Court suggested there may be times when a juror's bias is so extreme that a new trial may be necessary irrespective of Rule 606(b):

> There may be cases of *juror bias so extreme that, almost by definition, the jury trial right has been abridged*. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process.
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> *Id.* at 529 n.3 (italics added).

Tips for jury trial losers

As *Warger v. Shauers* demonstrates, what happens in the jury room usually stays in the jury room. In fact, juror evidence about deliberations generally cannot be the basis for a new trial even if it proves a juror lied during *voir dire*. So to increase the chance of a new trial based on juror bias or misconduct, a losing party should show bias or misconduct outside the jury room because Rule 606(b) only applies to deliberations.

Alternatively, if bias or misconduct takes place during deliberations, the losing party should use nonjuror evidence to prove it. The relevant text of Rule 606(b) only prohibits juror testimony, affidavits, and other evidence of juror statements about deliberations. In other words, all other evidence may be admissible, including exhibits as well as testimony from nonjuror witnesses.[1]

Or if bias or misconduct during deliberations can only be proven with juror evidence, the losing party should frame the evidence in terms of an exception to Rule 606(b)(1), so that it is admissible. These exceptions

include when an outside influence is improperly brought to bear on any juror; a mistake is made in entering a verdict on the verdict form; and extraneous prejudicial information is improperly brought to a jury's attention. But extraneous information must be something more than a juror's statement about a past experience.

Finally, if bias or misconduct during deliberations can only be proven with juror evidence that does not fall within an exception, the losing party should argue the bias or misconduct is so extreme the party's constitutional right to a jury trial has been abridged, and thus a new trial is required.

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Note

1. Despite its note that "[a]s enacted Rule 606(b) prohibited the use of *any* evidence of juror deliberations, subject only to the express exceptions for extraneous information and outside influences," the Supreme Court still found parties could use "nonjuror evidence." 135 S.Ct. at 527, 529 (italics in original).