

JUROR MISCONDUCT: RECOGNIZING IT AND RAISING IT ON APPEAL

By: Lori Quick

Jurors are human beings, with biases, prejudices, and preconceived notions. Unfortunately, those biases, prejudices and preconceived notions are typically not favorable to our clients. Knowing this, defense counsel must always be vigilant in detecting and bringing them to light. This article discusses some common manifestations of juror misconduct and how appellate counsel can recognize the issue and raise it in the Court of Appeal.

I. Introduction

The federal and state constitutions guarantee to a defendant accused of a crime the right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, section 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) An impartial juror is someone capable and willing to decide the case solely on the evidence presented at trial. (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) A sitting juror's actual bias, which would have supported a challenge for cause, renders him unable to perform his duty and thus subject to discharge and substitution. (*People v. Keenan* (1988) 46 Cal.3d 478, 532; *People v. Lomax* (2010) 49 Cal.4th 530, 589.) "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced. [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

II. What is Bias in the Context of Juror Misconduct?

When we talk about juror misconduct, it really comes down to one question: was the juror for some reason unable to impartially consider the facts? Was he or she able to set aside his preconceived notions about criminal defendants, crime, police, and the criminal justice system, and truly be an objective juror? In the context of juror misconduct, courts have defined two distinct types of bias: actual bias and implied bias.

A. What is Actual Bias?

Actual bias is defined as the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party. (Civ. Proc.

Code, sec. 225, subd. (b)(1)(C); see *People v. Hillhouse* (2002) 27 Cal.4th 469, 488; *People v. Foster* (2010) 50 Cal.4th 1301, 1325; *People v. Nesler* (1997) 16 Cal.4th 561, 581.)

Some examples of actual bias are when a juror states that he or she would find it hard to keep an open mind because of the nature of the charges against the defendant (*People v. Compton* (1971) 6 Cal.3d 55, 59 [Pen. Code, sec. 288 case]; *People v. Van Houten* (1980) 113 Cal.App.3d 280 [juror made physically and emotionally ill by graphic testimony regarding multiple murders]); when a juror feels he or she cannot believe the testimony of a particular kind of witness (*People v. Barnwell* (2007) 41 Cal.4th 1038 [juror refused to believe testimony of any police officer]); when a prospective juror states a belief in jury nullification and states that if selected he or she would not follow the law (*People v. Merced* (2001) 94 Cal.App.4th 1024 [prospective juror told court it was “reasonable to assume” he would not follow the law]; where a juror has a view on capital punishment that would prevent or impair his or her ability to return a verdict of death in the case before the juror (*People v. Cash* (2002) 28 Cal.4th 703, 719-720; *People v. Hamilton* (2009) 45 Cal.4th 863, 885); or where a juror would automatically vote for death in any murder case, or is biased in favor of the death penalty (see *Ross v. Oklahoma* (1988) 487 U.S. 81, 85 [101 L.Ed.2d 80, 87-88, 108 S.Ct. 2273]; *People v. Coleman* (1988) 46 Cal.3d 749, 763-765.) If the death penalty is imposed by a jury containing even one juror who would vote automatically for the death penalty without considering the mitigating evidence, “the State is disentitled to execute the sentence.” (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 2230, 119 L.Ed.2d 492].)

B. What is Implied Bias?

“Implied bias exists on facts as ascertained, and in judgment of law disqualifies the juror.” (Civ. Proc. Code, sec. 225, subd. (b)(1)(B).) Civil Procedure Code section 229 sets forth eight exclusive grounds on which a challenge for implied bias may be taken. They are:

- (a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

- (b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation

which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded on knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

As the statute expressly states, a juror may be excused for implied bias only for one of the reasons listed in the statute, and no other. (*People v. Ledesma* (2006) 39 Cal.4th 641, 670.) However, federal courts have held that bias can be implied or presumed from the “potential for substantial emotional involvement, adversely affecting impartiality” inherent in certain relationships. (*United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71; *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 527.) California courts also appear to be willing to

expand the kinds of situations that can be classified as “implied bias” under Civil Procedure Code section 229. For example, in *People v. Terry* (1994) 30 Cal.App.4th 97, the Fourth District ruled that a deputy district attorney called as a prospective juror in a case being prosecuted by his office could be challenged for implied bias, concluding “. . . the thrust and purpose of section 229, if not perhaps its specific wording, requires that an attorney who is a member of the firm of counsel trying a case should not be permitted, over objection, to serve on the jury.” (*Terry, supra*, 30 Cal.App.4th at p. 103.) A broad range of emotions can be characterized as implied bias under subdivision (f) which states that a prospective juror may be excused for implied bias if he or she has a state of mind “evinced enmity against, or bias towards, either party.”

III. Some Common Forms of Juror Misconduct

Jurors commit misconduct in a variety of ways. Virtually all of them indicate that the juror was biased, has become biased, or was instrumental in creating bias among other jurors. Some of the more commonly seen types of juror misconduct are presented below.

A. Concealment of Material Information During Voir Dire

“Voir dire examination is designed to protect a criminal defendant's right to a fair trial by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.’ [Citation.] A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct.” (*Hitchings, supra*, 6 Cal.4th at pp. 110–111, fn. omitted.) A prospective juror’s false answers on voir dire can prevent the parties from intelligently exercising their statutory right to challenge a prospective juror peremptorily or for cause and is “. . . not a mere matter of procedure, but the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction.” (*People v. Diaz* (1984) 152 Cal.App.3d 926, 933.)

Probably one of the most famous juror misconduct cases in California involving the concealment of information during voir dire is *People v. Nesler, supra*, 16 Cal.4th 561, which was handled by SDAP staff attorney Paul Couenhoven. There, the defendant was convicted of voluntary manslaughter with the use of a firearm after she fatally shot the defendant who was being prosecuted for sexually assaulting Nesler’s seven-year-old son.

During deliberations, one of the seated jurors told the rest of the jury that Nesler was not a good mother. The juror claimed to know this because she knew Nesler's babysitter who gave her unflattering information about Nesler's parenting skills, specifically that she would leave her children for days at a time. (*Id.*, at p. 571, 573-574.) She often told the other jurors that "if [they] knew what she knew" they would feel differently. (*Id.*, at p. 571) She also told them that after the trial they would find out that Nesler was "not the angel everyone is painting her to be." (*Ibid.*) The juror also referred to Nesler as a "crankster" and said that she fraternized with drug users and dealers. (*Id.*, at pp. 571, 573-574.) Although the Court of Appeal found no substantial likelihood that Nesler suffered actual harm from juror misconduct, the Supreme Court felt otherwise and reversed the Court of Appeal's judgment, reasoning that the juror's "interjection of extraneous evidence into the deliberations suggests that . . . she was unable to put aside both the information she had acquired outside of court and her impressions and opinions derived from that information, thus indicating a substantial likelihood of actual bias on her part." (*Id.*, at p. 587.)

In *In re Hitchings*, *supra*, 6 Cal.4th 97, the defendant was being tried for a double homicide. One of the jurors worked at a bank with the wife of one of the arresting officers. She failed to reveal during voir dire that in the course of her employment at the bank, she had at the very least overheard conversations about the case prior to trial. She did not reveal that the crime had been a regular topic of conversation at the bank, and that all of the bank employees, including herself, felt that the defendant was guilty. The Supreme Court determined that this was misconduct and stated that the juror's ". . . concealment of her knowledge of the case was unquestionably a material issue on voir dire. Indeed, the record shows the prospective jurors' prior knowledge of the case was of critical importance to defense counsel. We thus conclude the information concealed by [the juror] was sufficiently material and presents no obstacle to finding misconduct . . ." (*Hitchings*, *supra*, 6 Cal.4th at p. 116.)

In other cases, prejudicial juror misconduct has been found for a juror's failure to reveal that she had been assaulted at knifepoint during an attempted rape despite having been specifically asked about prior experiences as a victim (*People v. Diaz*, *supra*, 152 Cal.App.3d at p. 931); failure of the juror in a murder prosecution to reveal that her brother had been murdered (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970); and the failure to reveal status as a convicted felon. (*Green v. White* (9th Cir. 2000) 232 F.3d 671.)

B. Third Party Contact with Jurors

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is deemed presumptively prejudicial. The presumption is not conclusive, but the burden rests heavily

upon the government to establish that such contact with the juror was harmless to the defendant. (*Remmer v. United States* (1954) 347 U.S. 227, 229 [98 L.Ed.654, 74 S.Ct. 450]; *Foster, supra*, 50 Cal.4th at p. 1342; *People v. Lewis* (2009) 46 Cal.4th 1255, 1309.) It is misconduct for the jurors to communicate with anyone associated with the case. (See Pen. Code, sec. 1122; *People v. Jones* (1998) 17 Cal.4th 279, 310; see also *People v. Stewart* (2004) 33 Cal.4th 425, 510.)

Not every conversation with a third party is prejudicial. In *In re Carpenter* (1995) 9 Cal.4th 634, the Court summarized: “. . . when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test.” (*Carpenter, supra*, 9 Cal.4th at p. 653.) The “entire record” includes “the nature of the juror’s conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant . . . the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict.” (*Id.*, at p. 654; see *Hassan v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417, finding the presumption of prejudice had been rebutted, in part because “[t]here was overwhelming proof” in support of the verdict.)

Conversations about unrelated topics may very well be deemed nonprejudicial. In *People v. Loker* (2008) 44 Cal.4th 691, for example, one of the jurors had a conversation with the deceased victim’s father about the fact that they had both served in the United States Marine Corps. The Supreme Court found that while this was misconduct, it was not prejudicial. In so finding, the Court stated that “[s]uch a conversation is not, judged objectively, ‘inherently and substantially likely to have influenced the juror.’ [Citation.]” (*Loker, supra*, 44 Cal.4th 691, 754.) Other courts have found that brief conversations about topics unrelated to the case do not objectively demonstrate a substantial likelihood, or even a reasonable possibility, of actual bias. (*People v. Danks* (2004) 32 Cal.4th 269, 303; see *Stewart, supra*, at pp. 509–510 [juror's compliment to defendant's former girlfriend did not concern the merits of the case and was misconduct of a trifling nature]; *People v. Phelan* (1899) 123 Cal. 551, 567 [juror's conversation with a victim's brother on a subject unrelated to the case was not misconduct].)

C. Obtaining Information from Outside Sources

A jury's verdict must be based upon the evidence developed at the trial. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473.) Juror misconduct involving the receipt of extraneous information about a party or the case that was not part of the evidence received at trial creates a presumption that the defendant was prejudiced by the evidence and may establish juror bias. (*Nesler, supra*, 16 Cal.4th at p. 578.) The reason for this is because “[d]ue process means a jury capable and willing to decide the case solely on the evidence before it.” (*Smith v. Phillips, supra*, 455 U.S. at p. 217.) When a jury receives evidence from an outside source, the verdict is set aside if there is a “substantial likelihood” of juror bias. (*Nesler, supra*, at p. 578.) Bias is established if (1) the extraneous material, judged objectively, “is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror” [citation] or (2) from the nature of the misconduct and surrounding circumstances, it is substantially likely a juror ‘was ‘actually biased’‘ against the defendant. [Citation.] Because it is impossible to shield jurors from every contact that may influence their vote, courts tolerate some imperfection short of actual bias.” (*In re Hamilton* (1999) 20 Cal.4th 273, 296; see also *People v. Ramos* (2004) 34 Cal.4th 494, 519.)

Some examples of misconduct due to obtaining information from outside sources, not all of which resulted in reversal, are: juror contacting the testifying police officer with whom he was acquainted and consulting him about the lack of fingerprints and the absence of certain photographs which the officer viewed on the stand but which were not published to the jury (*People v. Pierce* (1979) 24 Cal.3d 199, 205-207); juror contacting attorney friend during deliberations to ask him questions of law pertaining to the trial (*People v. Honeycutt* (1977) 20 Cal.3d 150, 156-158); actual jurors reading newspaper accounts of the trial (*Ramos, supra*, 34 Cal.4th 494) or about reversals and parole (*People v. Mendoza* (2000) 24 Cal.4th 130); retired police officer juror introducing erroneous understanding of the law on crucial issue (*People v. Stankewitz* (1985) 40 Cal.3d 391, 395-396); consulting dictionaries for legal terms of art (*People v. Brasure* (2008) 42 Cal.4th 1037); Spanish speaking juror translating a portion of testimony previously translated by court interpreter (*People v. Cabrera* (1991) 230 Cal.App.3d 300); consulting the Bible for guidance on the death penalty (*Danks, supra*, 32 Cal.4th 269); a juror repeatedly referring to information obtained off the record when disagreeing with other jurors during deliberations. (*Nesler, supra*, 16 Cal.4th 561.) It is not clear whether it is misconduct for a jury to discuss a defendant’s off-the-stand demeanor during jury deliberations. The California Supreme Court expressly left open that question in *People v. Smith* (2007) 40 Cal.4th 483, 524-525 [declining to decide whether it may be misconduct for a jury to discuss a defendant’s off-the-stand demeanor during sanity phase deliberations.]

D. Actually Biased Jurors

What constitutes actual bias of a juror, as defined above, varies according to the

circumstances of the case. (*In re Carpenter* (1995) 9 Cal.4th 634, 653-654; *Nesler, supra*, 16 Cal.4th at p. 580.) “Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.” (*United States v. Wood* (1936) 299 U.S. 123, 145-146 [57 S.Ct. 177, 185, 81 L.Ed.78; *Nesler, ibid.*) Jurors are not required to be totally ignorant of the facts and issues involved, but must be able to lay aside his or her impressions or opinions and render a verdict based on the evidence presented in court. (*Irvin v. Dowd, supra*, 366 U.S. at pp. 722-723.)

Jurors have found to be actually biased in many different factual scenarios as demonstrated above. Expressions of opinion about the verdict before having heard the evidence is another example of actual bias. For example, in *People v. Brown* (1976) 61 Cal.App.3d 476, the conviction was reversed when the Court found actual bias where a juror told another juror before the close of evidence that “[the defendant] is guilty. There is no doubt about it.” The Court stated that it was clear that the juror had “in fact prejudged the case by expressing a clear opinion of guilt before he had heard all the evidence, and that such a statement was in violation of the court’s instructions and constituted serious misconduct. [Citations.]” (*Brown, supra*, 61 Cal.App.3d at p. 480.)

E. Refusal to Deliberate

“A refusal to deliberate consists of a juror’s unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.” (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) In *People v. Leonard* (2007) 40 Cal.4th 1370, a juror committed all three of the acts given in *Cleveland* as examples of refusal to deliberate. In *Leonard*, the juror stated at the outset of deliberations that the defendant was guilty and there was nothing to talk about. Thereafter, the juror sat in a corner reading a book. Unfortunately, the Court concluded that the misconduct was harmless, stating: “[t]his misconduct resulted in the jury operating not as a single unit, but as two separate units: a group of 11 jurors who, after discussing the case among themselves, unanimously concluded that defendant was guilty, and a ‘group’ consisting of a single juror . . . who separately reached the same conclusion.” (*Leonard, supra*, 40 Cal.4th at p. 1411.)

IV. Raising the Issue of Juror Misconduct on Appeal

As with most other appellate issues, whether and how the issue of juror misconduct

can be raised on direct appeal depends on what happened in the trial court. Juror misconduct leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. (*Nesler, supra*, 16 Cal.4th at p. 578; *People v. Marshall* (1990) 50 Cal.3d 907, 949-951; *Carpenter, supra*, 9 Cal.4th at pp. 650-655.) The presumption may be rebutted by proof that no prejudice actually resulted.” (*People v. Cooper* (1991) 53 Cal.3d 771, 835; *Hitchings, supra*, 6 Cal.4th at p. 118.) Whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court’s independent determination. (*Carpenter, supra*, at pp. 658-659; *Nesler, supra*, at p. 582.)

Whether an individual verdict must be overturned for jury misconduct depends upon the type of misconduct. For example, as explained above, in cases involving a juror’s receipt of or exposure to extraneous information, any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the 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 Hamilton, supra*, 20 Cal.4th at p. 296; *People v. Harris* (2008) 43 Cal.4th 1269, 1303.) The strength of the evidence against the defendant is a factor to be considered. (*Carpenter, supra*, 9 Cal.4th at p. 654.)

A. Actions by Trial Counsel

1. Challenge for Cause

If during voir dire a prospective juror’s statements demonstrated actual bias, or if implied bias may be shown, hopefully trial counsel will have challenged that juror for cause. “On review, if the juror’s statements are equivocal or conflicting, the trial court’s determination of the juror’s state of mind is binding. If there is no inconsistency, the appellate court will uphold the trial court’s ruling if it is supported by substantial evidence. [Citations.] A juror’s bias need not be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146-1147; *People v. Ayala* (2000) 24 Cal.4th 243, 272.)

Appellate counsel should carefully scrutinize the reporter’s transcript of jury voir dire transcript where the trial court denied a defense challenge for cause. Courts may properly rely on the juror’s statement of his or her ability to deliberate impartially to determine whether a juror can in fact maintain his or her impartiality after an incident raising a suspicion of prejudice. (*Harris, supra*, 43 Cal.4th at p. 1304.) If possible, try to characterize the juror’s statements as unequivocal. For example, where a juror states some reservation

about the defendant or the case, but states also that she hopes she can be impartial or will try to be impartial, appellate counsel should argue that this is not the same as actual impartiality. It exhibits a bias which deprives the defendant of trial by a fair and impartial jury regardless of whether the juror's bias is accompanied by an effort at fairness.

“To preserve a claim of error in the denial of a challenge for cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted.” (*People v. Millwee* (1998) 18 Cal.4th 96, 146; *Hillhouse, supra*, 27 Cal.4th at p. 487.) Whatever the scope of the trial court's power or duty to excuse biased jurors sua sponte may be, the failure to do so does not excuse the failure to preserve the issue for review. (*People v. Bolin* (1998) 18 Cal.4th 297, 316-317.) Thus, before arguing that a challenge for cause was improperly denied, be sure that trial counsel preserved the issue for appeal by exhausting all peremptory challenges. Appellate counsel must also be sure that trial counsel not only exhausted all peremptory challenges, but objected to the jury as finally constituted. The failure to take both actions operates to forfeit the claim on appeal. (*People v. Wilson* (2008) 43 Cal.4th 1, 14.)

2. Motion for New Trial

After a verdict is rendered against a defendant, a new trial may be granted if the jury has “been guilty of any misconduct by which a fair and due consideration of the case has been prevented.” (Pen. Code, sec. 1181, subd. (3).) “Where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance . . . which suggests a likelihood that one or more members of the jury were influenced by improper bias.” (*In re Hamilton, supra*, 20 Cal.4th at p. 294.) As stated above, jury misconduct raises a rebuttable presumption of prejudice. (*Id.*, at p. 295.)

The trial court is vested with broad discretion to act upon a motion for new trial. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1260.) It has discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. (*People v. Avila* (2006) 38 Cal.4th 491, 604; *People v. Dykes* (2009) 46 Cal.4th 731, 809.) “Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is ‘necessary to resolve material, disputed issues of fact.’ [Citation.] ‘The hearing . . . should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties’ evidence presents a material conflict that can only be resolved at such a hearing.’ [Citations.]” (*Avila, supra*, at p. 604.) The trial court's decision whether to conduct an evidentiary hearing on the issue of juror misconduct will be reversed only if the defendant can demonstrate an abuse of

discretion. (*Ibid.*; *People v. Carter* (2003) 30 Cal.4th 1166, 1216; *People v. Jones, supra*, 17 Cal.4th at p. 317; *People v. Williams* (1997) 16 Cal.4th 635, 686; *People v. Cox* (1991) 53 Cal.3d 618, 694, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Following denial of a motion for new trial based on juror misconduct, the reviewing court must determine for itself whether the defendant was denied a fair trial. (*Ault, supra*, 33 Cal.4th at p. 1262.) Courts have stressed the particular need for independent review of the trial court's reasons for denying a new trial motion in juror bias cases because of the need to protect the defendant's right to a fully impartial jury. (*Ibid.*)

Where trial counsel moved for a new trial based on juror misconduct, appellate counsel should of course first determine whether the juror's action or failure to act as the case may be can actually be characterized as misconduct and what kind of misconduct. Carefully examine the trial court's ruling to see whether an argument can be made that the court's findings of fact were not supported by substantial evidence.

B. Action Taken by the Trial Court

1. At Trial or During Deliberations

Assuming trial counsel properly moved to discharge a juror for cause, appellate counsel should of course examine the trial court's actions to determine whether the court acted appropriately in response. Penal Code section 1089 authorizes the trial court to discharge a juror at any time before or after the final submission of the case to the jury if, upon good cause, the juror is found to be unable to perform his or her duty. (*People v. Bennett* (2009) 45 Cal.4th 577, 621.) A juror's inability to perform must appear in the record as a "demonstrable reality." (*Ibid.*; see *People v. Barnwell, supra*, 41 Cal.4th at pp. 1052–1053.) On appeal, the trial court's decision is reviewed for abuse of discretion. (*Barnwell, supra*, at p. 1052.)

The secrecy of deliberations is "the cornerstone of the modern Anglo-American jury system." (*United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, 618.) Therefore, courts must exercise care when intruding into the deliberative process to ensure that the secrecy and sanctity of the deliberative process is maintained. (*Cleveland, supra*, 25 Cal.4th at p. 475.) However, the need to protect the secrecy of deliberations does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations. (*Id.*, at p. 476.) The trial court has a duty to investigate an allegation of juror misconduct to determine whether cause exists to replace an offending juror with a substitute. (*Keenan, supra*, 46 Cal.3d at p. 532.) The inquiry should be "as limited in scope as possible, to avoid intruding

unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, 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." (*Cleveland, supra*, 25 Cal.4th at p. 485.)

Assessing the qualifications of a juror challenged for cause is a matter falling within the broad discretion of the trial court. (*Ledesma, supra*, 39 Cal.4th at p. 668.) Generally, a trial court's rulings on motions to exclude for cause are afforded deference on appeal because the trial court considers not only the answers, but the tone and demeanor of the prospective jurors. (*People v. Avila* (2006) 38 Cal.4th 491, 529.) However, where the trial court's ruling is based on a "cold record", such as a written questionnaire, that deference is not warranted and the record is reviewed de novo. (*People v. Thompson* (2010) 49 Cal.4th 79, 100.)

Whenever the record indicates that there was an allegation of jury misconduct, appellate counsel should carefully scrutinize the record to determine (a) whether the trial court investigated the misconduct; (b) whether the scope of the inquiry made by the trial court was adequate; and (c) whether the juror's responses should have resulted in his or her replacement.

2. Motion for a New Trial

When a trial court is aware of possible juror misconduct, it must make whatever inquiry is reasonably necessary, but only when the defense comes forward with evidence that demonstrates a strong possibility of prejudicial misconduct. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255; see also *Carter, supra*, 30 Cal.4th at p. 1216.) When a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415.) In conducting that hearing, the trial court "must take great care not to overstep the boundaries set forth in Evidence Code section 1150." (*Id.*, at p. 418.) Evidence Code section 1150¹ "distinguishes between proof of overt

¹ Evidence Code section 1150, subdivision (a) provides: "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 influencing him to assent to or dissent from their verdict or concerning the

acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.) Consequently, “[t]he only improper influences that may be proved under Evidence Code section 1150 are those open to sight, hearing, and the other senses and thus subject to corroboration.” (*Ibid.*) It is an improper intrusion by the court to delve into juror opinion, conclusions drawn by others about jurors’ states of mind or level of understanding, and the particular significance jurors attached to the evidence at trial. (*People v. Collins* (2010) 49 cal.4th 175, 250.)

When faced with a case where a motion for a new trial based on jury misconduct was denied, appellate counsel should ensure that the trial court conducted a sufficient evidentiary hearing. The trial court’s denial of a request for an evidentiary hearing into allegations of jury misconduct is reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 635, 686; *Cox, supra*, 53 Cal.3d at p. 694.) Appellate counsel should of course as much as possible frame the misconduct as demonstrating a strong possibility of prejudice.

V. Conclusion

Courts often acknowledge that 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; see also *Steele, supra*, 27 Cal.4th at pp. 1265–1267.) “Indeed, lay jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process.” (*People v. Pride* (1992) 3 Cal.4th 195, 268; *People v. Yeoman* (2003) 31 Cal.4th 93, 161.) That they do so is considered both a strength of the jury system and a weakness that must be tolerated. (*Pride, ibid.*) Appellate counsel needs to be prepared to frame those personal experiences and backgrounds as biases that deprived the defendant of a fair trial.

mental processes by which it was determined.”